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Michigan Family Law Benchbook

Second Edition

April 2024 Update

PREPARED FOR

The State Court Administrative Office,
a Division of the Michigan Supreme Court

BY

The Institute of Continuing Legal Education

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www.icle.org

Printed in the United States of America

Library of Congress Control Number: 2006924781

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This new second edition of *Michigan Family Law Benchbook* represents a continuing collaboration between the Institute of Continuing Legal Education and the State Court Administrative Office, Michigan Judicial Institute (MJI), to provide family law materials to the bench and bar. The book covers divorce-related subjects, adoption, paternity, and guardianships, and is designed to complement MJI's benchbooks on juvenile delinquency, child protection, and domestic violence. The new second edition is available both in print and as an online edition that is fully searchable, linked to cited Michigan primary law, and continually updated. Through a new arrangement between MJI and ICLE, the *Benchbook* will be provided free (in print and online) to family division judges and referees. We are confident that the new edition will be helpful not only to judges and referees, but also to lawyers and others dealing with family law matters.

Like its predecessor, the second edition was developed by ICLE under the guidance of the Michigan Family Law Benchbook Advisory Committee, a group of judges, Friends of the Court, and referees appointed by the SCAO. Advisory Committee members not only reviewed the chapters, but also offered their suggestions regarding best practices, settlement techniques, dealing with unrepresented parties, interviewing children, and other issues. They also shared their own well-honed tools of the trade, including model orders and opinions, hearing/interview scripts, checklists, flow charts, and guidelines. We are very grateful for the time they spent and the insight they gave us into issues facing those who deal with family law matters.

The new edition builds on the excellent foundation laid by Mary Margaret Bolda, Esq., who drafted almost all of the original *Michigan Family Law Benchbook.* Her writing skills and prior experience as a clerk for several judges were invaluable. We are also very grateful to the practitioners who contributed to both the first and second editions—Joseph W. Cunningham, Plante & Moran, PLLC, for writing the chapter "Tax Considerations in Divorce"; Diana Raimi, Moran Raimi & Goethel, PC, for reviewing the "Property Division" chapter; and Nancy Keppelman, Stevenson Keppelman Associates, for reviewing the QDROs section of the "Property Division" chapter. We very much appreciate their help.

Finally, we want to thank the staff of the Michigan Judicial Institute—in particular, Tobin L. Miller, Publications/Program Manager, and Mary L. Galliver, Research Attorney—for their thoughtful review, suggestions, and assistance throughout the project. We look forward to collaborating with them on future editions of the book.

June 2006
Lynn P. Chard
Director

The April 2024 Update replaces the May 2023 Update. Please discard the May 2023 Update.

The April 2024 Update to *Michigan Family Law Benchbook,* Second Edition, covers legislation and statutory amendments through 2024 PA 35 and Pub L No 118-47 and covers caselaw, court rule changes, regulations, and form revisions through April 15, 2024. Other federal materials are current through April 15, 2024.

The April 2024 Update includes

- updates on approaching changes to the Revocation of Paternity (soon Parentage) Act including the new Assisted Reproduction and Surrogacy Parentage Act and incorporated gender-neutral substitutions in various provisions;
- new discussion regarding amendments to the Acknowledgment of Parentage Act;
- new analysis of extreme risk protection orders added to the section on personal protection orders;
- updates on the appointment of standby guardians under the Estates and Protected Individuals Code; and
- new Michigan Court of Appeals Cases on the powers and responsibilities of a parent under MCL 700.5215 and determining paternity under the Safe Delivery of Newborns Law.

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John D. Ferry, Jr., State Court Administrator

The Family Law Benchbook is a result of a collaborative effort of the Institute for Continuing Legal Education and the State Court Administrative Office, Michigan Judicial Institute. The goals of this partnership were to build upon ICLE's substantial work on domestic relations law published in Michigan Family Law to provide a resource for judges and referees assigned to the Family Division of the Circuit Court, and to develop a process to keep that resource current in an environment of rapid change.

The Benchbook is a part of a series of benchbooks developed to support the Family Division of the Circuit Court. When complete, the benchbooks will cover all of the types of cases that are within the subject matter jurisdiction of the Family Division of Circuit Court. It is our intent to keep all of these benchbooks up to date with regular supplements. The family division benchbooks are:

- Juvenile Justice Benchbook: Delinquency and Criminal Proceedings, MJI, July 1998 (2500 copies distributed to judges and court personnel)
- Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings, MJI, November 1998 (3000 copies distributed to judges and court personnel)
- Family Law Benchbook, ICLE, April 1999, (600 copies distributed to judges and court personnel)
- Child Protective Proceedings Benchbook, MJI, July 1999 (2500 copies to be distributed to judges and court personnel)

We anticipate that this partnership will efficiently provide the judiciary with useful current resources to assist in providing the best possible service to families in Michigan.

John D. Ferry, Jr.
State Court Administrator

1
Divorce Procedure

ICLE thanks the Michigan Judicial Institute and Rebekah L. T. Sellers for their assistance in reviewing, editing, and preparing the chapters in *Michigan Family Law Benchbook*.

Summary of Divorce Procedure

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Action for divorce. §1.2.

A divorce action may be brought by a husband or a wife or, in the case of an incompetent spouse, a guardian or a conservator.

Grounds for divorce. §1.3.

"[T]here has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."

The plaintiff may not include any other explanation of the grounds in the complaint. The defendant may admit or deny the grounds. The court may consider an admission but is not bound by it.

Jurisdiction; venue. §1.4.

On the filing date, one party must have resided in Michigan for at least 180 days and in the county of filing for at least 10 days. *Residence* means the place of a permanent home where the party intends to remain.

The 10-day county residency requirement need not be met if there is information that would allow the court to reasonably conclude that the parties' minor children are at risk of being taken outside the U.S. and kept in a foreign country by a defendant who was born in a foreign country or who is not a U.S. citizen.

Initial filings. §§1.8–1.11.

The initial filing for a divorce without children includes a summons, a complaint, filing fees, and a record of divorce or annulment (some counties require filing at the time of entry of the judgment).

If there are minor children or a request for spousal support, a verified statement must be served on the other party and provided to the Friend of the Court. The initial filing for a divorce with minor children must also include information about custody proceedings and the names and birth dates of the minor children.

The complaint must include the following:

- The statutory grounds for divorce, without further explanation.
- The parties' complete names and their names before marriage.
- Residency information.
- Whether a party is pregnant.
- The required case caption language (see §1.9).

- Whether there are minor children of the parties or minor children born during the marriage.
- The complete names and birth dates of any minors involved in the action, including minor children of the parties and all children born during the marriage.
- Whether there is property to be divided.
- If a request for protection of property is made, facts sufficient to support the relief requested.
- If spousal support is requested, a showing of the need for support and the other party's ability to pay.
- If there are minors or a request for child support, whether any Michigan court has continuing jurisdiction over the minor and, if so, the court and file number.
- If custody of a minor is to be determined, the following must be included in the complaint or in an attached affidavit: (1) the child's present address, (2) places where the child has lived within the last five years, (3) names and present addresses of persons with whom the child has lived during that period, (4) whether the party has participated in other litigation concerning the custody of the child in Michigan or elsewhere, (5) whether the party knows of a proceeding that could affect the current child custody proceeding, and (6) whether the party knows of a person who is not a party to the proceedings who has physical custody of the child or claims custody or parenting time rights. MCR 3.206.

Filing fees may be waived. Fees and costs must be waived or suspended for persons receiving public assistance and indigent persons. The judge may hold a hearing to determine if the person is indigent. If the affidavit of indigency is not disputed, the waiver is mandatory.

Service. §§1.15–1.18.

Service is as provided in the general rules for service, with a copy to the Friend of the Court if there are minor children, a party is pregnant, or support is requested.

If there is a nonresident defendant and jurisdiction is under the long-arm statute, service is made as on a resident defendant. If jurisdiction is acquired by personal service with an order for appearance and publication, specific proofs are required (see §1.15).

Requirements for alternative service—see §1.16.

Requirements when a spouse is in the armed services—see §1.19.

Ex parte orders; temporary restraining orders. §§1.21–1.28.

The court must be satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued. MCR 3.207(B)(1).

Orders are effective upon entry but may not be enforced until the other party is served with notice. MCR 3.207(B)(3).

Ex parte orders for child support, custody, or parenting time must include the notice in MCR 3.207(B)(5).

Temporary restraining orders. §1.24.

Requirements for granting a temporary restraining order (TRO):

- It clearly appears from specific facts shown in an affidavit or a verified pleading that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be entered.
- The applicant's attorney certifies in writing any efforts to give notice and why notice should not be required.
- A permanent record is made of nonwritten evidence, arguments, or representations supporting the application.

MCR 3.310(B)(1).

The order must be (1) endorsed with the date and time it is issued, (2) describe the injury and why it is irreparable, and (3) state why the order was granted without notice. MCR 3.310(B)(2).

Domestic relations TROs (unlike others) need not expire within a fixed period, and the court need not set a date for further hearing.

For personal protection orders, see §1.25 and Michigan Judicial Institute, *Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings* (4th ed 2024).

Temporary orders. §1.26.

May be entered at any time on the filing of a verified motion, after a hearing.

Must state effective date and whether it may be modified retroactively. The order remains in effect until modified or a final judgment or order is entered.

Domestic relations referee hearings; judicial review. §1.29.

The domestic relations referee must schedule a hearing within 14 days of receipt of the motion and must notify the parties' attorneys or unrepresented parties. The notice must clearly state that the matter will be heard by a referee. MCR 3.215(C).

Within 21 days after the hearing, the domestic relations referee must make a statement of findings on the record or must submit a written report to the court, including findings and a summary of the testimony. A recommended order must also be submitted and served on the attorneys or unrepresented parties, and proof of service must be filed with the court. MCR 3.215(E).

A party has the right to judicial review of any matter that was the subject of a referee hearing and resulted in a statement of findings and a recommended order. The party must file and serve written objection and notice of a hearing on the parties or their attorneys within 21 days after the domestic relations referee's recommended order was served. MCR 3.215(F).

If no such objections are filed, and the court approves, the domestic relations referee's recommended order takes effect.

A judicial hearing must be held within 21 days after an objection is filed, unless the court extends the time for good cause. MCR 3.215(F)(1).

The court hears the matter de novo, but the parties can stipulate that the judicial hearing be based solely on the record of the referee hearing.

Hearings on income withholding.

If the hearing concerns income withholding, the referee must arrange for a recommended order to be submitted to the court forthwith. If the recommended order is approved by the court, it must be given immediate effect.

Pretrial conferences. §§1.30–1.37.

The court at any time may require the parties' attorneys to appear for a pretrial conference; more than one may be held. MCR 2.401 lists issues that may or should be considered at an early scheduling conference, in a scheduling order, or at a pretrial conference; see §§1.31–1.34.

Scheduling orders should be done after consultation with counsel. If this is not possible, the parties may file a written request for amendment within 14 days after entry of the order. Within 14 days after receiving the request, the court must schedule a new conference, enter a new order, or notify the parties in writing that it declines to amend the order.

Mediation; arbitration. §§1.38–1.47.

Friend of the Court mediation. §1.38.

Must be provided for custody and parenting time disputes; optional use by the parties.

Court rule mediation. §§1.39–1.43.

The court may refer any contested issue to mediation, but parties who are subject to personal protection orders or who are involved in child abuse or neglect proceedings may not be referred to mediation without a hearing.

Referral to mediation—by stipulation, a party's written motion, or the court's own motion. MCR 3.216(C).

Objection to mediation—within 14 days after notice of an order assigning the matter to mediation, by motion and notice of a hearing. The motion must be heard within 14 days unless the court orders otherwise, but it must be heard before the case is submitted to mediation. MCR 3.216(D).

Private mediation. §1.44.

On the parties' stipulation, the court may order private mediation. MCR 3.216(E)(2).

Arbitration. §§1.45–1.46.

The parties may agree in writing to resolve property, custody, and child support issues. Having agreed, the parties are bound by the decision. The court may vacate the award if

- the award was procured by corruption, fraud, or other undue means
- there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights
- the arbitrator exceeded their powers
- the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to substantially prejudice a party's rights

Collaborative law. §1.47.

The Michigan Uniform Collaborative Law Act (UCLA), MCL 691.1331 et seq., governs collaborative law practice. Collaborative law consists of two clients and two attorneys working together, sometimes with other professionals, as part of a team to reach a fair and comprehensive settlement that works for the whole family on all issues. Parties and lawyers voluntarily contract, using a participation agreement, that the lawyers will only represent the clients in court to seek approval of an agreement resulting from the collaborative law process or in very limited emergencies.

Procedure for entering divorce judgments. §§1.50–1.60.

No divorce judgment may be entered without a hearing in open court at which proofs are taken. The testimony of at least one party must establish the statutory grounds and jurisdiction.

No proofs or testimony can be taken until 60 days after the complaint is filed, or 6 months if there are minor children. MCL 552.9f. The court may not shorten the 60-day period, but may reduce the 6-month period to as few as 60 days if there is "unusual hardship or compelling necessity." MCR 3.210(A)(2).

The parties may preserve testimony during the waiting period.

Consent judgments. §1.52.

Judgments based on agreements are no longer entered under the default rules. They are controlled by MCR 3.210(E).

Default judgments. §§1.53–1.57.

The grounds are same as in other cases (e.g., failure to plead or failure to comply with other court rules).

The party seeking a default files a default, a notice of entry of default, and a request of default and sends notice of entry of default to all parties. MCR 3.210(B).

A default may be filed at any time after the grounds are established, but the waiting period or other requirements may delay entry of the default judgment.

The entry of a default cuts off the defaulted party's right to proceed with the action until the default has been set aside. MCR 3.210(B)(2)(c).

The court may allow a defaulted party to engage in discovery, file motions, and participate in court hearings, referee hearings, and alternative dispute resolution (ADR) proceedings. The defaulted party's participation may be conditioned or limited in the court's discretion. MCR 3.210(B)(2)(d).

If the defendant has not appeared, a nonmilitary affidavit must be filed before the default judgment of divorce can be entered. MCR 2.603(C).

A hearing on the default judgment is required under certain circumstances. If a hearing is required, the party seeking the default judgment must schedule a hearing; serve the default judgment motion, notice of hearing, and copy of proposed judgment on the defaulted party at least 14 days before the hearing; and file a proof of service. MCR 3.210(B)(4). Notice is not required if the default is entered for failure to appear at trial or a scheduled hearing. The moving party should be prepared to show that the judgment is in accordance with the law.

Contested cases.

The judge must state findings of fact and conclusions of law. MCR 3.210(D).

Entry of the judgment.

A party must submit the judgment for entry within 21 days after the court's opinion or a settlement was placed on the record, unless the court grants an extension. The court may require that the judgment be submitted to the Friend of the Court for review.

Methods for entering a divorce judgment after trial or after the parties place the settlement on the record:

- The court may sign the judgment when it grants the relief provided by the judgment.
- After the parties approve the judgment's form, the court signs the judgment if it complies with the court's decision.
- The parties may submit the judgment under the seven-day rule.
- The parties may prepare a proposed judgment and file a motion for settlement.

Required provisions for divorce judgments.

All divorce judgments. §1.61.

- A determination of each party's rights in insurance on the life of the other party.
- A determination of each party's rights in pension, annuity, or retirement benefits; contributions to a pension, annuity, or retirement plan; and contingent rights in unvested benefits.
- The parties' rights in property.
- A provision granting, reserving, or denying spousal support.
- If spousal support is nonmodifiable, a provision to that effect.

Divorces with minor children—additional required provisions. §1.62.

- A prohibition against moving the children's residence outside Michigan or, in the case of a joint custody arrangement, a relocation agreement or mandated language prohibiting moving the children's residence more than 100 miles away.
- A requirement that the custodial parent promptly notify the Friend of the Court in writing of any change of the children's address.
- A statement by the court declaring the children's inherent rights and establishing the rights and duties as to the children's custody, support, and parenting time.

Judgments awarding child or spousal support—additional required provisions. §§1.63–1.64.

Child or spousal support must be ordered in the latest version of the State Court Administrative Office (SCAO) Uniform Support Order. This form order must accompany any judgment or order affecting child or spousal support. If only child or spousal support is ordered, then only the Uniform Support Order may be used. The Uniform Order governs if the terms of the judgment or order conflict with the Uniform Order. The final judgment must either incorporate the Uniform Order by reference or state that none is required.

Modification of judgment provisions. §1.69.

Generally, divorce judgment provisions regarding child custody, parenting time, child support, and periodic spousal support are modifiable; property division and alimony in gross provisions are not. See §§3.24–3.25, §§4.17–4.18, §§5.25–5.33, and §§6.43–6.51 for modification of particular provisions.

Relief from judgments. §§1.71–1.80.

Rehearing or new trial. §1.71.

May be ordered on a party's motion filed within 21 days of entry of the judgment or on the court's initiative during the same period (the order on the court's initiative must specify the grounds).

The motion will be granted if a party's substantial rights are materially affected by

- irregularity in the proceedings
- the prevailing party's fraud or misconduct
- decision against the great weight of the evidence
- newly discovered material evidence that could not with reasonable diligence have been discovered and produced at trial
- the court's error of law or mistake of fact
- void judgment
- any other reason justifying relief from the judgment

MCR 2.611(A)(1).

On a motion for a new trial, the court may

- set aside the judgment
- take additional testimony
- amend findings of fact and conclusions of law
- make new findings or conclusions and enter a new judgment

MCR 2.611(A)(2).

Amendment or correction. §1.72.

At any time, the court may amend the judgment to correct clerical or inadvertent errors; no change in circumstances is required. MCR 2.612(A)(1).

A motion to amend on other grounds must be brought within 21 days after entry of the judgment. MCR 2.611(B).

Setting aside judgments. §§1.74–1.79.

The parties' stipulations to set aside—generally valid.

The defendant over whom jurisdiction was acquired but who did not know of the divorce judgment must file a motion for relief within one year after entry of the judgment. The defendant must show adequate reason for relief and that innocent third parties will not be prejudiced. MCR 2.612(B).

Otherwise, on a motion brought within one year, a judgment may be set aside

- for mistake, inadvertence, surprise, or excusable neglect
- for newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial
- for fraud (intrinsic or extrinsic), misrepresentation, or other misconduct
- for void judgment
- because the judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application
- for any other reason justifying relief

MCR 2.612(C).

See §§1.75–1.78 for further explanation of these grounds.

A motion to set aside a default judgment before the default judgment is entered (except those based on lack of jurisdiction over the defendant or the subject matter) may be granted only on verified motion of the defaulted party showing good cause. MCR 3.210(B)(3). Good cause requires a showing that

- there was substantial defect or irregularity in proceedings
- a reasonable excuse exists for the defendant's failure to plead
- allowing the default to stand would cause manifest injustice

A motion to set aside a default judgment after the judgment has been entered is governed by MCR 3.210(B)(6)(a). The court may also set aside a default judgment under MCR 2.612. MCR 3.210(B)(6)(b).

Enforcement of divorce judgments. §§1.81–1.87.

The court has inherent authority as a court of equity to enforce its own directives. The court may enforce provisions in the divorce judgment that the parties agreed to even if the court would not have had authority to order them without the parties' consent.

See the appropriate chapter for enforcement procedures for specific types of provisions—chapter 3 for child custody, chapter 4 for parenting time, chapter 5 for child support, chapter 6 for spousal support, chapter 7 for Friend of the Court, and chapter 8 for property division.

Limitations periods. 1.83

Actions to enforce divorce judgments—10-year limitations period. The 10-year period begins to run when the cause of action accrues; for support orders enforced under the Support and Parenting Time Enforcement Act (SPTEA), the period begins to run when the last payment is *due*.

Actions to enforce divorce judgment liens on real property—15-year limitations period.

Foreign judgments. §1.84

Sister-state judgments—protected by the Full Faith and Credit Clause of the U.S. Constitution.

A foreign judgment filed under the Uniform Enforcement of Foreign Judgments Act is enforced like a Michigan judgment.

Attorney Fees. §§1.85–1.87

The court has authority to award attorney fees in certain circumstances, including the ability to pay or unreasonable conduct. The party requesting attorney fees bears the burden of proving that the fees were incurred and that they are reasonable. A lien by an attorney in a judgment is enforceable against the attorney's client in the divorce action. MCR 3.206(D).

I. General Considerations

A. Applicable Law

§1.1 Divorce cases and ancillary matters are within the exclusive jurisdiction of the family division of the circuit court. MCL 600.1021. Statutory provisions governing divorce generally appear at MCL 552.1–.45. Ancillary matters such as property division, spousal support, child custody, parenting time, and child support are covered elsewhere in the statutes and are discussed in other chapters of this book.

Procedural rules are provided by the court rules governing domestic relations actions, MCR subchapter 3.200; other applicable court rules governing civil proceedings generally, see MCR 3.201(C); the Friend of the Court Act, MCL 552.501 et seq.; and by the statutes governing specific ancillary matters.

B. Action for Divorce

§1.2 A divorce action "may be brought by a wife or a husband." MCL 552.11. Note, however, that the U.S. Supreme Court's decision in *Obergefell v Hodges*, 576 US 644 (2015), invalidated state laws including Michigan's statutes and constitutional provision defining marriage as being between one man and one woman "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." See §2.4. *See also Stankevich v Milliron*, 313 Mich App 233, 882 NW2d 194 (2015) (plaintiff had standing to bring equitable parent claim, which had previously been dismissed because Michigan did not recognize same-sex marriages before *Obergefell*). In actions involving minor children, a genetic connection is not required to be regarded as a legal parent to children conceived through assisted reproductive technology. *LeFever v Matthews*, 336 Mich App 651, 971 NW2d 672 (2021).

A conservator or a guardian may also file a divorce action on behalf of an incompetent spouse. *Burnett v Burnett (In re Estate of Burnett)*, 300 Mich App 489, 497, 834 NW2d 93 (2013); *see also Houghton v Keller*, 256 Mich App 336, 662 NW2d 854 (2003). For further discussion of the handling of matters in which a party is unable to make informed decisions, see chapter 12.

Because a child's claim seeking a divorce from the parents is unrecognized in Michigan, a court has no subject-matter jurisdiction over such an action. *Ryan v Ryan*, 260 Mich App 315, 677 NW2d 899 (2004).

C. Grounds for Divorce

§1.3 Michigan provides a single statutory ground for divorce: "[T]here has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." MCL 552.6. In the complaint, the plaintiff may make no other explanation of the grounds. The defendant may either admit the grounds alleged or deny them, without further explanation. An admission may be considered by the court but is not binding. The court will enter a judgment dissolving the bonds of matrimony if evidence is presented in open

court that there has been a breakdown in the marriage relationship, as described in the statutory language.

D. Jurisdiction and Venue

1. Residency Requirements

§1.4 On the date of filing, one of the parties must have resided in Michigan for at least 180 days and resided in the county of filing for at least 10 days. MCL 552.9(1); *Stamadianos v Stamadianos*, 425 Mich 1, 385 NW2d 604 (1986).

The 10-day county residency requirement need not be met if the following conditions are met and set forth in the complaint:

1. the defendant was born in, or is a citizen of, a country other than the United States;
2. the parties in the divorce action have a minor child or children; and
3. there is information that would allow the court to reasonably conclude that the minor child or children are at risk of being taken out of the country and retained in another country by the defendant.

MCL 552.9(2).

Residence has the same meaning for county and state residency purposes. Mere physical presence in a county for 10 days does not establish residence. *Lehman v Lehman*, 312 Mich 102, 19 NW2d 502 (1945). *Residence* means the place of a permanent home where a party intends to remain. *Banfield v Banfield*, 318 Mich 38, 27 NW2d 336 (1947); *Smith v Foto*, 285 Mich 361, 280 NW 790 (1938); *see also Leader v Leader*, 73 Mich App 276, 251 NW2d 288 (1977). MCL 552.9(1) does not require a party's continuing physical presence in the state for the residency period. *Ramamoorthi v Ramamoorthi*, 323 Mich App 324, 918 NW2d 191 (2018). In *Ramamoorthi,* plaintiff and her children lived in India during the jurisdictional period under coercion by defendant. Because plaintiff never intended to relinquish her Michigan residency, she satisfied the requirements of MCL 552.9(1). *Id.*

Michigan courts have jurisdiction over the parties' divorce action notwithstanding that a defendant, although residing in Michigan for more than 180 days before the divorce filing, intends to leave the state once their studies are completed. *Kar v Nanda*, 291 Mich App 284, 805 NW2d 609 (2011). While acknowledging that Michigan courts have previously held that the "resided" requirement in MCL 552.9(1) constitutes "a place of abode accompanied with the intention to remain," the *Kar* court interpreted "intent to remain" in this case as something less than a commitment to stay permanently or indefinitely. *See also May v Anderson*, 345 US 528 (1953).

Practice Tip

- *Even if the residency requirements are met and both parties live in Michigan, a Michigan court may be restricted from exercising subject-matter jurisdiction over matters that are ancillary to the dissolution of the marriage. For example, there may be jurisdictional restrictions on a Michigan court's ability to decide a custody*

or a parenting time issue when another state issued a prior custody determination and the child either maintains a significant tie to that state or Michigan has not become the child's home state. See 28 USC 1738A; MCL 722.1101 et seq. (Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA)). See also §§3.41–3.48. Similarly, there may be jurisdictional restrictions on a Michigan court if another state issued a prior support order for a party to pay for a child. See 28 USC 1738B; MCL 552.2101 et seq. (Uniform Interstate Family Support Act (UIFSA)). See also §§5.53–5.67.

2. The Out-of-State Spouse

§1.5 One of the following must exist before a decree of divorce can be granted:

> (a) The defendant is domiciled in this state at the time the bill of complaint for divorce is filed.
>
> (b) The defendant shall have been domiciled in this state when the cause for divorce alleged in the bill or petition arose.
>
> (c) The defendant shall have been brought in by publication or shall have been personally served with process in this state, or shall have been personally served with a copy of the order for appearance and publication within this state, or elsewhere, or has voluntarily appeared in the action or proceeding. Whenever any such order shall be served outside this state, proof of such service shall be made by the affidavit of the person who shall serve the same, made before a notary public, and when such affidavit shall be made outside this state it shall have attached the certificate of the clerk of a court of record, certifying to the official character of the notary and the genuineness of his or her signature to the jurat of the affidavit.

MCL 552.9a.

Two statutes provide alternative bases for obtaining jurisdiction over a nonresident defendant in a divorce action. *Lowe v Lowe*, 107 Mich App 325, 309 NW2d 254 (1981). Under Michigan's long-arm statute, MCL 600.705(7), the court may obtain personal jurisdiction over a nonresident defendant who maintained a domicile in Michigan while subject to a marital or family relationship that is the basis for a claim for divorce, spousal support, separate maintenance, property settlement, child support, or custody. Service is made as on a resident defendant, see §1.15.

The alternative statutory basis, MCL 552.9a(c), provides a basis for jurisdiction over the parties' marital status even if the defendant has insufficient contacts for jurisdiction under the long-arm statute. Service must be made and proof of service filed as provided in MCL 552.9a(c), see §1.15. See §1.19 for spouses in the armed services.

Practice Tip

- *Although MCL 552.9a(c) and 600.705(7) provide bases for obtaining jurisdiction over a nonresident defendant, a Michigan court may be restricted from exercising subject-matter jurisdiction over matters that are ancillary to the dissolution*

of the marriage, particularly when one party or the parties' child reside outside of Michigan. For example, Michigan may not be a child's home state under the UCCJEA, MCL 722.1101 et seq. See also 28 USC 1738A. See §§3.41–3.48. Similarly, another state may have issued a prior child support order. See 28 USC 1738B; MCL 552.2101 et seq. The UIFSA provides long-arm jurisdiction over a nonresident parent in certain circumstances, MCL 552.2201, but participation in a UIFSA proceeding does not confer personal jurisdiction over the parent for other proceedings or litigation. See §§5.53–5.67.

E. Competing Filings

§1.6 **Two different countries.** If a case is filed in a different country but is not yet decided, the second jurisdiction is still able to grant the divorce. *Ramamoorthi v Ramamoorthi*, 323 Mich App 324, 918 NW2d 191 (2018). The doctrine of comity only applies when there is an attempt to enforce a foreign judgment or order. The *Ramamoorthi* court found that even if a trial court lacked jurisdiction under the UCCJEA, it did not prevent the court from entering a valid divorce judgment concerning noncustody matters. MCL 722.1207 "specifically provides for bifurcation of a divorce proceeding and a custody proceeding under the UCCJEA." *Ramamoorthi.*

Two different counties. If cases are started in two different counties and two different summonses are issued, the first court that obtains jurisdiction hears the matter. In practice, this is the court where the matter was first filed rather than the court in which the defendant was first served. *See Mulford v Stender*, 215 Mich 637, 184 NW 490 (1921); *Detroit United Ry Co v Dingman*, 204 Mich 543, 170 NW 641 (1919).

Practice Tip

- *It is good practice for the courts in those counties to communicate when they are made aware of the conflict, resolve the matter if possible, and inform the parties of the resolution.*

Two different states. If cases are filed in two different states, the state of domicile of either party has jurisdiction to grant the divorce. *Williams v North Carolina*, 317 US 287 (1942). This problem is likely to come to the court's attention when the defendant brings a motion to dismiss or for a stay on the basis that the other state's forum is more convenient. While no Michigan case was found on this issue, the general rule appears to be that the plaintiff's choice of forum should be disturbed only for the weightiest of reasons. Robin Cheryl Miller, *Doctrine of Forum Non Conveniens: Assumption or Denial of Jurisdiction of Action Involving Matrimonial Dispute,* 55 ALR5th 647. If there is a child custody dispute, the provisions of the UCCJEA apply. MCL 722.1101 et seq. See §§3.39–3.45 for a discussion of the UCCJEA provisions.

F. Native American Tribal Jurisdiction

§1.7 Issues may arise related to Native Americans and tribal jurisdiction. The Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., applies to any "child custody proceeding" involving an "Indian child." However, the act does

not apply to a custody award in a divorce proceeding unless the placement is made to someone other than the parents. It does apply to foster care placement (including guardianship), termination (including voluntary termination) of parental rights, and preadoptive and adoptive placements. 25 USC 1903(1); MCR 3.002(2). The Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 et seq., similarly applies to any "child custody proceeding" involving an "Indian child," but has a broader definition of *Indian child* than the ICWA. See chapter 13 for the standards and procedures for application of the ICWA and the MIFPA to such proceedings.

In general, tribal courts are courts of general jurisdiction with broad and exclusive authority over civil matters arising within their territorial boundaries. Their authority includes power over matters involving tribal members and marriage, divorce, child support matters, and child custody issues, as well as over related activities of nonmembers within Indian territory. James A. Bransky, *Tribal Court Jurisdiction,* 67 Mich BJ 370, 374 (May 1988). However, tribal members may also seek resolution of a family law matter in a Michigan state court. Where all the parties reside on the reservation, the tribal court has exclusive jurisdiction.

Under MCR 2.615, tribal court orders are accorded full faith and credit in Michigan courts (meaning that they are presumed valid and enforceable) to the extent that the tribe or tribal court has agreed to reciprocal enforcement of state court orders. A list of the tribes that have agreed to reciprocal enforcement is available from the SCAO. The court rule sets out what must be proved to overcome the presumption of enforceability. The rule does not apply to orders that federal law requires be given full faith and credit. Under 25 USC 1911(d), the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings must be accorded full faith and credit by state courts. *See also* MCL 712B.7(8).

II. Initial Pleadings

A. Required Filings

§1.8 For a divorce *without children,* the initial filing must include the following:

1. a summons
2. the complaint for divorce
3. the filing fee
4. a record of divorce or annulment, filed at the time of entry of the judgment in some counties
5. if spousal support is requested, a verified statement (need not be filed with the court but must be served on the other party and provided to the Friend of the Court)

For a divorce *with minor children,* the initial filing must also include the following:

1. a verified statement (served as noted in item 5 above)

2. additional information about any other custody proceedings required by MCL 722.1209, MCR 3.206(B), and the complete names of any minors involved in this action, including all the minor children of the parties and all minor children born during the marriage, and for complaints for divorce, the age of all children born of the marriage, MCR 3.206(A)(2)(c)
3. additional filing fees

B. Requirements for the Complaint

§1.9 The plaintiff may only state the statutory language alleging a breakdown in the marriage and the defendant may only admit or deny the allegations. MCL 552.6. The general rules of procedure apply, unless otherwise specified in MCR subchapter 3.200, Domestic Relations Actions. MCR 3.201(C). Information regarding the form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E). MCR 3.206(A)(1). Effective January 1, 2024, parties and attorneys may include Ms., Mr., or Mx. as a preferred form of address and use one of the following pronouns: he/him/his, she/her/hers, or they/them/theirs. Courts must then use the individual's name, the designated salutation, personal pronouns, or other respectful means that are not inconsistent with the individual's designated salutation or personal pronouns when addressing, referring to, or identifying the party or attorney, either orally or in writing. MCR 1.109(D)(1)(b), *amended by* ADM File No 2022-03 (eff. Jan 1, 2024).

If minor children are involved, the case number must have a "DM" suffix. If there are no minor children, a "DO" suffix is required. *See* MCR 1.109(D), 3.206(A)(1), 8.117.

A party filing a complaint must include the following:

- Names of all parties involved.
- The statutory allegations on the breakdown of the marriage.
- The names of the parties before marriage.
- Residency information.
- Whether a party is pregnant.
- Whether there are minor children of the parties or minor children born during the marriage.
- The complete names and ages of any minors involved in the action, including all minor children of the parties and all minor children born during the marriage, and for complaints for divorce, the ages of all children born of the marriage.
- Either of the following statements, if known:

> (i) There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is / are] the subject of the complaint or petition, or

> (ii) There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is / are] the subject of the complaint or petition. Attached is a completed case inventory listing those cases.

- Whether there is property to be divided.
- If a request for personal protection or protection of property is made, facts sufficient to support the relief requested.
- If spousal support is requested, facts sufficient to show a need for support and the other party's ability to pay.

MCR 1.109(D)(2)(b), 3.206(A)(2)–(6).

If custody or parenting time of a minor child is to be determined or modified, the party must file SCAO form MC 416 (Uniform Child Custody Jurisdiction Enforcement Act Affidavit). MCR 3.206(B). Under MCL 722.1209, if the custody of a minor is to be determined, the following information needs to be included in the complaint or in an attached affidavit:

- the child's present address;
- places where the child has lived within the last five years;
- names and present addresses of persons with whom the child has lived during that period;
- whether the party has participated, as a party or witness or in another capacity, in another child custody proceeding with the child and, if so, the court, the case number of the child custody proceeding, and the date of the child custody determination;
- whether the party knows of a proceeding that could affect the current child custody proceeding, including a proceeding for enforcement or a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and, if so, the court, the case number, and the nature of the proceeding; and
- the name and address of each person that the party knows who is not a party to the child custody proceeding and who has physical custody of the child or claims rights of legal custody or physical custody of or parenting time with the child.

If this information is not furnished, the court may stay the proceeding until it is furnished. MCL 722.1209(2). Each party has a continuing duty to inform the court of a proceeding in Michigan or another state that could affect the current child custody proceeding. MCL 722.1209(4). The court may examine the parties under oath regarding all matters pertinent to the court's jurisdiction and the disposition of the case. MCL 722.1209(3).

If a party alleges that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court must seal and not disclose that information to the other party or the public unless the court conducts

a hearing and determines that the disclosure is in the interests of justice. MCL 722.1209(5).

C. Verified Statement and Verified Financial Information Form

§1.10 Each party must serve both a verified statement (SCAO form FOC 23) and a verified financial information form (SCAO form CC 320). If an action involves a minor or if child or spousal support is requested, the party seeking relief must serve on the other party and provide to the Friend of the Court a verified statement, which includes contact and financial information. Filing with the court is not required. MCR 3.206(C).

Unless waived in writing by the parties or if a settlement agreement, consent judgment of divorce, or a final order is signed, each party must serve a verified financial information form must be served within 28 days following service of the defendant's initial responsive pleadings. MCR 3.206(C)(2). For a more detailed description of the requirements for the verified statement, see §7.4.

D. Waiver of Filing Fees

§1.11 Filing fees must be waived in whole or in part on a showing by affidavit of indigency or inability to pay. MCL 600.2529(5). MCR 2.002 also requires these fees to be waived for persons receiving public assistance, persons represented by a legal services program, and indigent persons. For purposes of MCR 2.002, the term *fees* applies only to fees and does not include transcript costs. MCR 2.002(A)(2). If service of process by an official process server or by publication is necessary, the county will pay the fees for that service. MCR 2.002(I). MCR 2.002(L) requires courts to enable a litigant who seeks a fee waiver to do so by an entirely electronic process. If fees are waived before judgment, the waiver continues through the date of judgment unless ordered otherwise under MCR 2.002(J). MCR 2.002(A)(5).

The court may, in its discretion, conduct an evidentiary hearing to determine if the party is indigent. If an affidavit of indigency is not disputed, a waiver is mandatory. *Hadley v Ramah*, 134 Mich App 380, 351 NW2d 305 (1984).

In domestic relations cases, if a party qualifies for a fee waiver and is also entitled to an order requiring the other party to pay attorney fees, the court must order the fees to be waived and require the other party to pay them unless the other party is also required to have the filing fees waived. MCR 2.002(H).

E. Electronic Filing

§1.12 Pursuant to 2015 PA 230–235, Michigan is to develop, implement, and fund a statewide e-filing system. In addition, the Michigan Court Rules require all courts to implement e-filing and e-service capabilities in compliance with MCR 1.109(G) and SCAO standards. Different courts are at different stages with the e-filing requirements, so be sure to research local procedures. Attorneys must electronically file documents in courts where electronic filing has been implemented unless the attorney is exempted because of a disability. MCR 1.109(G)(3)(f). All other filers are required to electronically file documents only

in courts that have been granted approval to mandate electronic filing by the SCAO. MCR 1.109(G)(3)(f).

F. Third Parties

1. When Children Are Involved

§1.13 Domestic relations actions are statutory. Third-party intervention is permitted in extremely limited circumstances. *Killingbeck v Killingbeck*, 269 Mich App 132, 711 NW2d 759 (2005). Grandparents, for instance, have limited rights to intervene and seek custody in a divorce or an action pending under the Child Custody Act. MCL 722.26c, .27(1); *Olepa v Olepa*, 151 Mich App 690, 391 NW2d 446 (1986). Grandparents may also seek visitation with their grandchildren under MCL 722.27b. Grandparents must overcome by a preponderance of the evidence the powerful presumption that a "fit" parent's decision to deny visitation does not create a substantial risk of harm to the child's mental, physical, or emotional health, and must show that the visitation is in the best interests of the grandchild. See §§4.19–4.21 for an analysis of this law. Third parties with whom minors reside, and, in some instances, a relative, also may be able to seek a guardianship under MCL 700.5204. In *Killingbeck,* 269 Mich App at 140 n1, the trial court erred in permitting the child's biological father to intervene in the divorce action between the mother and her husband. The father's sole recourse was through a separate paternity action. See §3.27 and §3.35 for a discussion of third-person standing in custody issues.

2. When Property Is Involved

§1.14 Third parties may be named when they are conspiring with either party to defraud the spouse of an interest in property. *See Berg v Berg*, 336 Mich 284, 57 NW2d 889 (1953); *Brown v Brown*, 335 Mich 511, 56 NW2d 367 (1953).

In *Donahue v Donahue*, 134 Mich App 696, 352 NW2d 705 (1984), the court held that certain securities belonged to defendant, not his parents, and were included in the marital estate. *See also Smela v Smela*, 141 Mich App 602, 367 NW2d 426 (1985). However, it is generally beyond the jurisdiction of the divorce court to adjudicate third-party rights regarding property. *See Kasper v Metropolitan Life Ins Co*, 412 Mich 232, 313 NW2d 904 (1981) (no statutory authority to award property to anyone but parties to case); *Krueger v Krueger*, 88 Mich App 722, 278 NW2d 514 (1979).

In *Gates v Gates*, 256 Mich App 420, 664 NW2d 231 (2003), the trial court awarded a house that was titled in the husband's and wife's names to the husband with a value of zero because the husband's brother lived in the house and had made the mortgage payments. The court of appeals held that this award did not constitute an order that the house be conveyed to a third party.

A temporary restraining order conserving property may be served on financial institutions holding assets. Life insurance companies may also be served to preserve beneficiary rights. The effect of the order is uncertain since these third parties are not part of the lawsuit and arguably not bound.

A consent judgment of divorce provision releasing each party's rights to the life insurance proceeds of the other party waived defendant's rights to his late former wife's life insurance proceeds. *MacInnes v MacInnes*, 260 Mich App 280, 677 NW2d 889 (2004).

III. Service

A. On the Defendant

§1.15 Service is made as provided in the general rules for service of process. MCR 2.105, 3.203. The summons is valid for 91 days. It can be extended by court order for a definite period not exceeding one year from the filing of the complaint. MCR 2.102. MCR 3.203 now specifies the manner of postjudgment service of process.

In addition, if there are minor children, a party is pregnant, or child or spousal support is requested, a copy of all pleadings and papers must be provided to the Friend of the Court. A copy of the Friend of the Court's informational pamphlet must be served with the complaint if a child of the parties or a child born during the marriage is under the age of 18, a party is pregnant, or child or spousal support is requested. MCR 3.203; *see also* MCL 552.505(1)(a).

Service can be accomplished by the defendant's voluntary acknowledgment of service. See MCR 2.104(A)(1) or any of the procedures set out in MCR 2.105, including personal service or service by registered or certified mail, return receipt requested.

Nonresident defendants. If the defendant is a nonresident, the method of service depends on whether jurisdiction was acquired under the long-arm statute or the more limited jurisdiction of MCL 552.9a(c). If the defendant maintains a domicile in Michigan, the long-arm statute applies and service may be made as on a resident defendant.

If jurisdiction is obtained under MCL 552.9a(c) because the defendant was personally served outside of Michigan with an order for appearance and publication, specific proofs of service are required. Proof of service is made by filing an affidavit from the person who served the documents, executed before a notary. The affidavit must have attached a court clerk's certification of the official character of the notary and the genuineness of the notary's signature. MCL 552.9a(c).

Incarcerated defendants. In a domestic relations action involving minor children, where one of the parties is incarcerated, the party seeking an order regarding a minor child must

- contact the Department of Corrections to confirm the incarcerated party's prison number and location;
- serve the incarcerated person, and file proof of service with the court; and
- state in the petition or motion that a party is incarcerated and provide the party's prison number and location.

MCR 2.004(B). The caption of the petition or motion must state that a telephonic or video hearing is required by MCR 2.004. The court must issue an order

requesting that the department or the facility where the party is located allow that party to participate with the court or its designee in a hearing or conference, including a Friend of the Court adjudicative hearing or meeting, by way of a non-collect and unmonitored telephone call or video conference. The order must include the date and time for the hearing and the prisoner's name and prison identification number and must be served by the court on the parties and the warden or supervisor of the facility where the incarcerated party resides. MCR 2.004(C). Where the incarcerated respondent in a child protective proceeding was not given the opportunity to be available telephonically at the adjudication, the dispositional hearing, or the first three dispositional review hearings, the prosecutor, the court, and respondent's counsel failed to adhere to the procedures set out in MCR 2.004(B) and (C); therefore, the court of appeals held that the trial court erred in terminating respondent's parental rights. *In re DMK*, 289 Mich App 246, 796 NW2d 129 (2010). "[E]xcluding a[n incarcerated party from the opportunity to participate] for a prolonged period of the proceedings can[not] be considered harmless error." *Id.* at 255.

MCR 2.004 applies to parents incarcerated by the Michigan Department of Corrections. *Family Indep Agency v Davis (In re BAD)*, 264 Mich App 66, 690 NW2d 287 (2004). If a parent is incarcerated in another state or is in a county jail (not under the jurisdiction of the Michigan Department of Corrections), MCR 2.004 does not apply.

A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings. MCR 2.004(F). This provision does not apply if the incarcerated party actually participates in a telephone call or video conference. *Id.* The opportunity to participate in the proceedings must be offered for each proceeding, and "participation through 'a telephone call' during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the [incarcerated party] was not offered the opportunity to participate." *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 154, 782 NW2d 747 (2010).

The court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts. MCR 2.004(G).

B. Alternate Service by Court Order

§1.16 Alternate service is at the discretion of the court and is governed by MCR 2.105(J). A request for an order permitting alternate service is made in a verified motion. There is no hearing on the motion unless the court directs. Service may not be made until the order is entered.

Under MCR 2.105(J)(2), the motion must

- contain facts showing that process cannot reasonably be made under MCR 2.105;
- be dated and signed within 14 days of its filing;

- provide the defendant's last known address or state that no address is known; and
- if the defendant's name or present address is unknown, contain facts showing diligent inquiry to ascertain them.

Alternate service may be made "in any other manner reasonably calculated to give the defendant actual notice." MCR 2.105(J)(1). If service is to be by publication and mailing under MCR 2.106, the order directing notice by publication must include

- the name of the court,
- the names of the parties,
- a statement describing the nature of the proceedings,
- directions as to where and when to answer or take other action, and
- a statement as to the effect of failure to answer or act.

MCR 2.106(C).

Detailed requirements for service by publication are set forth in MCR 2.106(D). Briefly, the plaintiff must arrange for the order to be published at least once a week for three consecutive weeks; send a copy of the order, by registered mail, return receipt requested, to the defendant at the last known address by the date of the last publication; and file proof of mailing with the court. MCR 2.106(G). The newspaper must file an affidavit of publication. *Id.*

C. Alternative Electronic Service by Stipulation

§1.17 Parties can agree to alternative electronic service by filing a stipulation in the case. They may also agree to alternative electronic service of notices and court documents by the court or the Friend of the Court by filing a stipulation in the case. MCR 2.107(C)(4). The agreement for alternative electronic service may be withdrawn by a party or an attorney at any time in writing and will be effective immediately. MCR 2.107(C)(4)(h). Pursuant to MCR 2.107(G), "all service of process *except for case initiation* must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]" (emphasis added). This subsection is one of several amendments made to retain provisions of the administrative orders adopted by the court during the COVID-19 pandemic.

Alternative electronic service may be by email, text message, or an alert consisting of an email or text message to log into a secure website to view notices and court papers. MCR 2.107(C)(4)(a).

A document served by email or text message must be in PDF format or other format that prevents any edits or alterations of the document contents. MCR 2.107(C)(4)(d). An alternative electronic service transmission sent at or before 11:59 p.m. will be deemed to be served on that day. If the transmission is sent on a

Saturday, a Sunday, a legal holiday, or other day on which the court is closed pursuant to court order, it is deemed to be served on the next business day. MCR 2.107(C)(4)(g).

D. On the Friend of the Court

§1.18 The Friend of the Court, or in some counties the prosecuting attorney, must be served with a copy of all pleadings and other papers filed in the action if there is a minor child or a request for child or spousal support. For a more compete discussion, see §7.2.

IV. Parties in the Armed Services

§1.19 If a motion for change of custody is filed *while* a parent is active duty, *see* MCL 722.22(a), the court must not consider the parent's absence due to that active duty status in a best interests of the child determination. MCL 722.27(1)(c); *see Kubicki v Sharpe*, 306 Mich App 525, 858 NW2d 57 (2014) (MCL 722.27(1)(c) did not preclude trial court from deciding father's change of custody motion filed two months before mother's enlistment). Generally, the court must not enter an order that changes the child's placement that existed on the date the parent was called to deployment. However, the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interests of the child. MCL 722.27(3). The temporary order may be for a limited period of time. *Id.* The parent must inform the court of the parent's deployment end date before or within 30 days after that deployment ends. MCL 722.27(4). Once the court has been informed of the deployment end date, the court must reinstate the custody order in effect immediately preceding that deployment period. *Id.* If a motion for change of custody is filed after a parent returns from deployment, the court must not consider the parent's absence due to that deployment or future deployments in a best interests of the child determination. *Id.*

The Servicemembers Civil Relief Act applies to all members of the Army, Navy, Air Force, Marine Corps, and Coast Guard on active duty, all members of the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days to respond to a declared national emergency, and commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration. 50 USC 3901 et seq. The Servicemembers Act completely replaces the old Soldiers' and Sailors' Civil Relief Act of 1940, but includes many of the same protections. The American Bar Association (ABA)'s *A Judge's Guide to the Servicemembers Civil Relief Act* is available on the ABA website.

A party seeking a default in a civil proceeding against a defendant who has not filed an appearance must file an affidavit stating whether the defendant is in military service and showing the necessary facts to support the affidavit. Alternatively, a plaintiff must file an affidavit stating that the plaintiff is unable to determine whether the defendant is in the military service. If there is evidence that proper notice was given but that the defendant failed to answer, a default may be entered, but only if an affidavit verifying proper notice and nonmilitary status is provided.

If the defendant is a servicemember, no default judgment can be entered until the court appoints an attorney to represent the defendant. Once an attorney for the servicemember is appointed, the court must decide on a stay of proceedings. In cases where the defendant is in military service, the court must stay the proceedings for at least 90 days (upon application of counsel or on the court's own motion) if the court determines that

- there may be a defense to the action and a defense cannot be presented without the presence of the defendant, or
- after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

50 USC 3931(d). *See also* MCL 722.27(3).

If the court is unable to determine whether the defendant is in military service, prior to entering a default judgment, the court may require the plaintiff to file a bond in an amount approved by the court. 50 USC 3931(b)(3). The bond must remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable law.

A servicemember may waive any of the rights and protections of the Servicemembers Civil Relief Act. 50 USC 3918(a).

Under the Michigan Military Act, any actions against officers and enlisted personnel on active duty in the Michigan state militia are stayed until after termination of active state service. MCL 32.517.

V. Motions for Temporary Relief

A. In General

§1.20 A divorce action routinely involves motions requesting temporary relief through ex parte orders or temporary orders. Both orders can be used for any domestic relations matter within the court's jurisdiction. MCR 3.207(A). Typically these orders involve questions of child custody, parenting time, child and/or spousal support, income withholding, concealment or preservation of assets, personal protection, or one party's request for assistance in paying attorney fees.

Because ex parte orders are granted without giving the other party notice or an opportunity to respond, it is appropriate to limit them to situations where there is an emergency or extreme facts requiring prompt action.

Some motions may require early resolution, but may not merit ex parte consideration. These matters can be set for a show-cause hearing in 14 days, with the court requiring the moving party to file proof of service on the other party before the hearing.

Practice Tip

- *With highly contested issues, the court may want to advise both parties that there will be a limit on the time and/or on the number of witnesses that each side may call for the show-cause hearing. If the issue cannot be resolved within those limits, that may signal that the matter is better addressed at a full motion hearing.*

Depending on the issues, the matter might then be referred to a domestic relations referee or to the Friend of the Court.

B. Motions for Ex Parte Relief

1. Procedure

§1.21 Under MCR 3.207, a court may issue an ex parte order with regard to any domestic relations matter within its jurisdiction if

> the court is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued.

MCR 3.207(B).

An ex parte order is effective on entry but may not be enforced until the other party is served with notice. MCR 3.207(B)(3). The moving party under MCR 3.207(B)(2) must arrange for service of a true copy of the ex parte order on the other party as well as on the Friend of the Court if the case involves minor children or spousal support. An ex parte order remains in effect until modified or superseded by a temporary or final order. MCR 3.207(B)(4).

Ex parte orders for child support, custody, or parenting time must include the following notice:

> "NOTICE:
>
> "1. You may file a written objection to the order or a motion to modify or rescind the order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve a true copy of the objection or motion on the friend of the court and the party who obtained the order.
>
> "2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.
>
> "3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing. Even if an objection is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."

MCR 3.207(B)(5).

All other ex parte orders must include notice that the ex parte order will automatically become a temporary order if the other party does not file a written request to modify or rescind and a request for a hearing. There is no specific language required for this notice. There is a 14-day time limit for objecting after the order is served. A timely requested hearing must be held within 21 days after the

objection or motion is filed. A change occurring after the hearing may be made retroactive to the date of the ex parte order. MCR 3.207(B)(6).

The court should not sign a proposed order if the required notice is missing.

See form 1.1 for a sample order denying ex parte relief in a list format that considers both procedural requirements under MCR 3.207 and bases for denying the motion.

Practice Tip

- *There should be a record on ex parte proceedings. One suggested procedure adapts the requirements in MCR 3.310 for seeking a TRO. Consider doing the following:*
  1. *Ask why the other attorney was not contacted. Determine what is so urgent.*
  2. *Put any discussion or amplification of what is in the pleadings on the record.*
  3. *Determine whether the matter is one that could be addressed in a telephone conference.*
  4. *In an appropriate situation, have staff contact both attorneys and include in the order granting or denying the motion the date and time of the call, who, if anyone, was contacted, and the substance of the conference if it was not on the record. Be sure to include counsel for both parties, if both have counsel, when discussing the merits of an ex parte petition.*

2. Common Orders

§1.22 Child custody, support, and parenting time. While the case is proceeding, the court may enter ex parte orders for the care, custody, and support of the children. MCL 552.15(1). Parenting time may also be sought ex parte. MCL 722.27a(11). Without an order, each parent has the right to custody and either party may retain the children.

The Michigan Child Support Formula is used as a guideline for determining the amount of support that may be ordered unless application of the formula is unjust or inappropriate. MCL 552.605(2). See chapter 5.

All provisions regarding child support must be prepared on a Uniform Support Order. MCR 3.211(D). FOC 10, Uniform Child Support Order, should be used when payments go through the Friend of the Court or the Michigan State Disbursement Unit. FOC 10a, Uniform Child Support Order, No Friend of Court Services, should be used when payments go directly to the recipient. If the support ordered does not follow the Michigan Child Support Formula, FOC 10d, Uniform Child Support Order Deviation Addendum, must also be used.

The party submitting the first temporary order awarding child custody, parenting time, or support must serve the Friend of the Court and the parties with a Judgment Information Form (SCAO form FOC 100) and proof of service. This form, which contains personal identifying information, is separate from the court order and not a public document. MCR 3.211(F)(2).

Restraints on the transfer or dissipation of assets. The purpose of this type of request is to preserve the status quo until the final adjudication of the parties' property rights. *See Irvin v Irvin*, 93 Mich App 770, 286 NW2d 920 (1979). The restraining order may prohibit deleting a spouse from health care coverage or other benefits or changing the beneficiaries of life insurance.

Restraints on personal conduct. Ex parte orders or TROs may be used to restrain personal conduct, such as prohibiting the other party from repeated nonviolent harassment. They can help regulate conduct that may interfere with living arrangements, child custody or parenting time, support, or property matters pending entry of the final judgment.

Practice Tip

- *Tips for ex parte requests:*
  - *All ex parte requests are potential "red flags." Be cautious. Use court resources, such as the Friend of the Court, when possible before signing an order. Ex parte motions must be supported by affidavits or verified pleadings that "irreparable injury, loss, or damage will result from the delay required" to provide notice. MCR 3.207(B)(1). Missed parenting time can usually be made up as can missed child support payments. Make sure that the harm or injury alleged is truly irreparable.*
  - *Typically, ex parte orders are rarely granted for custody, even in an emergency based on the need for a hearing on the best interests factors before changing custody. However, "extended parenting time" can be granted pending a hearing.*
  - *Exercise an abundance of caution and schedule a motion on the ex parte order as soon as possible, e.g., the court's next motion day.*
  - *While MCR 3.207(B)(5) requires the nonmoving party to file a written objection to the ex parte order for child support, custody, or visitation, ex parte orders should only be enforceable until the court's next day motion to ensure both parties come to court and the court can hear evidence from both sides. Set a hearing date in the ex parte order and a date by which the ex parte order must be served on the nonmoving party.*
  - *When the parties are still residing together, carefully consider a request for granting one party physical or sole custody or child support.*
  - *Require that requests for child support include certification that the amount requested follows the child support guidelines. Also, information in the verified statement may be useful in deciding a request for child or spousal support.*

3. Challenging Ex Parte Orders

§1.23 For all ex parte orders, a written objection or a motion to modify or rescind the order must be filed within 14 days after service. A true copy of the objection or motion must be served on the Friend of the Court (if service is required) and the petitioner. MCR 3.207(B)(5)–(6).

If the order granted child support, custody, or parenting time under the Child Custody Act, the Friend of the Court must then try to resolve the dispute. If a resolution cannot be reached, the matter may be brought before the court.

For all other ex parte orders, a hearing must be held within 21 days after the filing. Any change in the order may be made retroactive to the date of the challenged order. MCR 3.207(B)(6).

4. Temporary Restraining Orders

§1.24 The general court rule on injunctions, MCR 3.310, applies to a request for a TRO in a domestic relations case. MCR 3.207(B)(7). Under MCR 3.310(B), the "irreparable injury" standard described in §1.21 applies, the applicant's attorney must certify in writing any efforts made to give notice and the reasons notice should not be required, and a permanent record or memorandum must be made of any nonwritten evidence, arguments, or other representations made in support of the application. MCR 3.310(B)(1)(b)–(c).

The order must

1. be endorsed with the date and time of issuance,
2. describe the injury and state why it is irreparable, and
3. state why it was granted without notice.

MCR 3.310(B)(2).

Unlike other TROs, TROs in domestic relations cases need not expire within a fixed period not to exceed 14 days, MCR 3.310(B)(3), nor does the court automatically set a date for a further hearing, MCR 3.310(B)(2)(c). TROs are enforced by motions to show cause, seeking a finding of contempt of court under MCL 600.1701 et seq.

5. Protection Orders

§1.25 **In general.** For a comprehensive discussion of domestic violence and personal protection orders (PPOs), see Michigan Judicial Institute, *Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings* (4th ed 2024), available in PDF format on the Michigan Judicial Institute website.

Parenting time and PPOs are addressed in §§4.22–4.25.

There are four types of protection orders, distinguished by the categories of persons who may be restrained.

- A *domestic relationship PPO,* MCL 600.2950, can restrain behavior (including stalking) that interferes with the petitioner's personal liberty or causes the petitioner to have a reasonable apprehension of violence. This PPO applies when the petitioner and respondent are in a domestic relationship (including a dating relationship).
- A *stalking PPO,* MCL 600.2950a(1), can enjoin a person from engaging in stalking, MCL 750.411h; aggravated stalking, MCL 750.411i; or cyber-

stalking, MCL 750.411s. No particular relationship is required for this PPO.

- A *nondomestic sexual assault PPO,* MCL 600.2950a(2), is available to protect the petitioner when the respondent has been convicted of sexually assaulting the petitioner or of furnishing obscene material to the petitioner, MCL 750.142, or has threatened the petitioner with, or subjected the petitioner to, a sexual assault. No particular relationship is required for this PPO.
- An *extreme risk protection order,* MCL 691.1801–.1821, may be obtained by an eligible petitioner who states facts to show that, without the extreme risk protection order, the respondent "can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation." MCL 691.1805(3). While spouses and former spouses, household members and former household members, dating relationships and former dating relationships, and people who have children in common with the respondent are eligible petitioners, the extreme risk protection order may also be sought by nonhousehold family members, health care professionals, law enforcement officers, or a respondent's legal guardian as defined by MCL 691.1803. MCL 691.1805(2). Procedures for obtaining an extreme risk protection order are governed by MCR 3.715–.722. MCR 3.701(A), *amended by* ADM File No 2023-24.

If the petitioner and respondent are in a domestic relationship as defined by the statute, a domestic relationship PPO should be used, even if the domestic abuse constitutes stalking. MCL 600.2950(1)(i).

Pursuant to MCL 600.2950(1), a domestic relationship PPO is available to restrain

- the petitioner's spouse or former spouse,
- a person with whom the petitioner has a child in common,
- a person who resides or has resided in the same household as the petitioner, or
- a person with whom the petitioner has or has had a "dating relationship."

Dating relationship is defined in the statute as "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 600.2950(30)(a).

Under MCL 600.2950(1)(a)–(*l*), a domestic relationship PPO may enjoin or restrain one or more of the following acts:

- entering onto premises
- assaulting, attacking, beating, molesting, or wounding a named individual
- threatening to kill or physically injure a named individual

- removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court
- purchasing or possessing a firearm
- interfering with the petitioner's efforts to remove the petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined
- interfering with the petitioner at the petitioner's place of employment or education or engaging in conduct that impairs the petitioner's employment or educational relationship or environment
- if the petitioner is a minor who has been the victim of sexual assault, as that term is defined in section 2950a, by the respondent and if the petitioner is enrolled in a public or nonpublic school that operates any of grades K to 12, attending school in the same building as the petitioner
- having access to information in records concerning a minor child of both the petitioner and the respondent that will inform the respondent about the address or telephone number of the petitioner and the petitioner's minor child or about the petitioner's employment address
- engaging in conduct that is prohibited under MCL 750.411h and .411i (stalking and aggravated stalking)
- any of the following with the intent to cause the petitioner mental distress or to exert control over the petitioner regarding an animal in which the petitioner has an ownership interest:
  - injuring, killing, torturing, neglecting, or threatening to injure, kill, torture, or neglect the animal
  - removing the animal from the petitioner's possession
  - retaining or obtaining possession of the animal
- engaging in any other specific act or conduct that imposes on or interferes with personal liberty or that causes a reasonable apprehension of violence

A PPO may not be issued if the petitioner and the respondent are parent and child and the child is an unemancipated minor. MCL 600.2950(28), .2950a(28).

Special procedures for minors. In general, PPO actions with a minor party are subject to the same issuance procedures that apply in actions involving adults, although MCR 3.703(F)(1) requires a petitioner under age 18 or a legally incapacitated individual to proceed through a next friend. Personal and extreme risk protection orders where either the respondent or the petitioner is a minor require that the petition be brought in the county of residence where either the petitioner or respondent resides. MCR 3.703(E)(2), .716(F)(2).

Enforcement proceedings against a respondent under age 18 differ significantly from adult enforcement proceedings and are governed by subchapter 3.900 (formerly 5.900) of the Michigan Court Rules. See MCR 3.701(A) and .981 (formerly 5.981) for the rules applicable to minor respondents. PPO violations by

people under age 18 (previously age 17) will be subject to the dispositional alternatives listed in the Juvenile Code. MCL 712A.2(h), .18(17). A family court will have exclusive jurisdiction in proceedings concerning a juvenile under 18 years of age (previously age 17). MCL 712A.2(a), (h).

A court may appoint a guardian ad litem for a minor involved as a respondent in a PPO proceeding under MCL 712A.2(h). A court must appoint a next friend or a guardian ad litem for a petitioner or a respondent of an extreme risk protection order who is a minor (or a legally incapacitated individual). MCR 3.716(G).

Ex parte PPOs. Under MCL 600.2950(12), a court will issue an ex parte PPO without written or oral notice to the respondent or the attorney "if it clearly appears from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued." *See also* MCR 3.703(G).

The standard for issuing an ex parte PPO under the nondomestic relationship PPO statute is worded differently. The statute provides that "[a] court shall not issue a [nondomestic PPO] ex parte … *unless* it clearly appears from specific facts … that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action before a personal protection order can be issued." MCL 600.2950a(12) (emphasis added).

The PPO statutes and court rules do not require the petitioner to appear on the record before the court to obtain an ex parte PPO, but some individual courts require the petitioner to appear on the record before they will issue an ex parte PPO. If a petitioner does not request an ex parte PPO, MCR 3.705(B)(1) requires the court to interview the petitioner or to hold an evidentiary hearing before granting or denying the PPO. *Lamkin v Engram*, 295 Mich App 701, 815 NW2d 793 (2012).

Contents of petition. Under MCR 3.703(B), the petition must

> (1) be in writing;
>
> (2) state with particularity the facts on which it is based;
>
> (3) state the relief sought and the conduct to be restrained;
>
> (4) state whether an ex parte order is being sought;
>
> (5) state whether a personal protection order action involving the same parties has been commenced in another jurisdiction; and
>
> (6) be signed by the party or attorney as provided in MCR 1.109(E). The petitioner may omit his or her residence address from the documents filed with the court, but must provide the court with a mailing address.

See MCL 600.2950(3), .2950a(6).

Under MCR 3.703(D)(1), the petitioner must notify the court about other pending actions, orders, or judgments affecting the parties to a personal protection action.

If the respondent is under age 18, MCR 3.703(C) requires that the petition list the respondent's name, address, and either age or date of birth. Moreover, the petition must list the names and addresses of the respondent's parent or parents, guardian, or custodian, if this is known or can easily be ascertained.

MCL 600.2950(2) requires petitioners to notify the court if they know that the respondent has been issued a license to carry a concealed weapon and is required to carry a weapon as

- a condition of employment,
- a police officer licensed or certified under MCL 28.601–.615,
- a sheriff,
- a deputy sheriff or a member of the Michigan Department of State Police,
- a local corrections officer,
- a Department of Corrections employee, or
- a federal law enforcement officer who carries a firearm during the normal course of employment.

This notice requirement does not apply to petitioners who do not know the respondent's occupation. MCL 600.2950(2), .2950a(5).

Contents of PPO. If a court grants a PPO restraining a respondent age 18 or older, MCL 600.2950(11) and .2950a(11) require that the order contain the following information, in a single form "to the extent practicable":

- A statement that the PPO has been entered. MCL 600.2950(11)(a), .2950a(11)(a).
- A statement regarding the penalties for violation of a PPO:
  - If the respondent is age 17 or older, the PPO must state that a violation will subject the respondent to immediate arrest and to the civil and criminal contempt powers of the court, and that if the respondent is found guilty of criminal contempt, they must be imprisoned for not more than 93 days and may be fined not more than $500.00. MCL 600.2950(11)(a)(*i*), .2950a(11)(a)(*i*); MCR 3.706(A)(3)(a).
  - If the respondent is less than 17 years of age, the PPO must state that a violation will subject the respondent to immediate apprehension or being taken into custody and the dispositional alternatives listed in the Juvenile Code, MCL 712A.18. MCL 600.2950(11)(a)(*ii*), .2950a(11)(a)(*ii*); MCR 3.706(A)(3)(b). A family court will have exclusive jurisdiction in proceedings concerning a juvenile under 18 years of age. MCL 712A.18.
- A statement that the PPO is "effective and immediately enforceable anywhere in [Michigan] after being signed by a judge" and that, after service, the PPO "may be enforced by another state, an Indian tribe, or a territory of the United States." MCL 600.2950(11)(b), .2950a(11)(b). *See also* MCR 3.706(A)(2).

- A statement listing the type or types of conduct enjoined. MCL 600.2950(11)(c), .2950a(11)(c); MCR 3.706(A)(1). The prohibited acts listed in MCL 600.2950(1), in the criminal stalking and cyberbullying statutes, and in MCL 600.2950a(3) are not automatically incorporated into every PPO so be specific. A PPO restrains the respondent only from doing the particular acts identified in the order.
- An expiration date stated clearly on the face of the order. MCL 600.2950(11)(d), .2950a(11)(d); MCR 3.706(A)(4). The following rules apply with regard to the duration of a PPO:
  - Ex parte orders must be valid for at least 182 days. The statutes have no minimum time provision for the duration of orders entered after a hearing with notice to the respondent. MCL 600.2950(13), .2950a(13).
  - If the respondent is under age 18, the issuing court's jurisdiction continues over the respondent until the PPO expires, even if the expiration date is after the respondent's 18th birthday. MCL 712A.2a(6). Violations committed on or after the respondent's 17th birthday are subject to adult penalties. MCL 600.2950(11)(a)(*i*), .2950a(11)(a)(*i*). If a violation occurs after the respondent's 18th birthday, adult enforcement procedures apply, as well as adult penalties. MCL 712A.2a(3); MCR 3.708(A)(2).
- A statement that the PPO is "enforceable anywhere in Michigan by any law enforcement agency, and that if the respondent violates the personal protection order in another jurisdiction, the respondent is subject to the enforcement procedures and penalties of the jurisdiction in which the violation occurred." MCR 3.706(A)(5). *See also* MCL 600.2950(11)(e), .2950a(11)(e).
- The name of the law enforcement agency that the court has designated for entering the PPO into the LEIN network. MCL 600.2950(11)(f), .2950a(11)(f); MCR 3.706(A)(6). The PPO statutes do not specify any particular law enforcement agency that must be designated for purposes of LEIN entry. In choosing an agency, the court will consider the need for immediate enforcement of the PPO and ready access to information by police officers in the area where the petitioner resides.
- If the PPO was issued ex parte, a statement that the restrained person may move to modify or terminate it, and may request a hearing within 14 days after service or actual notice of the order. The PPO must also state that motion forms and filing instructions for this purpose are available from the court clerk. MCL 600.2950(11)(g), .2950a(11)(g); MCR 3.706(A)(7).

Contents of complaint and order for an extreme risk protection order. MCR 3.716(B) lists the complaint requirements for an extreme risk protection order. See MCR 3.716(D) when the complaint is against a minor and MCR 3.716(E) if there are existing actions, orders, or judgments affecting the parties. Note that the court clerk must "maintain the petitioner's address as confidential," and the address "must not be disclosed in any pleading or paper or otherwise." MCL 691.1805(7); *see also* MCR 3.716(C).

Contents of order granting extreme risk protection order. The requirements for an extreme risk protection order are listed in MCL 691.1809(1) and MCR 3.719. Many of these mirror the requirements for other PPOs. However, there are additional requirements and procedural differences for extreme risk protection orders due to the potential for an order to surrender firearms. For example, extreme risk protection orders do the following:

- Impose a preponderance of the evidence standard for considering factors listed in MCL 691.1807 when ruling on the complaint. MCR 3.718(A)(2).
- Have a tighter time frame for ruling. The court must expedite proceedings and rule on the request within one business day of filing. MCR 3.718(A)(1), (D).
- May be issued as immediate emergency ex parte orders. If the petitioner is a law enforcement official, they may request an immediate order via telephone if they are "responding to a complaint involving the respondent and the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure the respondent or another individual by possessing a firearm." MCR 3.718(B)(1). If an immediate surrender of firearms is ordered, the court may order an anticipatory search warrant if the law enforcement official establishes in an affidavit "probable cause to believe that if the respondent refuses to immediately comply with the order, there is a fair probability that the respondent's firearm(s) or concealed pistol license will be found in the location or locations to be searched." MCR 3.718(C).
- Last for one year from the date of issuance unless extended, modified, or terminated. MCL 691.1817; MCR 3.719(A)(12), .720(B).

SCAO forms. The SCAO has developed standardized protection order forms that comply with the relevant statutory requirements:

- For a domestic relationship PPO, see Petition for Personal Protection Order (Domestic Relationship) (SCAO form CC 375) and accompanying Order (SCAO form CC 376).
- For a domestic relationship PPO against a minor, see Petition for Personal Protection Order Against Minor (Domestic Relationship) (SCAO form CC 375M) and accompanying Order (SCAO form CC 376M).
- For an extreme risk protection order, see Complaint for Extreme Risk Protection Order, Adult Respondent (SCAO form CC 452) and accompanying Order (SCAO form CC 453), and see Complaint for Extreme Risk Protection Order, Minor Respondent (SCAO form CC 452M) and accompanying Order (SCAO form CC 453M).

Pending or prior actions between the parties. MCR 3.703(D), .706(C), and .716(E) contain procedural requirements for situations where there are other pending actions or prior orders or judgments affecting the parties to the PPO petition or complaint:

- If the protection order petition or complaint is filed in the same court where the pending action was filed or the prior order or judgment was entered, the protection order action shall be assigned to the same judge. MCR 3.703(D)(1)(a), .716(E)(1)(a).
- If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court in which the protection order action was filed should contact the other court, if practicable, to determine any relevant information. MCR 3.703(D)(1)(b), .716(E)(1)(b).
- If a prior court action resulted in an order providing for continuing jurisdiction of a minor, and the petition requests relief with regard to the minor, the court considering the protection order petition or complaint must comply with the notice requirements of MCR 3.205. MCR 3.703(D)(2), .716(E)(2).
- If there is an existing custody or parenting time order between the parties, "[t]he court issuing a personal protection order must contact the court having jurisdiction over the parenting time or custody matter as provided in MCR 3.205, and where practicable, the judge should consult with that court, as contemplated in MCR 3.205(C)(2), regarding the impact upon custody and parenting time rights before issuing the personal protection order." MCR 3.706(C)(1).

  See MCR 3.706(C)(2)–(3) for provisions regarding the relationship between a PPO and an existing custody or parenting time order.

Motions to dismiss, modify, rescind, or terminate a protection order. The subject of a protection order may move to dismiss, modify, rescind, or terminate a protection order. MCL 600.2950(11)(g), (13), 691.1807(5); MCR 3.720(A). If the PPO was granted pursuant to MCL 600.2950a(2), the hearing will be subject to MCL 750.520j, which limits evidence regarding the petitioner's sexual conduct, unless the respondent files a written motion and offer of proof at the same time the motion to modify or terminate the PPO is filed. MCL 600.2950a(4). There is no motion fee for a motion to dismiss, modify, rescind, or terminate a protection order. MCL 600.2529(1)(e); MCR 3.720(D).

Publication restricted. A court may not publicly disseminate information on the Internet about a PPO that is likely to expose the protected party's identity or location. MCR 3.705(C). Note that the extreme risk protection order statute and corresponding court rules do not expressly incorporate 18 USC 2265 by reference as does MCR 3.705. The respondent is referred to as the "restrained" person. The petitioner is not referenced as the "protected person." However, the petitioner's address is confidential under MCL 691.1805(7) and MCR 3.716(C).

C. Motions for Temporary Orders

§1.26 Motions for temporary orders typically concern child custody and support, parenting time adjustments, restraints on distributing property, residence in the marital home, and requests for attorney fees.

A motion for a temporary order differs from an ex parte order in that it may not be granted without a hearing, unless the parties agree otherwise. MCR 3.207(C)(2).

The motion may be made at any time during the pendency of a case by filing a verified motion setting forth facts sufficient to support the relief requested. MCR 3.207(C)(1).

Other provisions regarding the temporary order include the following:

- It may be modified at any time, following a hearing and on a showing of good cause.
- It must state its effective date and whether it may be modified retroactively by a subsequent order.
- It remains in effect until modified or until entry of the final judgment or order.
- It is vacated by entry of the final judgment or order, unless specifically continued or preserved. An exception is support arrearages that have been assigned to the state.

MCR 3.207(C)(3)–(6).

Practice Tip

- *Beware of granting exclusive use of the marital home to one party in the absence of evidence of abusive conduct, a risk of physical harm, or conduct detrimental psychologically or emotionally to the children. That the petitioner is "uncomfortable" with the living arrangement probably does not justify depriving the other party of a residence.*

Order for attorney fees. At any time, a party may request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a postjudgment proceeding. The motion must allege facts sufficient to show that the petitioner is unable to bear the expense and that the other party is able to pay. Alternatively, the motion must allege facts sufficient to show that the fees and expenses were incurred because the other party was able to comply with a previous court order but refused. MCR 3.206(D). See §§1.85–1.86.

Practice Tip

- *An order for attorney fees is not typically granted ex parte. If incomes have already been equalized through spousal support, the court may be inclined to deny the motion. But see Myland v Myland, 290 Mich App 691, 804 NW2d 124 (2010), where the lower court committed an error of law when it denied the plaintiff-wife attorney fees because "it only awards attorney fees where a party engages in egregious conduct or wasteful litigation and indicated that plaintiff[-wife] could use her spousal support to pay her attorney." Id. at 702. The court of appeals reversed and remanded, finding that the lower court abused its discretion when it failed to consider whether attorney fees were necessary to enable the plaintiff-wife to defend her suit, "including whether, under the circumstances, plaintiff[-wife] would have*

to invade the same spousal support assets she is relying on to live in order to satisfy her attorney fees, and whether, under the specific circumstances, defendant[-husband] has the ability to pay or contribute to plaintiff[-wife]'s fees."Id. at 703. See also Loutts v Loutts, 309 Mich App 203, 871 NW2d 298 (2015) (although defendant's attorney fees exceeded her yearly income, trial court did not abuse its discretion in declining to award fees under MCR 3.206(D)(2)(a) (formerly MCR 3.206(C)(2)(a)) because defendant received substantial cash property settlement and failed to show she would have to invade her spousal support assets to pay fees); Loutts v Loutts, 298 Mich App 21, 25, 826 NW2d 152 (2012) (trial court abused its discretion by failing to address defendant-wife's request for attorney and expert fees under MCR 3.206(D)(2)(a) (formerly MCR 3.206(C)(2)(a)) and should have "consider[ed] her ability to pay her fees relative to plaintiff[-husband]'s ability to pay").

D. Stipulated Temporary Orders

§1.27 The parties may enter into an agreement regarding custody during the pendency of a divorce. *Thompson v Thompson*, 261 Mich App 353, 683 NW2d 250 (2004). The court may enter a temporary order based on the stipulation. *Id.* However, neither the stipulation nor the temporary order can overcome the court's obligation to consider the best interests of the child when determining the permanent custody arrangement. Further, a temporary order issued after the stipulation of the parties and without an evidentiary hearing is not a "previous judgment or order." No change of circumstances need be shown to justify a permanent custody arrangement differing from that in the temporary order. Instead, the test will be whether a differing custody arrangement is in the best interests of the child. MCL 722.27(1).

VI. The Friend of the Court

§1.28 A full discussion of the role of the Friend of the Court can be found in chapter 7. The Friend of the Court has many statutory preadjudication duties in a domestic relations matter, including informing the parties as to their rights regarding the involvement of the Friend of the Court office, and providing information on the process and the rights and responsibilities of the parties. The Friend of the Court also provides mediation services, see §§7.7–7.10, and investigates and makes recommendations regarding child custody, parenting time, and child support, see §§7.11–7.13. The Friend of the Court has enforcement duties for child and spousal support, custody, and parenting time, see §§7.14–7.30. In certain circumstances, the parties may opt out of receiving Friend of the Court services, see §7.3. For a referral order, see SCAO form FOC 12.

VII. Domestic Relations Referees

§1.29 Domestic relations referee powers. Domestic relations referee powers and procedures are set forth in MCL 552.507 and MCR 3.215. Domestic relations referees may hear any motion referred to them by the circuit court except for motions pertaining to an increase or decrease in spousal support. MCL 552.507(2)(a). The chief judge may refer certain motions to a referee by adminis-

trative order. MCR 3.215(B)(1). The individual judge, to the extent allowed by law, may refer other specified motions to a referee on the parties' written stipulation, on a party's motion, or on the judge's own initiative. MCR 3.215(B)(2). The referee may also be directed to conduct settlement conferences and scheduling conferences. MCR 3.215(B). See exhibit 1.1 for a listing of the statutory authority of domestic relations referees and the issues on which they may hold hearings.

A referee appointed pursuant to MCL 552.507(1) must be a member in good standing of the State Bar of Michigan. MCR 3.215(A). A nonattorney Friend of the Court referee who was serving as a referee when MCR 3.215 took effect on May 1, 1993, may continue to serve. MCR 3.215(A).

Scheduling and conduct of hearings. MCR 3.215(C) sets out the domestic relations referee's prehearing duties. Within 14 days after receiving a motion or referral under MCR 3.215(B), the referee must schedule the matter for hearing. The referee must serve a notice of the hearing on the parties' attorneys or on unrepresented parties. The notice of the hearing must clearly state that the matter will be heard by a domestic relations referee.

The referee may adjourn a hearing for good cause without preparing a recommendation for an order, except that if the adjournment is subject to any terms or conditions, the referee may only prepare a recommendation for an adjournment order to be signed by a judge. MCR 3.215(C)(2).

As to the conduct of hearings, MCR 3.215(D) provides that

1. the Michigan Rules of Evidence apply;
2. a referee must provide the parties with notice of the right to request a judicial hearing by giving oral notice during the hearing and written notice in the recommendation for an order;
3. testimony must be taken in person, except that a referee may allow testimony to be taken by telephone for good cause or under MCR 2.407;
4. an electronic or stenographic record must be kept of all hearings.

A referee's role is primarily fact-finding and investigative; purely legal questions should be left to the circuit court judges. *D'Allessandro v Ely*, 173 Mich App 788, 434 NW2d 662 (1988).

A recording made under MCR 3.215(D)(4) may be used solely to assist the parties during the proceeding recorded or, at the discretion of the trial judge, in any judicial hearing following an objection to the referee's recommended order; it may not be used publicly. MCR 3.215(D)(4)(a). If ordered by the court, or if stipulated by the parties, the referee must provide a transcript, verified by oath, of each hearing held. The cost of preparing a transcript must be apportioned equally between the parties, unless otherwise ordered by the court. MCR 3.215(D)(4)(b).

Report and recommended order. Within 21 days after the hearing, the referee must make a statement of findings on the record or submit a written report to the court with a statement of findings and a summary of testimony. MCR 3.215(E)(1). The referee must find facts specifically and state separately the law the referee applied. Overelaboration of detail and particularization of facts is not

required. MCR 3.215(E)(1)(a). A recommended order must also be submitted to the court and served on the attorneys or unrepresented parties. The referee's recommended order must include: (1) a signature line for the court to indicate its approval of the order; (2) notice that if the recommended order is approved by the court and no written objections are filed within 21 days, the order shall become final; (3) notice advising the parties of any interim effect of the recommended order; and (4) prominent notice of all available methods for obtaining a judicial hearing. MCR 3.215(E)(1)(b). Proof of service must be filed with the court.

If the court approves the referee's recommended order, the recommended order must be served within seven days of approval, or within three days if it is to be given interim effect, and a proof of service must be filed with the court. If no objections are filed within 21 days after service on the attorneys or unrepresented parties, the recommended order becomes a final order. MCR 3.215(E)(1)(c).

If the hearing concerned income withholding, the recommended order must be submitted "forthwith," and if the court approves the recommended order, it must be given immediate effect. MCR 3.215(E)(2).

The recommended order may be prepared using any of the methods set forth in MCR 3.215(E)(3).

Interim effect for domestic relations referee's recommended order. With certain exceptions, the court may by administrative order or on a case-by-case basis provide that the domestic relations referee's recommended order will take interim effect pending a judicial hearing. MCL 552.507(7); MCR 3.215(G)(1). The court must provide notice that the recommended order will become an interim order by including that notice under a separate heading in the referee's recommended order or in a separate order adopting the referee's recommended order as an interim order. MCR 3.215(G)(1). The court may not give interim effect to a referee's recommendation for an order for incarceration, an order for forfeiture of any property, or an order imposing costs, fines, or other sanctions. MCR 3.215(G)(2). In addition, an administrative order may not give interim effect to an order that changes a child's custody or domicile or an order that would render subsequent judicial consideration of the matter moot. MCR 3.215(G)(3).

Judicial review. A party is entitled to a judicial hearing on any matter that has been the subject of a domestic relations referee hearing. MCL 552.507(5). A party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection and notice of hearing within 21 days after the referee's recommendation is served. MCR 3.215(E)(4). The objection must include a clear and concise statement of the specific findings or application of law to which an objection is made. Objections regarding the accuracy or completeness of the recommendation must state with specificity the inaccuracy or omission. *Id. See Cochrane v Brown*, 234 Mich App 129, 592 NW2d 123 (1999) (timely written objections and request that court consider additional evidence require de novo hearing); *Constantini v Constantini*, 171 Mich App 466, 430 NW2d 748 (1988) (hearing denied on contested custody issue where request was tardy); *see also McGregor v Jones*, No 361447, ___ Mich App ___, ___ NW3d ___ (Mar 16,

2023) (although MCR 3.215(E)(4) allows trial court to impose any reasonable restrictions and conditions to conserve resources of parties and court, trial court erred when imposing additional requirement that plaintiff submit transcript of referee hearing to court before de novo hearing).

There are certain referee hearings that arguably are not subject to a de novo hearing before the judge. MCR 3.215(E)(4) states that a party may obtain a judicial hearing on any matter that *resulted in a statement of findings and a recommended order*. A dismissal (because the moving party failed to appear), a hearing where the parties placed a settlement on the record, or an adjournment would not result in a statement of findings and, under the court rule, would not be subject to de novo review.

A hearing may also occur on the court's own motion. MCL 552.507(5). The judicial hearing must be held within 21 days after the written objection is filed, unless the time is extended for good cause. MCR 3.215(F)(1).

At least seven days before the judicial hearing, a party who intends to offer evidence from the record of the domestic relations referee hearing must provide notice to the court and each other party. If a stenographic transcript is necessary, the party offering the evidence generally must pay for the transcript. MCR 3.215(D)(4)(c).

The court is required to hold a de novo hearing on any matter that has been the subject of a domestic relations referee hearing upon the request of a party or the court's own motion. MCL 552.507; *Marshall v Beal*, 158 Mich App 582, 405 NW2d 101 (1986); *see also Mann v Mann*, 190 Mich App 526, 476 NW2d 439 (1991) (clear legal error for court to temporarily change custody solely on basis of Friend of the Court recommendation without first holding evidentiary hearing de novo). MCL 552.502(k) defines *de novo hearing* as a "new judicial consideration of a matter previously heard by a [domestic relations] referee." MCL 552.507 provides:

> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:
>
> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
>
> (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.
>
> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
>
> (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.
>
> (b) A new decision based only on evidence presented at the time of the de novo hearing.

> (c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

MCL 552.507(5)–(6).

If an objection to the referee recommendation is filed, the court must allow the parties to present "live evidence" at a judicial hearing. MCR 3.215(F)(2). However, the court may conduct the hearing by reviewing the record of the referee hearing. *Dumm v Brodbeck*, 276 Mich App 460, 740 NW2d 751 (2007). At this hearing, the court has the discretion to

- prohibit a party from presenting evidence on findings of fact that were not objected to,
- determine the referee's finding conclusive as to any fact not objected to,
- prohibit the introduction of new evidence or use of new witnesses absent an adequate showing that the evidence was not available at the referee hearing, and
- impose any reasonable restrictions and conditions that conserve the resources of the parties and the court.

MCR 3.215(F)(2).

However, the trial court's ability to limit the evidence presented in a de novo hearing does not stand for the proposition that the court can do away with the hearing unless the party requesting the hearing intends to present new evidence. *Butters v Butters*, 342 Mich App 460, 995 NW2d 558, *vacated in part on other grounds,* No 164888, ___ Mich ___, 982 NW2d 173 (2022).

If the court on its own motion uses the record of the referee hearing to limit the judicial hearing under MCR 3.215(F), the court must make the record available to the parties and must allow the parties to file supplemental objections within seven days of the date the record is provided to the parties. Following the judicial hearing, the court may assess the costs of preparing a transcript of the referee hearing to one or more of the parties. MCR 3.215(D)(4)(d).

The court of appeals has held that proceedings before a domestic relations referee may be binding under the provisions of the Domestic Relations Arbitration Act (DRAA), MCL 600.5070 et seq., if all of the requirements of the act are satisfied. An agreement for a binding decision at the referee level without provision for review by the circuit court and without meeting the requirements of the arbitration act, including review as specified at MCL 600.5080, is void. *Harvey v Harvey*, 257 Mich App 278, 668 NW2d 187 (2003), *aff'd on other grounds,* 470 Mich 186, 680 NW2d 835 (2004). See §1.45 for a discussion of domestic relations arbitration.

If the court determines that an objection is frivolous or interposed for the purpose of delay, it may assess reasonable costs and attorney fees. MCR 3.215(F)(3).

VIII. Pretrial Conferences

A. In General

§1.30 At any time, a court may direct the parties' attorneys to appear for a conference. The court should use the provisions of MCR 2.401 to facilitate the progress of the case and its fair and expeditious disposition. More than one conference may be held in an action. MCR 2.401 sets out guidelines for three approaches: (1) an early scheduling conference, (2) a scheduling order, and (3) a final pretrial conference.

While the court rules discuss these tools in separate sections, each cross-references the other so that any of the issues discussed below can be handled by any of the options.

Practice Tips

- *The timing, purpose, and format of pretrial conferences will vary depending on court resources, the personality of the judge, and local rules or customs. However, a willingness to spend time on a case early sets the stage for settlement by establishing what is needed for a timely resolution.*
- *The following are techniques to consider:*
  - *Require the parties to be present so that they are aware of what the court expects and what the attorneys do before the court.*
  - *If feasible, consider using a law clerk or other court personnel as a facilitator or conference manager.*
  - *Use the pretrial conference to let the attorneys know what the court is willing to do, such as giving an indication, if asked, of a likely ruling on an issue as it has thus far been presented. This can help narrow issues or redirect the attorney's resources.*
  - *Be consistent. Establish a system so attorneys can come to the pretrial conference prepared for what is needed and expected.*
  - *Require information to be submitted in a specified format, which assures that the court's concerns are answered by both parties.*
  - *If feasible, have counsel submit written arguments or proposed orders via Google drive or thumb drive. This can decrease the time required to issue orders and written opinions.*
  - *Inform the attorneys of procedural policies on motions, proposed orders, and judgments. Policies that can promote an efficient and fair resolution of an action include encouraging attorneys to send out proposed orders with notice of hearings. In the alternative, require filing the order or judgment under the seven-day rule, especially where significant issues are involved such as paternity, child custody or parenting time, or substantial property issues. Use of the seven-day rule can be especially useful when one party is appearing in pro per. For further guidance on working with pro per litigants, see exhibit 1.2.*
  - *Have the attorneys sign every order they submit; make a clear paper trail of who submitted what papers.*

- *Be sure that both counsel understand what is expected. Forms 1.2 and 1.3 are two approaches to the pretrial conference and scheduling. Note that both require the signatures of both counsel.*

MCR 2.401 does not require that someone with "authority to settle" attend the pretrial conference. Instead, the person attending the pretrial conference must now "have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement." MCR 2.401(F).

B. Early Scheduling Conferences

§1.31 Under MCR 2.401(B)(1), considerations for the early scheduling conference include

> (a) whether jurisdiction and venue are proper or whether the case is frivolous;
>
> (b) whether to refer the case to an alternative dispute resolution procedure under MCR 2.410;
>
> (c) the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case;
>
> (d) disclosure, discovery, preservation, and claims of privilege of [electronically stored information];
>
> (e) the simplification of the issues;
>
> (f) the amount of time necessary for discovery, staging of discovery, and any modification to the extent of discovery;
>
> (g) the necessity or desirability of amendments to the pleadings;
>
> (h) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;
>
> (i) the form and content of the pretrial order;
>
> (j) the timing of disclosures under MCR 2.302(A);
>
> (k) the limitation of the number of expert witnesses, whether to have a separate discovery period for experts, whether to require preparation and disclosure of testifying expert reports, and whether to specify expert disclosure deadlines;
>
> (*l*) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;
>
> (m) the possibility of settlement;
>
> (n) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;
>
> (o) the identity of the witnesses to testify at trial;
>
> (p) the estimated length of trial;
>
> (q) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A); and

(r) other matters that may aid in the disposition of the action.

C. Discovery Planning

§1.32 Under MCR 2.401(C), the parties must confer among themselves and prepare a proposed discovery plan on court order or written request of another party. The proposed discovery plan must address all disclosure and discovery matters and propose deadlines for completion. If either party fails to participate in good faith with the development and planning of the proposed discovery plan, the court may order appropriate sanctions. MCR 2.401(C)(4).

D. Verified Financial Information Form

§1.33 Parties are required to complete SCAO form CC 320 (Domestic Relations Verified Financial Information Form), sign the form before a notary, and serve it on the opposing party within 28 days of service of a defendant's initial responsive pleading unless the parties have waived the requirement in writing or service of the form is otherwise not required under MCR 3.206. MCR 3.206(C). The parties must serve a copy of the form on the opposing party and must file a proof of service with the court. The form itself is not to be filed with the court.

Exchanging verified financial information forms does not preclude the parties from other forms of discovery. Therefore, the verified financial information form can be used along with the service of interrogatories.

The verified financial information form is confidential. MCR 3.206(C)(3). A party's or minor's address may be omitted from copies served to the opposing party for good cause. *Id.* The party omitting information from the form must explain in a sworn affidavit their reasoning for omitting the information. MCR 3.206(C)(4). MCR 3.206(C)(2) provides specific rules governing the exchange of financial information in cases involving domestic violence, sexual assault, or stalking. The rule allows a victim under those circumstances to "omit any information" from the form that "might lead to the location of where the victim lives or works, or where a minor child may be found." *Id.*

Although filing the verified financial information form with the court is not required, failure to timely serve the form on the opposing party "may be addressed by the court or by motion consistent with [pursuing discovery under] MCR 2.313." MCR 3.206(C)(2). A party who has served the form on an opposing party must supplement or correct the form in a timely manner after becoming aware that the form contains incomplete or incorrect information. MCR 3.206(C)(5).

E. Scheduling Orders

§1.34 Under MCR 2.401(B)(2)(a), a scheduling order may be entered at an early scheduling conference, a pretrial conference, or whenever the court concludes that the order would facilitate the progress of the case. More than one order may be entered in a case.

When scheduling events, the court should consider

- the nature and complexity of the case;

- the issues involved;
- the number and locations of the parties;
- the number and location of the witnesses, including experts;
- the extent of expected and necessary discovery; and
- the availability of reasonably certain trial dates.

MCR 2.401(B)(2)(b).

A scheduling order may also include provisions regarding

- the discovery of electronically stored information,
- agreements for asserting claims of privilege or protection as trial-preparation material after production,
- preserving discoverable information, and
- the form in which electronically stored information shall be produced.

MCR 2.401(B)(2)(c).

Scheduling is to be done after meaningful consultation with all counsel of record, whenever practical. If the manner of entering the scheduling order does not permit meaningful advance consultation with counsel, the following procedure is provided by MCR 2.401(B)(2)(c):

1. Within 14 days after entry of the order, a party may file and serve a written request for amendment, detailing why the order should be amended.
2. Upon receiving the request, the court will reconsider the order in light of the objections raised.
3. Within 14 days after receiving the request, the court must then schedule a conference, enter a new order, or notify the parties in writing that the court declines to amend the order.

MCR 3.215(B)(3) permits domestic relations referees to be authorized to conduct scheduling conferences.

F. Discovery

§1.35 The court rules concerning discovery apply to all civil actions, including domestic relations actions. MCR 3.201(C). Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. MCR 2.302(B). Information within the scope of discovery need not be admissible in evidence to be discoverable. MCR 2.302(B)(1).

In general, a party that has made a disclosure under MCR 2.302(A)—or that has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

- in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or
- as ordered by the court.

MCR 2.302(E)(1)(a)(i)–(ii).

A duty to supplement disclosures or responses may be imposed by order of the court, agreement of the parties, or at any time before trial through requests for supplementation. MCR 2.302(E)(1)(b).

If the court finds, by way of motion or otherwise, that a party has not supplemented disclosures or responses as required by MCR 2.302(E) the court may enter an order as is just, including an order providing that sanctions stated in MCR 2.313(B), and, specifically, MCR 2.313(B)(2)(b). MCR 2.302(E)(2).

Examples of discovery that may be initiated under the rules:

1. interrogatories to parties, MCR 2.309;
2. depositions of parties on oral examination, MCR 2.306(A), discovery subpoena to a nonparty, MCR 2.305, or by written questions, MCR 2.307;
3. subpoena of documents or other tangible things, MCR 2.305(A)(2); and
4. requests for medical information, MCR 2.314.

Confidentiality orders may be issued to protect sensitive information, especially that requested from third parties. *See Eyde v Eyde*, 172 Mich App 49, 431 NW2d 459 (1988).

A court order must be obtained to compel physical or mental examinations of persons. MCR 2.311(A). A court order is also required for a mental examination to be recorded by audio or video. *Id., amended by* ADM File No 2022-14. If the court orders a mental examination to be recorded, the conditions in MCR 2.311(B), *amended by* ADM File No 2022-14, must be met. This may be particularly relevant if one party alleges that the other is an unfit parent or if a spousal support claim is made because of disability.

The requirement in the Child Custody Act that the court consider the mental and physical health of the parties when determining child custody does not waive the application of the physician-patient privilege. Furthermore, submission to an examination by a court-appointed psychologist and the admission of the psychologist's testimony does not constitute a waiver of the medical privilege with respect to a treating physician. *Navarre v Navarre*, 191 Mich App 395, 479 NW2d 357 (1991).

Sanctions against the party, the attorney, or both may be imposed for a violation of the discovery rules. *See* MCR 2.313. The court may enter a default judgment against a party if that party fails to obey an order to provide or permit

discovery. MCR 2.313(B)(2)(c); *see also Draggoo v Draggoo*, 223 Mich App 415, 566 NW2d 642 (1997); *Abadi v Abadi*, 78 Mich App 73, 259 NW2d 244 (1977).

G. Limited Scope Representation

§1.36 The Michigan Supreme Court approved guidelines for limited scope representation. The Michigan Rules of Professional Conduct and Michigan Court Rules provide guidance to lawyers in unbundled arrangements.

Per MRPC 1.2(b), a lawyer licensed to practice in Michigan may "limit the scope of a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance" as long as the representation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

The amendments also allow a lawyer licensed to practice in Michigan to draft or partially draft pleadings, briefs, and other papers to be filed with the court without requiring the attorney to sign the document or identify the lawyer nor file an appearance (or deem an appearance has been filed on the filing of the drafted or partially drafted documents). All of these documents must be signed by the self-represented party and state, "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)." MRPC 1.2(b)(1); *see* MCR 2.117(D) (merely assisting in preparation of papers is not appearance). See SCAO form MC 516, Notice of Limited Scope of Appearance, and SCAO form MC 517, Notice of Withdrawal from Limited Scope Appearance.

An attorney may provide a client with limited representation, which would reduce a client's costs and allow the client to retain their classification as self-represented. MRPC 4.2(b).

H. Withdrawal by Attorney

§1.37 Occasionally, an attorney will move to discontinue representation in a divorce case. Ethically, the attorney may withdraw only after informing the client that withdrawal cannot be done without the court's permission and if withdrawal can be accomplished without a material adverse effect on the client's interests. MRPC 1.16(b). If the case has been filed, the attorney needs the court's permission to withdraw, even if the client consents. MRPC 1.16(c). A court should require a lawyer to reveal information protected under MRPC 1.6 only to the extent reasonably necessary to adjudicate the motion to withdraw. In eliciting this information, only the court, and no other counsel or parties, should examine the lawyer. MRPC 1.6(c)(2), .16; RI-51 (June 4, 1990). Failure to pay attorney fees is not a sufficient reason by itself for withdrawal. The lawyer may seek to withdraw if the "financial burden is great," based on various factors. RI-20 (June 15, 1989); *see also* MRPC 1.16(b)(4), (5).

The timing of withdrawal is important. If an important court date is imminent and the client is likely to be prejudiced by failure to have an attorney, the judge should not be inclined to grant the withdrawal.

When an attorney is allowed to withdraw, the opposing party and the court must continue to process the case. Many questions often arise. What is the now unrepresented party's address? Is the person aware of the next scheduled court appearance? Are they aware of the trial date? A well drafted order will answer these questions and allow the case to proceed in an orderly manner. See form 1.4.

IX. Alternative Dispute Resolution, Mediation, and Arbitration

A. Friend of the Court Alternative Dispute Resolution

§1.38 The Friend of the Court is required to provide ADR to assist parties in voluntarily settling child custody and parenting time disputes. MCL 552.513(1). Informal ADR through the Friend of the Court may also occur on other issues such as child support and property division. For a complete discussion of Friend of the Court mediation, see §§7.7–7.10.

B. Court Rule Mediation

1. Referral to Mediation

§1.39 Any contested issue in a divorce proceeding may be submitted to mediation. MCR 3.216(C)(2). However, parties who are subject to personal protection orders or who are involved in child neglect or abuse proceedings may not be referred to mediation unless it is requested by the protected party or a hearing takes place to determine whether mediation is appropriate. MCL 600.1035(1)(b); MCR 3.216(C)(3).

MCR 3.216 does not alter the Friend of the Court mediation procedures or restrict the Friend of the Court enforcement authority. MCR 3.216(A)(3).

A domestic relations matter is referred to mediation through the parties' written stipulation, on a party's written motion, or on the judge's own order. MCR 3.216(C)(1).

Domestic relations mediation is a "nonbinding process in which a neutral third party facilitates communication between parties to promote settlement." MCR 3.216(A)(2). If the parties request and the mediator agrees, the mediator may provide a written recommendation for settlement of any issues that remain unresolved at the conclusion of a mediation proceeding. This procedure, *evaluative mediation,* is defined in MCR 3.216(A)(2) and governed by MCR 3.216(I). The parties may request evaluative mediation at the outset or at the conclusion of mediation if the mediator is willing to provide an evaluation. MCR 3.216(I)(1). However, a court may not submit contested issues to evaluative mediation unless all parties so request. MCR 3.216(A)(2), (C)(2), (I).

Each party must agree in writing, before the first mediation session, to make timely payment of one-half of the mediator's fees. MCR 3.216(J)(2).

The court may find that some other payment arrangement or some other allocation of fees is appropriate, given the economic circumstances of the parties, and order that one of the parties pay more than one-half of the fee. MCR 3.216(J)(2). The court may hear objections to the total fee the mediator charges. MCR 3.216(J)(5).

2. Objection to Mediation

§1.40 A party objecting to mediation must file a written motion and notice of a hearing and must serve copies on the attorneys of record and the mediation clerk within 14 days after notice of the order assigning the matter to mediation. MCR 3.216(D)(1). The motion will be heard within 14 days after it is filed, unless the court orders otherwise; the motion must be heard before the case is submitted to mediation. MCR 3.216(D)(2).

Cases may be exempt from mediation for the following reasons:

(a) child abuse or neglect;

(b) domestic abuse, unless attorneys for both parties will be present at the mediation session;

(c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;

(d) reason to believe that one or both parties' health or safety would be endangered by mediation; or

(e) for other good cause shown.

MCR 3.216(D)(3).

3. Selection of the Mediator

§1.41 Domestic relations mediation is conducted by a single mediator who is appointed by the court. The court must appoint a person requested by the parties in a timely written stipulation. MCR 3.216(E)(2). A mediator selected by agreement of the parties need not meet the qualifications set forth in MCR 3.216(G). MCR 3.216(E)(2). If the parties have not stipulated to a mediator, they must indicate whether they would prefer a mediator who is willing to conduct an evaluative mediation. Failure to indicate a preference is treated as not requesting evaluative mediation. MCR 3.216(E)(3)(a).

The ADR clerk will assign a mediator from the court's list of mediators. MCR 3.216(E)(3)(b), (F). If the parties have selected evaluative mediation, the clerk will assign a mediator who is willing to provide an evaluation. The judge may recommend a mediator only on the request of all parties by stipulation in writing or orally on the record. If the parties have not stipulated to a mediator, the judge may not appoint one. MCR 3.216(E)(4).

4. Mediation Procedure

§1.42 **Scheduling.** The mediator must schedule a mediation session within a reasonable time at a location accessible by the parties. MCR 3.216(H)(1).

Mediation summary. At least three days before the session, each side must submit to the mediator and serve on opposing counsel a summary setting forth

- the facts and circumstances of the case;
- the issues in dispute;

- a description of the marital assets and their estimated value, where such information is appropriate and reasonably ascertainable;
- the parties' income and expenses;
- a proposed settlement; and
- any documentary evidence that may substantiate information contained in the summary.

MCR 3.216(H)(2).

Amount of time for sessions. Under MCR 3.216, mediation is not limited by time constraints as it is under MCR 2.403, the court rule for case evaluations.

Presence of the parties. The parties must attend the mediation session in person unless excused by the mediator. MCR 3.216(H)(3).

Domestic violence screening. The mediator must make reasonable inquiry, with the use of the domestic violence screening protocol provided by the SCAO, about whether either party has a history of a coercive or a violent relationship with the other party. MCL 600.1035(2).

Privileged communication. Communications between parties or counsel and a mediator must not be disclosed without the written consent of the parties. However, this prohibition does not apply to

- the mediator's report to the court regarding the completion of mediation,
- information reasonably required by court personnel to administer and evaluate the mediation program,
- information necessary for the court to resolve fee disputes, or
- information necessary for the court to consider issues related to failure to appear at the mediation session, failure to submit the mediation summary, or similar issues.

MCR 3.216(H)(8).

MCR 2.412 replaced MCR 3.216(H)(8) and governs confidentiality in mediation. This rule expands the number of exceptions to mediation confidentiality to include situations in which

- a statute or court rule requires disclosure;
- the communication is in the mediator's report under MCR 3.216(H)(6);
- the disclosure is made during a session that is open to the public;
- the communication is a threat (or statement of a plan or is used to plan) to inflict bodily injury or commit or conceal a crime;
- the disclosure involves a claim of abuse or neglect of a child, protected individual, or vulnerable adult or is included in a report about such a claim or sought or offered to prove such a claim under certain circumstances;

- the disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney disciplinary process;
- the communication occurs in a case out of which arises a claim of malpractice and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant; or
- the disclosure is in a proceeding to enforce, rescind, reform; or avoid liability on a document signed by the mediation parties or acknowledged by the parties under certain circumstances.

MCR 2.412(D).

Written settlement agreements. When a settlement is reached during mediation, the settlement must be put in writing and signed by the parties or acknowledged by the parties on an audio or video recording. MCR 3.216(H)(7). The parties "acknowledge" the agreement at the eventual hearing for entry of the judgment; this does not mean the signatures must be notarized or verified. *Wyskowski v Wyskowski*, 211 Mich App 699, 536 NW2d 603 (1995); *see also Rivkin v Rivkin*, 181 Mich App 718, 449 NW2d 685 (1989) (settlement agreement not effective unless reduced to writing). If the parties do not deliver the written agreement to the mediator within 14 days, mediation is terminated. MCR 3.216(H)(7).

No agreement reached. Within seven days of completion of mediation, the mediator must advise the court, stating only the date of completion of the process, who participated in the mediation, whether a settlement was reached, and whether further ADR proceedings are contemplated. If the mediator is preparing a report pursuant to an evaluative mediation, the report to the court may be delayed until the completion of the evaluation process. MCR 3.216(H)(6).

5. Rejection of the Mediator's Recommendation

§1.43 If both parties do not accept the recommendation in full, the case proceeds to trial. Even if portions have been accepted by both parties, either party may demand a trial on all issues. MCR 3.216(I)(4).

There are no sanctions imposed against either party for accepting or rejecting the mediator's report. The court is not allowed to know which party or parties rejected the report. MCR 3.216(I)(5). In addition, the court may not read the mediator's report and recommendation or admit it into evidence without the parties' consent. MCR 3.216(I)(6).

C. Private Mediation

§1.44 Under MCR 3.216(A)(4), the court may order, on the parties' stipulation, the use of other settlement procedures. The parties may also elect, independent of a court order, to seek mediation but must act in a manner that does not interfere with the court's scheduling order.

D. Arbitration

1. In General

§1.45 MCR 3.216 provides that courts are not prohibited from ordering, on the parties' stipulation, other settlement procedures. The court may not unilaterally order the use of other settlement procedures. *Watson v Watson*, 204 Mich App 318, 514 NW2d 533 (1994). Once the scope and procedure are agreed to, the parties are bound by the decision maker's ruling unless they can show fraud or duress. *See Marvin v Marvin*, 203 Mich App 154, 511 NW2d 708 (1993).

Domestic relations arbitration is governed by the DRAA, MCL 600.5070 et seq. For additional information on arbitration procedures, see the Uniform Arbitration Act, MCL 691.1681 et seq. If there is a conflict between the DRAA and the Uniform Arbitration Act, the DRAA controls. MCL 600.5070(1).

The parties to a divorce may agree to binding arbitration to resolve real and personal property division, child custody, child support (subject to limitations), parenting time, spousal support, prenuptial and postnuptial enforceability, costs and fees, allocation of parties' responsibility for marital debt, and any other contested matter. MCL 600.5071; *Dick v Dick*, 210 Mich App 576, 534 NW2d 185 (1995). Matters of child abuse and neglect are specifically excluded from arbitration. MCL 600.5072(4). A stipulated order satisfies the requirement of a written agreement to arbitrate. *Miller v Miller*, 474 Mich 27, 707 NW2d 341 (2005).

Arbitration may not be ordered by the court unless each party acknowledges in writing or on the record that the party has been informed of the following:

- arbitration is voluntary
- arbitration is binding and the right of appeal is limited
- arbitration may not be appropriate in all cases and is not recommended for cases involving domestic violence
- the arbitrator's powers and duties will be outlined in a written arbitration agreement that has to be signed by the parties before arbitration can begin
- the arbitrator has the power to decide the issues assigned to arbitration and the court will enforce the decisions
- each party may consult with an attorney or choose to be represented by an attorney throughout the process, and parties may seek free legal services if unable to afford an attorney
- the payment of costs of arbitration, including payment of the arbitrator's fee, is the responsibility of the parties

MCL 600.5072(1).

Prearbitration disclosures delineating the procedural requirements for voluntary submission to binding arbitration are mandatory. *See Johnson v Johnson*, 276 Mich App 1, 739 NW2d 877 (2007) (trial judge erred in allowing default judgment premised on plaintiff's failure to participate in arbitration when plaintiff not advised of statutory criteria for voluntary submission).

Cases in which either party is subject to a personal protection order involving domestic violence are excluded from arbitration. MCL 600.5072(2). However, a court may refer a case to arbitration if each party waives the exclusion. A party may not waive the exclusion unless they are represented by an attorney throughout the action, including the arbitration process, and is informed about arbitration, the suspension of formal rules of evidence, and the binding nature of arbitration. *Id.* If the court finds the waiver is informed and voluntary, the findings and the waiver must be placed on the record. MCL 600.5072(3).

When one spouse dies before the entry of a judgment of divorce, the court loses jurisdiction over the matter. *Tokar v Estate of Tokar*, 258 Mich App 350, 671 NW2d 139 (2003). Even if the spouses entered into an arbitrated agreement before one spouse died, the agreement could not be confirmed by the court and reduced to judgment.

To be appointed as an arbitrator, an individual must

- be an attorney in good standing with the State Bar of Michigan,
- have practiced in Michigan for no less than five years before the appointment and have demonstrated an expertise in the area of domestic relations law, and
- have had training in the dynamics of domestic violence and in handling domestic relations matters involving domestic violence.

MCL 600.5073(2). The office of the Friend of the Court, an ADR clerk, or any other individual designated by the chief judge of the circuit may maintain a list of arbitrators who have met the required qualifications. The list must include the arbitrators' qualifications and experience. The court is required to appoint any arbitrator the parties agree on, provided the arbitrator is qualified and has consented to the appointment. MCL 600.5073(1).

Although arbitration of a domestic matter may be heard by a single arbitrator or by a panel of three arbitrators who may be appointed by the circuit court as necessary, MCL 600.5073(1), domestic relations arbitration is best suited to a single arbitrator.

An arbitrator appointed by the court must disclose to the parties any circumstances that affect impartiality. If the arbitrator denies a party's request for disqualification, the party may file a motion for disqualification with the court, which must be heard within 21 days after the motion is filed. If the court finds the arbitrator is disqualified, it may appoint a new arbitrator agreed to by the parties or void the arbitration agreement. MCL 600.5075.

The arbitrator has the power to administer oaths, issue subpoenas and orders for discovery, and order the filing of sworn statements regarding the parties' assets and liabilities. MCL 600.5074(2)–(4). The DRAA does not require the formality of a hearing in the arbitration proceedings to approximate a court hearing. Instead, the procedures for the hearing shall be determined by the parties and the arbitrator. *Miller* (procedure where arbitrator shuttled between parties in separate rooms satisfied act's requirement of hearing).

Generally, no record is made of the arbitration hearing unless the parties agree otherwise. MCL 600.5077(1). If a record is not required, the arbitrator may make a record to aid in reaching a decision. *Id.* A record is required for any portion of the hearing that concerns child-related issues and must follow the Michigan Court Rules for the record of a witness's testimony in a deposition. MCL 600.5077(2).

2. Vacating or Modifying an Award

§1.46 A court must vacate an arbitration award if

- the award was procured by corruption, fraud, or other undue means;
- there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- the arbitrator exceeded their powers; or
- the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to substantially prejudice a party's rights.

MCL 600.5081(2). However, the fact that an arbitrator's award is not a purely even distribution of assets and debts does not establish that the arbitrator exceeded their authority. *Washington v Washington*, 283 Mich App 667, 770 NW2d 908 (2009) (court found that arbitrator did not exceed his authority in awarding wife one-quarter of the marital assets and three-quarters of the marital debts where arbitrator explicitly considered parties' arguments and evidence and based his decision on controlling legal factors pertaining to equitable division of property).

A motion to vacate an arbitration award in a domestic relations case must be filed within 21 days of the award being issued. MCR 3.602(J)(3). However, if a party timely files a motion to correct errors or omissions within 14 days of the award being issued, the 21-day period to file a motion to vacate an arbitration award under MCR 3.602(J)(3) will begin to run on the date the arbitrator delivers a decision on the motion to correct errors or omissions. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 23–24, 777 NW2d 722 (2009). *See also* MCL 600.5078(3).

Defendant's ex parte contact with an arbitrator does not prevent confirmation of an arbitrator's award where "the arbitrator responded promptly and decisively to disclose the contact and prevent further contact [with defendant]," and plaintiff did not show "that the arbitrator exceed[ed] his powers, according to the arbitration agreement, by receiving [defendant's] ex parte contact." *Cipriano v Cipriano*, 289 Mich App 361, 808 NW2d 230 (2010). In *Cipriano,* the court of appeals also found that the trial court erred in modifying the arbitrator's award by reducing the amount of monthly installment payments made to plaintiff by defendant, where defendant's complaint was untimely and where the court made no reference to any grounds for modification in MCR 3.602(K)(2).

The fact that the relief could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award. MCL

600.5081(3). An award for child support, parenting time, or child custody may be vacated if the court finds the award not in the best interests of the child. MCL 600.5080(1). A review or modification of child custody, parenting time, or the amount of child support is conducted under, and is subject to, the standards and procedures applicable to those issues under other state law and court rules. MCL 600.5080(2).

In *Harvey v Harvey*, 257 Mich App 278, 668 NW2d 187 (2003), *aff'd on other grounds,* 470 Mich 186, 680 NW2d 835 (2004), the trial court entered a consent order for a binding custody decision by a Friend of the Court referee. The order provided that the decision would not be reviewable. Based on the referee's decision, the court awarded the father sole legal and physical custody of the children. The mother filed a motion for a de novo hearing, which the trial court denied. The court of appeals held that this was error because an agreement for a binding decision in a domestic relations matter with no right of review in the court does not meet the requirements of the DRAA. Therefore, plaintiff was entitled to a de novo hearing of the child custody findings and recommendation. The supreme court affirmed, but on different grounds. The supreme court held that regardless of the type of ADR used by the parties, the Child Custody Act requires the trial court to determine independently what custodial placement is in the best interests of the children. This does not mean that where the parties have agreed to a custody arrangement, the court must conduct a hearing or otherwise engage in intensive fact-finding. However, the deference due parties' negotiated agreements does not diminish the court's obligation to examine the best interests factors and make the child's best interests paramount.

Harvey was followed in *Bayati v Bayati*, 264 Mich App 595, 691 NW2d 812 (2004) (custody order vacated and remanded for de novo hearing where trial court merely entered custody decision of arbitrator, without independent consideration of best interests).

In *MacIntyre v MacIntyre*, 264 Mich App 690, 692 NW2d 411, *reversed in part and remanded,* 472 Mich 882, 693 NW2d 822 (2005), the arbitrator conducted a best interests analysis and awarded sole physical custody to plaintiff. The trial judge entered a judgment of divorce consistent with the arbitrator's decision, after making independent findings based on his de novo review of the record of the arbitration proceeding. Citing *Harvey,* the court of appeals vacated and remanded for a full de novo hearing on the child's best interests. However, the supreme court reversed and clarified the scope of the circuit court's duty to make "independent findings" in reviewing an arbitrator's child custody decision:

> MCL 600.5080(2) requires a "review" of the child custody decision. The parties' agreements may not waive the availability of an evidentiary hearing if the circuit court determines that a hearing is necessary to exercise its independent duty under the Child Custody Act, MCL 722.25. But as long as the circuit court is able to "determine independently what custodial placement is in the best interests of the children[,]" [*Harvey,* 470 Mich at 187], an evidentiary hearing is not required in all cases. In this case, the Oakland Circuit Court was able to make such an independent determination without a hearing. We REMAND the case to the Court of Appeals for consideration of the remaining issues on appeal.

472 Mich at 882.

Taken together, *Harvey* and *MacIntyre* indicate (1) that the arbitrator must conduct a hearing with all parties present unless otherwise agreed to in the parties' arbitration agreement, (2) that the trial court must make an "independent determination" regarding the best interests of the minor children, and (3) that the trial court may make independent findings based on the record made in the arbitration hearing.

E. Collaborative Law

§1.47 The UCLA, MCL 691.1331 et seq., governs collaborative law practice. MCR 3.222 and .223 integrate the collaborative law process under the UCLA. See SCAO memorandum "Collaborative Law Act Process and Agreements under MCR 3.222; Summary Proceedings for Entry of Consent Judgment or Order under MCR 3.223" for more information. Collaborative law is an ADR parties use to settle and resolve domestic relations issues. *See generally* MCL 691.1336(1). Subject to waiver, preclusion, and limitations of privileges under MCL 691.1348 and .1349, "a collaborative law communication is privileged under [MCL 691.1347(2)], is not subject to discovery, and is not admissible in evidence." MCL 691.1347(1).

Collaborative law consists of two clients and two attorneys working together, sometimes with other professionals, as part of a team to reach a fair and comprehensive settlement that works for the whole family on all issues. The process starts "when the parties sign a collaborative law participation agreement." MCL 691.1335(1). If a domestic relations case is not pending at the time the parties enter into the agreement, the parties may commence an action to submit to the court. MCR 3.222(B)(1), (C). MCR 3.222(C) outlines the procedures for establishing jurisdiction. If a domestic relations case is pending at the time the parties enter into the agreement, the parties must promptly file a notice of the signed agreement and a motion to stay proceedings (SCAO form CCFD 22) with the tribunal. MCL 691.1336(1); *see also* MCR 3.222(B)(2). The court can either stay the proceedings without a hearing or schedule a hearing within 28 days after the motion is filed. MCR 3.222(B)(2)(a). Stay is subject to court-ordered status reports (SCAO form CCFD 23), MCL 691.1336(3), emergency orders, MCL 691.1337, and approval of agreement resulting from the collaborative law process, MCL 691.1338. MCL 691.1336(1); MCR 3.222(B)(2)(a)–(b); *see* MCL 691.1332(o) (defining *tribunal*). Note, however, that the parties cannot be ordered to participate in a collaborative law process. MCL 691.1335(2).

A collaborative lawyer may not appear before the tribunal to "represent a party in a proceeding related to the collaborative matter" unless the lawyer is seeking approval of an agreement resulting from the collaborative law process or requesting or defending an order "to protect the health, safety, welfare, or interest of a party if a successor lawyer is not immediately available to represent that person." MCL 691.1339(1), (3). Under the UCLA, the participation agreement must

1. be in a record (this would normally be in writing or "on the record" in court),
2. be signed by the parties,

3. state the parties' intention to use the collaborative process,
4. describe the nature and scope of the matter (it can be broader than "just" divorce),
5. identify the collaborative attorneys representing each party, and
6. contain a statement by each collaborative attorney confirming the attorney's representation of a party in the collaborative process.

MCL 691.1334(1). In addition, the parties may agree to include additional provisions not inconsistent with the act. MCL 691.1334(2). These might include maintaining the status quo, use of other team members, agreements concerning children, and confidentiality. See MCL 691.1346 for confidentiality of collaborative law communication.

> Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party. A reasonable inquiry includes the use of the domestic violence screening protocol for mediation provided by the state court administrative office.

MCL 691.1345(1). The collaborative lawyer must continue to assess whether "the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party" and "may not begin or continue a collaborative law process unless … [t]he party or prospective party requests beginning or continuing the process[, and t]he collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during [the] process." MCL 681.1345(2)–(3).

Under the UCLA, the collaborative law process concludes when one of the following occurs:

1. The collaborative matter is resolved as evidence by a signed record. MCL 691.1335(3)(a).
2. Part of the collaborative matter is resolved as evidenced by a signed record that includes the parties agreeing that the remaining parts will not be resolved in the process. MCL 691.1335(3)(b).
3. The process terminates. MCL 691.1335(3)(c). *See* MCL 691.1335(4) (describing ways to terminate collaborative law process). Note that "[a] party may terminate collaborative law process with or without cause." MCL 691.1335(6).
4. The collaborative law participation agreement provides for an alternative method. MCL 691.1335(9).

The parties must promptly file notice with the tribunal when the collaborative law process concludes, which lifts the stay of proceedings. MCL 691.1336(2). The notice may not specify why the process terminated. *Id.* The process will not conclude if the parties agree to request that the tribunal "approve a resolution of the collaborative matter or any part of the matter as evidenced by a signed record." MCL 691.1335(8).

If the parties fail to file notice before the stay expires, the court must provide notice of intent to dismiss the case for lack of progress. MCR 3.222(B)(2)(c)(ii). The court must provide the parties with an opportunity to be heard before dismissing the case. *Id.* MCR 3.222(E) outlines the dismissal procedures.

If, during the process, the parties fail to reach an agreement and either party wishes to have matters resolved by the tribunal, the collaborative attorneys and other members of the team are generally disqualified from further representation. MCL 691.1339(1), .1340; *see also* MCL 691.1335(4)–(8) (describing end of collaborative process); MCR 3.222(F). Agreements resulting from the process may be submitted to the tribunal for approval. MCL 691.1338. If the parties have reached an agreement and are requesting to have it entered as a final judgment or order, they need to submit a petition to the court (SCAO form CCFD 25). The petition must contain, at a minimum, the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order; comply with the provisions of MCR 2.113 and MCR 3.206(A) and (B); be signed by both parties; be accompanied by the proposed final judgment or proposed final order that complies with MCR 3.211 and is signed by both parties; be accompanied by a verified statement if required by MCR 3.206(C) and judgment information form (SCAO form FOC 100) if required by MCR 3.211(F); and, under MCL 691.1345, be accompanied by domestic violence screening forms. MCR 3.222(C)(1)(a)(i)–(vi). For more on collaborative law, see *Michigan Family Law* ch 8 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed).

X. Settlement Agreements

A. In General

§1.48 To be enforceable, a settlement must be placed on the record or memorialized in writing. MCR 2.507(G); *see also Marshall v Marshall*, 135 Mich App 702, 712–713, 355 NW2d 661 (1984); *Massachusetts Indem & Life Ins Co v Thomas*, 206 Mich App 265, 520 NW2d 708 (1994).

Courts are bound by property settlements reached through negotiation and agreement absent fraud, duress, or mutual mistake. *Lentz v Lentz*, 271 Mich App 465, 721 NW2d 861 (2006); *Keyser v Keyser*, 182 Mich App 268, 451 NW2d 587 (1990). In *Lentz,* the court stated "we will not rewrite or abrogate an unambiguous agreement negotiated and signed by consenting adults by imposing a 'reasonable' or 'equitable' inquiry on the enforceability of such agreements." 271 Mich App at 478. In reviewing a property settlement agreement, the court must consider whether the agreement was entered into and signed freely, voluntarily, and understandingly, not whether the settlement is equitable. *Lentz; Keyser.*

If the trial court does not approve the proposed settlement, it must give the parties an opportunity to present proofs before judgment can be entered. *Jones v Jones*, 132 Mich App 497, 347 NW2d 756 (1984); *Watson v Watson*, 204 Mich App 318, 322, 514 NW2d 533 (1994). Once approved, however, modifications of property settlements in divorce judgments are disfavored.

Where a settlement agreement is not merged into the judgment, parties retain a number of powerful remedies to enforce their agreement and remedies for fraud.

These remedies are not available when a settlement is embodied directly in a judgment without a separate agreement. *Foreman v Foreman*, 266 Mich App 132, 701 NW2d 167 (2005); *Grace v Grace*, 253 Mich App 357, 655 NW2d 595 (2002).

Except for the important distinction between merged and nonmerged settlement agreements, most of the attributes of a settlement agreement apply equally to consent judgments and vice versa. *See Thornton v Thornton*, 277 Mich App 453, 746 NW2d 627 (2007) (consent judgment is contract and will be enforced absent factors such as fraud or duress).

B. Agreements Concerning Children

§1.49 Although a court is generally bound by the parties' agreement regarding property settlement, the court remains free to exercise its discretion on issues of child custody and child support. *Kline; see also Phillips v Jordan*, 241 Mich App 17, 614 NW2d 183 (2000). The welfare of the children—not the claims, personal rights, or desires of the parents—is paramount in determining custody and support. *Delamielleure v Belote*, 267 Mich App 337, 340, 704 NW2d 746 (2005) (parenting time is right of child and obligation of parent and cannot be waived by divorce settlement); *Napora v Napora*, 159 Mich App 241, 406 NW2d 197 (1986) (trial court not bound by parties' agreement to modify custody order); *Puzzuoli v Puzzuoli*, 3 Mich App 594, 143 NW2d 162 (1966) (custody). Though the court is obligated to determine whether the parties' agreement on custody and parenting time is in the best interests of the child, the court is permitted to accept an agreement resolved by the parents. *Rettig v Rettig*, 322 Mich App 750, 912 NW2d 877 (2018). If the court finds the agreement is in the best interests of the child, there is no need to expressly articulate each of the best interests factors under MCL 722.23. *Id.*

Other cases have enforced agreements regarding child-related issues in specific situations. *See, e.g., Dick v Dick*, 210 Mich App 576, 583, 588, 534 NW2d 185 (1995) (parties may agree to binding arbitration of child support and custody); *Koron v Melendy*, 207 Mich App 188, 523 NW2d 870 (1994) (implicit in trial court's acceptance of parties' custody and parenting time agreement is court's determination that arrangement is in child's best interests); *Rossow v Aranda*, 206 Mich App 456, 457, 522 NW2d 874 (1994) (mother bound by stipulation transferring physical custody of eldest daughter to father, absent showing of duress or coercion).

A party may not disclaim parenthood by stipulation. *Hawkins v Murphy*, 222 Mich App 664, 565 NW2d 674 (1997). However, the court may determine the husband's paternity rights during the divorce proceeding, see §10.51.

XI. Entering Judgments

A. Proofs Required

§1.50 Nearly every divorce judgment, even when the defendant has been defaulted, requires a court hearing at which proofs are taken. See MCR 3.210(B)(5)(a) (proofs required for default judgments unless otherwise provided by statute or court rule), (E)(1) (consent judgments). The testimony of at least one

party in a divorce action—typically but not necessarily the plaintiff—must establish the grounds for divorce and the court's jurisdiction to enter a divorce judgment. *See* MCR 2.517, 3.210(B)(5)(a), (D). In the case of a default judgment, the party moving for entry of judgment "may be required to present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law." MCR 3.210(B)(5)(c); *see Koy v Koy*, 274 Mich App 653, 735 NW2d 665 (2007); *see also Barnes v Jeudevine*, 475 Mich 696, 705, 707, 718 NW2d 311 (2006), *cert denied,* 549 US 1265 (2007). See §1.57.

See form 1.5 for sample questions to ask a witness at a hearing to enter a divorce judgment.

Practice Tips

- *If a party is proceeding in pro per, the court may have to take some additional measures to be sure that the party understands what is being decided at the hearing. For specific suggestions, see exhibit 1.2.*
- *When taking proofs, be sure to ask about all children born to either party during the marriage (rather than "born of the marriage" or "born to the two of you") and be sure the divorce judgment accurately reflects the legal status of children included in the judgment. Be sure to include children born after the parties separated.*

B. The Waiting Period

§1.51 There is a 60-day waiting period after the complaint is filed before proofs or testimony may be taken. MCL 552.9f; *see also* MCR 3.210(A). If minor children are involved, the period is 6 months. MCL 552.9f. Because divorce cases are generally heard in open court on proofs taken, this waiting period sets the earliest date on which the judgment may be entered. *See* MCR 3.210(B)(5)(a).

The court has no power to shorten the 60-day period. *Alexander v Alexander*, 103 Mich App 263, 303 NW2d 202 (1981) (court erred in accepting parties' stipulation to reduce 60-day period). However, the court can shorten the 6-month waiting period to as few as 60 days on written motion and proper showing of "unusual hardship or compelling necessity." MCL 552.9f; MCR 3.210(A)(2); *Hood v Hood*, 154 Mich App 430, 436, 397 NW2d 557 (1986) (fact that spouse stayed out late and fought did not rise to level of compelling necessity).

A party may perpetuate testimony before the waiting period has expired. MCL 552.9f; *see also* MCR 3.210(A)(3). This allows a party's testimony to be placed in the court file and considered by the court at the hearing for entry of the divorce judgment. *Alexander.*

Violation of the waiting period renders the judgment voidable, not void. However, even if the parties agreed to an earlier hearing, a party may have the judgment set aside because the violation is not harmless error. *Calo v Calo*, 143 Mich App 749, 373 NW2d 207 (1985); *but see Alexander* (violation did not render judgment void *ab initio* and reversing judgment would serve no purpose because defendant would not be permitted to renegotiate agreed-on property settlement).

C. Consent Judgments

§1.52 In many cases, the parties reach agreement before trial. Judgments based on agreements are not entered under the default rules. They are controlled by MCR 3.210(E). Either party may present a proposed judgment approved regarding form and content and signed by all parties and their attorneys. MCR 3.210(E)(1). MCR 3.210(E) does not dispense with the requirement of MCL 552.6(3) that the court hear testimony in open court on the statutory requirements. *See* MCR 3.210(B)(5)(a) (judgment, including consent judgment, must be heard in open court). If the court determines that the proposed consent judgment is not in accordance with law, the parties must submit a modified judgment within 14 days or as ordered by the court. MCR 3.210(E)(2). After entry, the moving party must serve a copy of the judgment on all other parties. MCR 3.210(E)(3).

D. Default Judgments

1. In General

§1.53 The procedure in default cases must comply with MCR 3.210(B). For consent judgments, see §1.52.

A default may be entered at any time after the grounds for default have been established, but entry of the default judgment may be delayed because of the mandatory waiting period or completion of the Friend of the Court report. Divorce judgments generally may not be entered without a hearing in open court. MCR 3.210(B)(4), (5) (proofs must be heard in open court unless otherwise provided by statute or court rule).

The entry of a default cuts off the defaulted party's right to "proceed with the action until the default has been set aside." MCR 3.210(B)(2)(c). See §1.55.

2. Grounds

§1.54 A default may be entered for failure to plead if the defendant has not answered within 21 days after personal service within Michigan or 28 days after service by registered mail or service outside the state. *See* MCR 2.108(A)(1)–(2), 3.210(B)(2)(a); *see, e.g., Vaillencourt v Vaillencourt*, 93 Mich App 344, 287 NW2d 230 (1979). If service is by publication or posting pursuant to MCR 2.106 and MCL 552.9a(c), the default may be entered after the amount of time specified in the order for the defendant's answer, which cannot be less than 28 days. MCR 2.108(A). The court may enter a default judgment against a party who fails to obey orders to provide or permit discovery. MCR 2.313(B)(2)(c); *see, e.g., Koy v Koy*, 274 Mich App 653, 735 NW2d 665 (2007); *Draggoo v Draggoo*, 223 Mich App 415, 566 NW2d 642 (1997) (discovery regarding valuation of estate). If a party fails to attend a hearing or produce evidence when required to do so by a subpoena or court order, the court may enter a default judgment against that party. MCR 2.506(F)(6).

3. Entry of Default

§1.55 The default process is set out in MCR 3.210(B). Generally, the plaintiff enters a default by filing a default, a notice of entry of a default, and a request of the default verified in accordance with MCR 1.109(D)(3). The party filing the default must send notice of entry of the default to all parties and to the defaulted party, whether or not the defaulted party has appeared in the action, and must file proof of service and a copy of the notice with the court. MCR 3.210(B)(2)(b), (e). Every subsequent paper filed in the case must be served on the defaulted party. MCR 3.210(B)(2)(e).

The entry of a default cuts off the defaulted party's right to "proceed with the action until the default has been set aside by the court under [MCR 3.210(B)(3)]." MCR 3.210(B)(2)(c). However, the court may allow a defaulted party to engage in discovery, file motions, and participate in court hearings, referee hearings, and ADR proceedings. MCR 3.210(B)(2)(d). The defaulted party's participation may be conditioned or limited in the court's discretion. *Id.*

To set aside the default before entry of the default judgment, the defaulted party must file a motion showing lack of personal or subject matter jurisdiction, or file a verified motion showing good cause. MCR 3.210(B)(3).

4. Nonmilitary Affidavits

§1.56 If the defendant has not appeared in the action, a nonmilitary affidavit must be filed before a default judgment of divorce can be entered. MCR 3.210(B)(5)(b); *see, e.g., Emmons v Emmons*, 136 Mich App 157, 355 NW2d 898 (1984) (nonmilitary affidavit not required if defendant has appeared). See §1.19.

5. Entry of Judgment

§1.57 A hearing on the default judgment is required when

1. the action involves a judgment of divorce, separate maintenance, or annulment under MCR 3.210(B)(5)(a);
2. the requested judgment will give relief different in kind from, or in a greater amount than, stated in the pleadings; or
3. the moving party needs a judicial determination of relief because the party lacks sufficient facts to complete the judgment.

MCR 3.210(B)(4)(a). If a hearing is required, the party seeking the default judgment must schedule a hearing; serve the default judgment motion, notice of hearing, and copy of proposed judgment on the defaulted party at least 14 days before the hearing; and file a proof of service. *Id.*

If no hearing is required and there is enough information in the moving party's complaint or motion for the court to grant relief, the moving party has two options:

1. Schedule a hearing; serve the default judgment motion, notice of hearing, and copy of proposed judgment on the defaulted party at least 14 days before the hearing; and file a proof of service; or

2. Serve on the defaulted party a verified default judgment motion, a copy of the proposed judgment, and a notice stating that the judgment will be provided to the court for signing if no written objections are filed with the clerk within 14 days. If no objections are timely filed, the moving party must submit the judgment for entry. Otherwise, the moving party must notice the default judgment entry for a hearing.

MCR 3.210(B)(4)(b).

Service must be made pursuant to MCR 3.203 or in a manner permitted by the court. MCR 3.210(B)(4)(c).

Notice is not required if the default is entered for failure to appear at trial or a scheduled hearing. MCR 3.210(B)(4)(d). Failure to give proper notice when required constitutes a denial of due process, invalidates the judgment, and requires that it be set aside. *Ragnone v Wirsing*, 141 Mich App 263, 367 NW2d 369 (1985); *Deeb v Berri*, 118 Mich App 556, 325 NW2d 493 (1982) (failure to give seven days' notice (under MCR 2.603) is substantial defect that may be raised for first time on appeal). The notice must be written; oral notice does not substantially comply. *Vaillencourt.* A notice that contains incorrect information about the hearing also does not substantially comply. *Whalen v Bennett*, 67 Mich App 720, 242 NW2d 502 (1976).

At the hearing on the motion for entry of default judgment, the moving party "may be required to present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law." MCR 3.210(B)(5)(c). If children are involved, the court may consider all relevant evidence necessary to make findings regarding custody, parenting time, and support. MCR 3.210(B)(5)(d); *see also Barnes v Jeudevine*, 475 Mich 696, 705, 707, 718 NW2d 311 (2006), *cert denied,* 549 US 1265 (2007) (determination that child is not child of marriage requires affirmative finding by trial court based on clear and convincing evidence). For sample questions for counsel to ask clients on record, see form 1.5.

If, in a default case, the court determines that the proposed judgment is inappropriate, the party who prepared it must present a modified judgment that conforms with the court's opinion within 14 days. MCR 3.210(B)(5)(e).

If the default judgment is entered, the moving party must serve a copy on the defaulted party within 7 days of entry and promptly file a proof of service. MCR 3.210(B)(5)(f).

The defaulted party may move to set aside a default judgment if the motion showing good cause is filed within 21 days after entry of the default judgment, except that those requirements are not applicable where

- the court did not have personal jurisdiction over the defendant;
- the court lacked subject-matter jurisdiction;
- the moving party failed to meet the service requirements of MCR 3.210(B)(2)(b); or
- the moving party failed to meet the requirements of MCR 3.210(B)(4).

MCR 3.210(B)(6)(a). The court may also set aside or modify a default judgment under MCR 2.612 or as provided by statue. MCR 3.210(B)(6)(b). The defaulting party must be required to pay the other party's taxable costs and the court may impose other conditions, including imposition of a reasonable attorney fee. MCR 3.210(B)(7).

Practice Tips

- *Practitioners should avoid overreaching in the default judgments submitted to the trial court for approval. They should also be prepared to demonstrate to the court that the proposed relief is in accord with Michigan law. Lawyers should anticipate close judicial scrutiny of child support deviations, excessive spousal support, and disparate or skewed property awards. Prudent attorneys will anticipate and be prepared for court inquiry regarding the judgment being in accord with Michigan law.*
- *Remember, the defaulted party must be served with a copy of the motion for entry of default judgment, notice of hearing, and the proposed default judgment 14 days in advance of the hearing. On the day of hearing, the court may alter some provisions if it determines that the proposed judgment does not comply with the law (e.g., the division of property is not fair and reasonable or the custody and parenting time provisions are not in the child's best interests). If so, the altered judgment must be served under the 7-day rule.*
- *The court may require the moving party to present evidence sufficient to show that the proposed judgment is proper. The court may consider any relevant evidence from the moving party before entering a default judgment of divorce. Practitioners may wish to bring documentary evidence to submit to the court if the defaulted party contests the proposed default judgment.*
- *Also, keep in mind that MCR 3.210(E) provides for entry of a consent judgment for divorce, separate maintenance, or annulment. Stipulations to proceed are no longer required.*

E. Judgments in Contested Cases

§1.58 In a contested divorce case, a trial judge must state findings of fact and conclusions of law. MCR 2.517(A); *Beason v Beason*, 435 Mich 791, 460 NW2d 207 (1990); *see also, e.g., Dillon v Dillon*, 134 Mich App 423, 350 NW2d 892 (1984) (remanding for new trial when prior judge's inadequate findings of fact rendered successor judge without authority to enter judgment); *Nicpon v Nicpon*, 9 Mich App 373, 157 NW2d 464 (1968) (sua sponte raising issue and reversing for failure to make adequate findings). See form 1.6 for a model bench opinion; see also *Michigan Family Law* form 7.6 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for a similar proposed findings of fact and conclusions of law form.

However, failure to make adequate findings does not mandate reversal in all cases. Since an appellate court reviews certain issues in a divorce case de novo, it may correct the omission by making findings of fact on the record before it. *Stackhouse v Stackhouse*, 193 Mich App 437, 484 NW2d 723 (1992) (making findings from records regarding necessity for attorney fees).

A successor judge may grant a divorce based on the predecessor's finding of a marital breakdown but may not resolve property issues if the predecessor's findings are an insufficient basis for a property settlement decision. *Dillon* (remanding for new trial when first judge heard extensive testimony concerning property, then ordered that each party keep property in each party's possession).

Practice Tips

- *Have counsel number the pages in a divorce judgment to avoid arguments that something was omitted.*
- *Have both attorneys and both parties sign the judgment.*
- *Unless a proposed judgment is sent out in advance to the other side, have it submitted under the seven-day rule, MCR 2.602(B)(3).*

F. Entry and Effective Date of Judgments

1. Entry of Judgments

§1.59 Within 21 days after the court issues an opinion or a settlement is placed on the record, the moving party must submit the judgment, order, or motion to settle the judgment or order, unless the court grants an extension. MCR 3.211(F)(1).

As of January 1, 2006, a party submitting a first temporary order and the party submitting the final proposed judgment awarding child custody, parenting time, or support must serve the Friend of the Court, and unless the court orders otherwise, all other parties with a completed copy of the latest SCAO Judgment Information Form (FOC 100) along with a proof of service. MCR 3.211(F)(2). The SCAO forms can be found at ICLE's website. If the court modifies the proposed judgment or order before signing it, the party submitting it must submit a new Judgment Information Form within seven days if any information previously submitted changes as a result of the court's modification. MCR 3.211(F)(3). Before signing a judgment or order awarding child or spousal support, the court must determine that the party has certified that the Judgment Information Form has been submitted to the Friend of the Court and that any order concerning a minor or spouse is accompanied by a Uniform Support Order or explains why a Uniform Support Order is unnecessary. MCR 3.211(F)(4). Except as otherwise provided in MCR 3.206(C), a Judgment Information Form (SCAO form FOC 100) must be filed in addition to the verified statement required by MCR 3.206(C). MCR 3.211(F)(5). For a discussion of the requirement for a Uniform Support Order, see §1.63.

The court may require that the judgment or order be submitted to the Friend of the Court for review to determine that it contains the provisions required by MCR 3.211(C)–(F). MCR 3.211(G).

There are four methods for entering a divorce judgment after a trial.

1. The court may sign the judgment when it grants the relief provided by the judgment. MCR 2.602(B)(1).

2. The court must sign the judgment if all the parties approve it as to form and the court determines that it comports with the court's decision. MCR 2.602(B)(2). A judgment approved as to form may be presented to the court at any time after the judgment is granted.
3. The judgment may be submitted under the seven-day rule. If no written objections to its accuracy or completeness are filed within seven days of service of the proposed judgment, the court must sign the judgment if it comports with the court's decision. If the judgment does not comport, the court clerk will notify the parties to appear before the court to settle the matter. A party who objects to a proposed judgment must serve the objections on all parties, and the party who filed the proposed judgment must notice it for settlement before the court within seven days after receiving notice of the objections. Objections regarding the accuracy or completeness of the judgment or order must state with specificity the inaccuracy or omission. MCR 2.602(B)(3).
4. A party may prepare a proposed judgment and notice it for settlement before the court. MCR 2.602(B)(4).

2. Effective Date

§1.60 A judgment takes effect and is thus subject to enforcement "21 days after a final judgment (as defined in [MCR 7.202(6)]) is entered in the case." MCR 2.614(A)(1).

In practice, custody and parenting time orders have been given immediate effect. *Hoke v Hoke*, 162 Mich App 201, 412 NW2d 694 (1987) (court's custody order was effective on pronouncement because it was intended to be given immediate effect and parties relied on it although judgment was not entered for several weeks). *But cf.* MCR 2.614(A)(2)(e) (providing for immediate enforcement only of orders issued before judgment in domestic relations actions); *Lyons v Lyons*, 125 Mich App 626, 336 NW2d 844, *appeal after remand,* 128 Mich App 203, 339 NW2d 875 (1983) (judgments, including custody and support provisions, are automatically stayed for 21 days following entry).

G. Mandatory Provisions in Divorce Judgments

1. All Judgments

§1.61 A separate and distinct paragraph, prefaced by an appropriate heading, must cover each subject in the judgment. MCR 3.211(A). *See, e.g., Kyte v Kyte*, 325 Mich 149, 37 NW2d 784 (1949).

All divorce judgments must include the following:

- A determination of each party's rights in insurance on the life of the other party, MCL 552.101; MCR 3.211(B)(1)
- A determination of each party's rights, including contingent rights, in (a) any vested pension, annuity, or retirement benefits; (b) accumulated contributions to a pension, annuity, or retirement plan; and (c) any unvested pension, annuity, or retirement benefits, MCL 552.101(4); MCR 3.211(B)(2).

Specific provisions regarding these benefits, including QDROs and EDROs, are discussed in chapter 8.

- The parties' rights in property, MCL 552.103; MCR 3.211(B)(3); *see Yeo v Yeo*, 214 Mich App 598, 543 NW2d 62 (1995) (vacating judgment that did not include property division but reserved property issues for future consideration). A property settlement agreement not merged into a judgment may not be enforced as a judgment. *See Marshall v Marshall*, 135 Mich App 702, 355 NW2d 661 (1984).
- A provision granting, reserving, or denying spousal support, MCL 552.13(1); MCR 3.211(B)(4)

See form 1.7 for a list of all required judgement provisions.

2. Judgments Awarding Custody of a Minor

§1.62 A judgment awarding custody of a minor must include the following:

- a prohibition against moving the child's residence outside Michigan, MCR 3.211(C)(1)
- a requirement that the custodial parent promptly notify the Friend of the Court in writing of any change of the child's address, MCR 3.211(C)(2)
- a statement by the court declaring the child's inherent rights and establishing the rights and duties as to the child's custody, support, and parenting time, MCL 722.24(1)
- in joint custody arrangements, the parents' agreement regarding relocation of the child's legal residence or, if the parents do not agree on a relocation provision, the following statement: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the 'Child Custody Act of 1970,' 1970 PA 91, MCL 722.31."

3. Judgments Awarding Spousal or Child Support

§1.63 A judgment awarding spousal or child support must include the following:

- a provision for statutory income withholding, MCL 552.604
- a provision for the payment of statutory Friend of the Court fees, if payment is to be made through the Friend of the Court or the state disbursement unit, MCL 600.2538(1); *see Trantham v State Disbursement Unit*, 313 Mich App 157, 882 NW2d 170 (2015) (rejecting plaintiff's contention that Friend of the Court user fees constituted unconstitutional taking of private property for public use and violated substantive due process)
- the retroactive modification paragraph required by MCL 552.603(6)(a)
- a notice that liens will be imposed by operation of law and that the payer's real and personal property can be encumbered or seized if an arrearage

greater than two months' support payments has accrued, MCL 552.603(6)(b)

- a notice that an order for dependent health care coverage takes effect immediately and that, in a Friend of the Court case, a national medical support notice will be sent to the parent's current and subsequent employers and insurers if appropriate and inform the parent that they may contest the action by requesting a review or hearing concerning availability of health care coverage at a reasonable cost, MCL 552.603(6)(c)
- in a Friend of the Court case, the parties' residential or mailing addresses and a requirement that they notify the Friend of the Court of any changes of address, telephone number, or employment in writing within 21 days, MCL 552.603(7)(a), (b), (8)
- in a Friend of the Court case, a requirement that each party keep the Friend of the Court informed if the party holds an occupational or a driver's license, MCL 552.603(7)(d)
- in a Friend of the Court case, the name, address, and telephone number of each party's current sources of income, and a requirement that the parties keep the Friend of the Court informed of any changes, MCL 552.603(7)(e), (8), .605a(1)(a)
- in a Friend of the Court case, a notice that each party must provide their Social Security number and driver's license numbers to the Friend of the Court unless the party is exempt under law from obtaining a Social Security number or is exempt under law from disclosing their Social Security number for religious reasons, MCL 552.603(7)(f)

Practice Tip

- *While a parent must inform the Friend of the Court of the name, address, and telephone number of current sources of income and of any changes in sources of income, it does not require that the parties reveal the amount of increase or decrease resulting from this change.*

Uniform Support Order. Any provisions regarding child or spousal support must be prepared on the latest version of the SCAO Uniform Support Order. See FOC 10, FOC 10a, FOC 10b, FOC 10c, and FOC 10d. This order must accompany any judgment or order affecting child or spousal support and both documents must be signed by the judge. If only child or spousal support is ordered, then only the Uniform Support Order must be submitted to the court for entry. The terms of the Uniform Support Order govern if there is any conflict with the terms of the judgment or order. MCR 3.211(D)(1). The SCAO forms can be found at ICLE's website.

Parties may agree to waive the right to modification of spousal support provided their agreement sets forth (1) that the parties forgo their statutory right to petition the court for modification of spousal support under MCL 552.28; (2) that the parties agree that the spousal support provision is final, binding, and non-

modifiable; and (3) that the agreement is reflected in the judgment of divorce. *Staple v Staple*, 241 Mich App 562, 616 NW2d 219 (2000).

4. Judgments Awarding Child Support

§1.64 In addition to the provisions noted in §1.63, the following further provisions are required when child support is awarded:

- Notice that support payments continue until the child reaches 18 ($19^1/_2$ if specific statutory requirements are met and the child is attending high school). MCL 552.605b.
- For a Friend of the Court case, a provision requiring that one or both parents obtain or maintain health care coverage that is accessible to the child and is available to the parent at a reasonable cost. MCL 552.605a(2).
- In a Friend of the Court case, a requirement that each party keep the Friend of the Court informed of any health care coverage or nonprofit health corporation coverage that is available to the party or that is maintained by the party; the name of the insurance company, nonprofit health care corporation, or health maintenance organization; the policy, certificate, or contract number; and the names and birth dates of the persons for whose benefit the coverage is maintained. MCL 552.605a(1).
- "Notice that an order for dependent health care coverage takes effect immediately and that, in a friend of the court case, a national medical support notice will be sent to the parent's current and subsequent employers and insurers if appropriate. The notice shall inform the parent that the parent may contest the action by requesting a review or hearing concerning availability of health care coverage at a reasonable cost." MCL 552.603(6)(c).
- Substantially the following provision:

  > If a child for whom support is payable under the order is under the state's jurisdiction and is placed in foster care, that support payable under the order is assigned to the department.

  MCL 552.605d(1)(a).
- Substantially the following provision:

  > If a child for whom support is payable under the order is under court jurisdiction and is placed in county-funded foster care, that support payable under the order is assigned to the department.

  MCL 552.605d(1)(b).
- Substantially the following provision, if the case is a Friend of the Court case:

  > The office of the friend of the court may consider the person who is providing the actual care, support, and maintenance of a child for whom support is ordered as the recipient of support for the child and may redirect support paid for that child to that recipient of support, subject to the procedures prescribed in section 5d of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605d.

> If the payer resides full-time with a child for whom support is payable under this order, support for that child abates in accordance with policies established by the state friend of the court bureau and subject to the procedures prescribed in section 5d of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605d.

MCL 552.605d(1)(c)(i)–(ii).

The former MCR 3.211(E)(1) and (4) required a support order to state the amount by which the support would decrease as the number of minor children decreased and to contain a provision for the preservation of support arrearages owing to the state on the date of entry of the judgment. The Uniform Support Order specifies that the order continues in effect until each child reaches age 18 or graduates from high school, but does not specify how the total amount of support will decrease as a child reaches age 18 or graduates from high school. The Uniform Support Order does state that support payable under any prior order is preserved.

H. Optional Provisions in Divorce Judgments

§1.65 Costs. A trial court may award costs to either party and may order costs to be paid out of any property that is in the court's jurisdiction. MCL 552.13(1).

Attorney fees and litigation fees. If an award of attorney fees is necessary to enable a party to prosecute or defend the action, the trial court may award the amount it finds necessary and reasonable. MCL 552.13(1); MCR 3.206(D); *see, e.g., Thames v Thames*, 191 Mich App 299, 477 NW2d 496 (1991) (plaintiff was in financial need and defendant had unnecessarily prolonged proceedings with spurious claims and allegations). MCR 3.206(D)(2) provides two independent bases for awarding attorney fees. MCR 3.206(D)(2)(a) allows fees when one party is unable to pay and the other party is able to pay. MCR 3.206(D)(2)(b) (formerly MCR 3.206(C)(2)(b)) "considers only a party's behavior, without reference to the ability to pay," and allows attorney fees and expenses if they were incurred because the other party was able to comply with a previous court order but refused. *Richards v Richards*, 310 Mich App 683, 701, 874 NW2d 704 (2015). A motion for attorney fees under MCR 3.206(D) must be brought within a reasonable time after the fees sought were incurred, and what constitutes a reasonable time depends on the particular facts and circumstances of each case. *Colen v Colen*, 331 Mich App 295, 952 NW2d 558 (2020) (trial court did not abuse its discretion in denying plaintiff's motion for attorney fees on ground that by neglecting matter for almost two years, plaintiff had failed to timely pursue attorney fees).

Restoration of name. If the wife wishes to use a name other than her husband's, the judge may, when granting the divorce, restore her birth name or prior surname or allow her to adopt another surname if she does not seek the change with fraudulent intent. MCL 552.391; *see also* MCL 711.1.

It is important to note that the right to marry for same-sex couples includes the right to benefits associated with marriage. *Pavan v Smith*, 582 US 563 (2017);

Obergefell v Hodges, 576 US 644 (2015). Therefore, while the Michigan statute is gender specific, it should be applied as gender neutral.

XII. Selected Trial Issues

A. In General

§1.66 In general, the contested divorce case proceeds to trial and is governed by the practice and procedure applied in other civil actions. MCR 3.201(C). Many trials concern ancillary issues such as property division, spousal or child support, or custody. See those chapters for specific issues that arise in those disputes.

If a foreign language interpreter is "necessary for a person to meaningfully participate in the case or court proceeding," the court will appoint an interpreter (either in response to a request or sua sponte) for a party or a testifying witness. MCR 1.111(B)(1). The court may appoint an interpreter for a person other than a party or a witness who has a "substantial interest" in the proceeding. MCR 1.111(B)(2).

B. Selected Evidentiary Issues

§1.67 Admissibility of relevant evidence. All relevant evidence is admissible. MRE 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." MRE 401, *amended by* ADM File No 2021-10 (eff. Jan 1, 2024).

Tape-recorded conversations. Parents sometimes offer tapes of telephone conversations between the child and the other parent as evidence of that parent's unfitness. State and federal statutes generally prohibit the interception or use of an electronic communication with a criminal penalty and civil damages. 18 USC 2510 et seq.; MCL 750.539c, .539e, .539h. While it is not a crime for a participant to tape their own conversation, the participant may not unilaterally permit a third party to listen in on a conversation. *See Dickerson v Raphael*, 222 Mich App 185, 564 NW2d 85 (1997), *rev'd in part on other grounds and remanded for new trial,* 461 Mich 851, 601 NW2d 108 (1999). Conversations conducted on a cordless telephone are protected by the Michigan eavesdropping statute. *People v Stone*, 463 Mich 558, 621 NW2d 702 (2001). Nor may a parent of a minor child consent on behalf of the child to the taping of a conversation between the child and the other parent under Michigan's eavesdropping statute. *Williams v Williams (On Remand)*, 237 Mich App 426, 603 NW2d 114 (1999). On remand from the supreme court, the court of appeals affirmed its prior decision reversing the trial court's order on the state law count. However, as to the federal wiretapping act, it reversed and remanded for the trial court to determine if defendants, in good faith, reasonably believed that it was necessary and in the child's best interests to "vicariously consent" on behalf of the child to the recording. *Id.* at 429 (citing *Pollock v Pollock*, 154 F3d 601 (6th Cir 1998)).

Lay witnesses. Every person is competent to be a witness unless the court finds, after questioning the person, that the person does not have sufficient physi-

cal or mental capacity or sense of obligation to testify truthfully and understandably. MRE 601. The witness must have personal knowledge of the matter, which may be proved by the witness's own testimony. MRE 602.

A nonexpert witness's opinion testimony is limited to one that is "(a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." MRE 701, *amended by* ADM File No 2021-10 (eff. Jan 1, 2024). *See Lee v Lee*, 191 Mich App 73, 477 NW2d 429 (1991) (trial court erred in refusing to hear testimony based on parties' personal knowledge of marital home's value).

Expert witnesses. An expert witness may give an opinion where that testimony would assist the trier of fact in understanding the evidence or a fact in issue. MRE 702. The underlying facts or data essential to the expert's opinion or inference must be in evidence. MRE 703.

The expert's opinion may include an "ultimate issue" to be decided by the court. MRE 704. The expert may testify to an opinion or inferences without first disclosing the underlying facts or data relied on, although disclosure may be required on cross-examination. MRE 705.

The court may, on its own motion, enter an order to show cause why an expert witness should not be appointed and may appoint a witness agreed on by the parties or chosen by the court. MRE 706.

The expert must be qualified as an expert by knowledge, skill, experience, training, or education. MRE 702. The expert's testimony is based on their "scientific, technical, or other specialized knowledge." *Id.* MRE 702 states that an expert witness may testify if (1) "the testimony is based on sufficient facts or data," (2) "the testimony is the product of reliable principles and methods," and (3) the witness "has reliably applied the principles and methods to the facts of the case." Form 1.8 is a list of questions a judge may ask of a proposed expert witness to determine whether the person is qualified to testify.

Before the U.S. Supreme Court decision in *Daubert v Merrell Dow Pharms*, 509 US 579 (1993), both federal and Michigan courts decided the admissibility of scientific opinion testimony in light of a "general acceptance" test based on *Frye v United States*, 293 F 1013, 1014 (DC Cir 1923). *Frye* required that both an opinion's theoretical underpinnings and the particular technique and/or device used to come to the opinion be generally accepted, i.e., recognized by the relevant scientific community as producing reliable results.

However, in *Daubert,* the U.S. Supreme Court adopted a "more relaxed" standard. *People v McMillan*, 213 Mich App 134, 137 n2, 539 NW2d 553 (1995). Under *Daubert,* "widespread acceptance" within the scientific community is a factor to be considered, but the results of scientific tests are admissible if the trial judge is satisfied that the tests and their results "rest[] on a reliable foundation and [are] relevant to the task at hand." *Daubert,* 509 US at 579.

Although *Daubert* addressed only scientific evidence, in *Kumho Tire Co v Carmichael*, 526 US 137 (1999), the Supreme Court extended *Daubert* to all opinions

based on technical or other specialized knowledge; in other words, to all expert testimony.

In 2004, the Michigan Supreme Court revised MRE 702 in a very significant way when it deleted from the first sentence the word *recognized*. Before 2004, the rule read, "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact …." Now, it reads, "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact …." The amendment of MRE 702 to conform to FRE 702, and the express citation of *Daubert* in the staff comment, strongly indicates adoption of the *Daubert* standard.

Hearsay exception: admissibility of written report. An expert's written evaluation report in a contested child custody case should be admissible under the hearsay exception for "records of a regularly conducted activity" when these foundational requirements are met:

- The record was made at or near the time by—or from information transmitted by—someone with knowledge.
- The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit.
- Making the record was a regular practice of that activity.
- All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule prescribed by the Supreme Court or with a statute permitting certification.
- The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

MRE 803(6), *amended by* ADM File No 2021-10 (eff. Jan 1, 2024).

Report or recommendation submitted by the Friend of the Court. A Friend of the Court report and recommendation may be considered by the court under MRE 1101(b)(9), which states the rules of evidence, other than those regarding privileges, do not apply to the court's consideration of a report or recommendation submitted by the Friend of the Court. However, a Friend of the Court report cannot be admitted as evidence unless both parties agree. *Wagner v Wagner*, No 268250 (Mich Ct App Aug 17, 2006) (unpublished). This is an enormous cost-saving procedure. See form 1.9.

Fees. Expert witnesses may not be paid more than the ordinary witness fees provided by law unless the court awards a larger sum. MCL 600.2164(1).

Limits on the number of expert witnesses. No more than three expert witnesses may testify on each side on the same issue without the court's permission. MCL 600.2164(2).

Confidentiality issues. Privileged or confidential communications may be excluded from discovery or trial testimony. Privilege is governed by common law, except as modified by statute or court rule. MRE 501. As a general rule, the privilege may be waived by the party with the right to assert it. A party concerned with

information being divulged for purposes other than the divorce action may request a protective order. MCR 2.302(C). The following are selected privileges that may arise in a domestic relations dispute.

- **Marriage and family therapists.** Communications between a marriage and family therapist and the clients are privileged. The privilege may be waived when disclosure is required by law or is necessary to protect the health or safety of an individual, if the therapist is a defendant in an action arising out of the services, or when a written waiver is obtained from each adult involved in the therapy and then only in accordance with the terms of the waiver. MCL 333.16911. Either parent may waive the privilege on behalf of the child to allow the child's therapist to testify. *Thames v Thames*, 191 Mich App 299, 477 NW2d 496 (1991).
- **Tax documents.** Under IRC 6103, federal income tax returns and return information are confidential. Under MCL 339.732, communications between a certified public accountant and a client are privileged in the civil arena.
- **Physician-patient privilege.** A party asserting that medical information that is otherwise discoverable is privileged is precluded from introducing any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition. MCR 2.314(B)(2). In a divorce case that includes a child custody dispute, a party may raise the physician-patient privilege to preclude testimony about the party's mental or physical health. *Navarre v Navarre*, 191 Mich App 395, 479 NW2d 357 (1991). The *Navarre* court made this ruling even though the Child Custody Act states that the parties' mental and physical health is one of the 12 enumerated factors that the court should consider. However, the statute would not preclude a court from appointing an expert witness under MRE 706 to do an independent evaluation.
- **Private investigators.** Any communication by a client to a professional licensed under the Professional Investigator Licensure Act, MCL 338.821 et seq., and any information that is obtained in connection with an assignment for the client is privileged. *Ravary v Reed*, 163 Mich App 447, 415 NW2d 240 (1987). Note that under the revised act, *professional investigator* means anyone, "other than an insurance adjuster who is on salary and employed by an insurance company, who, for a fee, reward, or other consideration engages in the investigation business." MCL 338.822. Note that professional investigators under the act now include computer forensic experts but do not include CPAs acting within the scope of their licensed professional practice and not performing investigative services. MCL 338.824, .826.
- **Materials prepared for litigation.** Materials prepared in anticipation of litigation or for trial are discoverable only on a showing that the party seeking discovery has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent by other means. If discovery is ordered, that does not include the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the

litigation. MCR 2.302(B)(3)(a). The parameters for the discovery of materials related to expert witnesses are governed by MCR 2.302(B)(4)(a).

Offer of proof. Failure to permit an offer of proof, see MRE 103, results in reversible error if no compelling reason for the denial is placed on the record. *See Hileman v Indreica*, 385 Mich 1, 187 NW2d 411 (1971) (reversible error in denying counsel's request to make separate record under predecessor general court rule; court's responsibility to put "good cause" explanation on record).

C. Attorney Fees and Costs

§1.68 Once an attorney fee award is ordered in a divorce judgment, the award is treated as a property award and recovery may be had from any of the spouse's assets over which the court has jurisdiction. *Chisnell v Chisnell*, 149 Mich App 224, 385 NW2d 758 (1986) (garnishment of military retirement pay); *cf. Balmer v Rose*, 30 Mich App 662, 186 NW2d 833 (1971) (attorney fees order could have been enforced by execution, though court used contempt power).

XIII. Modification of Judgments

§1.69 Generally, divorce judgment provisions concerning child custody, parenting time, child support, and spousal support are modifiable, while property division and alimony in gross provisions are not. *See* MCL 552.17 (modification of child support orders); MCL 552.28 (modification of spousal support and other allowances); MCL 722.27 (modification of custody and parenting time orders). Parties may agree to waive the right to modification of spousal support provided their agreement sets forth (1) that the parties forgo their statutory right to petition the court for modification of spousal support under MCL 552.28; (2) that the parties agree that the spousal support provision is final, binding, and nonmodifiable; and (3) that the agreement is reflected in the judgment of divorce. *Staple v Staple*, 241 Mich App 562, 616 NW2d 219 (2000). However, the trial court acting as a court of equity may modify the divorce judgment to reach an equitable result. *Hagen v Hagen*, 202 Mich App 254, 508 NW2d 196 (1993). For more information on modification of particular provisions, see §§3.24–3.25, §§4.17–4.18, §§5.25–5.33, and §§6.43–6.51.

The court generally has no jurisdiction to modify a divorce judgment unless a party files a motion requesting it. *Petoskey v Kotas*, 147 Mich App 487, 382 NW2d 804 (1985). Either party may request modification of a divorce judgment. *McCarthy v McCarthy*, 74 Mich App 105, 253 NW2d 672 (1977). The need for a separate motion may be waived if both parties offer evidence on the issue when it is raised as a defense in a support enforcement action. *See* MCL 552.607(1)(h), (5). Once a postjudgment motion is filed, the parties may engage in discovery. MCR 2.302(A)(4).

If the court had personal jurisdiction over a party in the original divorce proceeding, it generally has personal jurisdiction in a postjudgment proceeding, even if the responding party is not a resident when the motion is filed. *See Dittenber v Rettelle*, 162 Mich App 430, 413 NW2d 70 (1987); *Rapaport v Rapaport*,158 Mich App 741, 405 NW2d 165, *modified on other grounds,* 429 Mich 876, 415

NW2d 864 (1987). Even if the parties and children move out of state, the court retains jurisdiction to modify the divorce judgment regarding issues pertaining to the dissolution of the marriage. *See, e.g., Hentz v Hentz*, 371 Mich 335, 123 NW2d 757 (1963). Note, however, that a Michigan court can lose continuing jurisdiction over certain issues. For example, another state may become the child's home state under the UCCJEA, MCL 722.1101 et seq. See §§3.41–3.48. Similarly, a support order issued in Michigan may be registered and modified in another state. See the UIFSA, MCL 552.2101 et seq. See §§5.53–5.67.

Michigan courts have jurisdiction to modify a nonfinal provision of a foreign (sister state or foreign country) divorce judgment only if a party proves that a change in circumstances necessitates a change. However, modification of nonfinal provisions may be subject to statutory restrictions. See the UCCJEA, MCL 722.1101 et seq.; the Parental Kidnapping Prevention Act, 28 USC 1738A; and the UIFSA, MCL 552.2101 et seq. Final provisions of sister-state judgments are protected by the Full Faith and Credit Clause of US Const art IV, §1. *Henry v Henry*, 362 Mich 85, 106 NW2d 570 (1960).

XIV. Relief from Judgments

A. In General

§1.70 Requests for relief from judgments in domestic relations cases are governed by the same rules used in other civil actions. The court can generally extend time limits for filing motions if a request is made before the time limit expires or if the failure to act was the result of excusable neglect. MCR 2.108(E). The rules for motion practice in MCR 2.119 apply.

B. Motion for a New Trial or Rehearing: MCR 2.611

§1.71 A rehearing or new trial may be ordered on a party's motion or the court's initiative. MCR 2.611. The party's motion must be filed and served within 21 days after entry of judgment, MCR 2.611(B), although this time limit can be extended, MCR 2.108(E). An order for a new trial on the court's initiative must be made within 21 days after entry of the judgment and must specify on which grounds it is based. MCR 2.611(C).

A new trial may be granted if a party's substantial rights are materially affected by the grounds listed in MCR 2.611(A)(1) and .612(C)(1), such as

- irregularity in the proceedings,
- the prevailing party's fraud or misconduct,
- decision against the great weight of the evidence,
- newly discovered material evidence that could not with reasonable diligence have been discovered and produced at trial,
- the court's error of law or mistake of fact,
- a void judgment, or
- any other reason justifying relief from the judgment.

A new trial on selected issues should be granted only if the matter to be reheard is distinct and separable from the rest of the action. *Mitchell v Mitchell*, 333 Mich 441, 53 NW2d 325 (1952).

On a motion for a new trial, the court may set aside the judgment, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions and enter a new judgment. MCR 2.611(A)(2).

Facts not already on the record must be supported by affidavit, which must be filed and served with the motion. Opposing affidavits must be filed and served within 21 days after service of the motion, unless the parties stipulate for 21 additional days. The court may extend or shorten the response time for good cause. The court may permit reply affidavits and may call and examine witnesses. MCR 2.611(D).

C. Amendment or Correction of Judgments: MCR 2.612(A), 2.611

§1.72 At any time, a trial court may amend a judgment to correct clerical or inadvertent errors, on its own initiative or a party's motion. MCR 2.612(A)(1). A party need not show changed circumstances. *See Westgate v Westgate*, 291 Mich 18, 288 NW 860 (1939) (amending judgment to conform to trial court's opinion); *Westerhof v Westerhof*, 137 Mich App 97, 357 NW2d 820 (1984) (adding inadvertently omitted provision). If the error is discovered after an appeal is filed or an appellate court has granted leave, the trial court can only amend the judgment appealed from by order of the court of appeals, by the parties' stipulation, or "as otherwise provided by law." MCR 2.612(A)(2), 7.208(A).

A motion to amend may also be brought under MCR 2.611 on grounds other than clerical errors or errors based on oversight or omission. *See, e.g., Plaza v Plaza*, 40 Mich App 430, 199 NW2d 251 (1972) (motion to amend judgment to include support arrearages). Unlike motions for correction of clerical or inadvertent errors, a motion to amend must be filed and served within 21 days after entry of the judgment. MCR 2.611(B); *but see Vioglavich v Vioglavich*, 113 Mich App 376, 317 NW2d 633 (1982) (trial court should have granted motion to amend judgment *nunc pro tunc* filed four years after entry of judgment when request was made to validate second marriage).

D. Clarification of Judgments

§1.73 If a judgment's meaning is ambiguous or uncertain, the court may need to construe or interpret the judgment to enforce it. *See, e.g., Vigil v Vigil*, 118 Mich App 194, 324 NW2d 571 (1982) (dispute over whether mortgage provision included payments for tax escrow). The court may clarify and construe a divorce judgment as long as it makes no change in the substantive rights of the parties. *Bers v Bers*, 161 Mich App 457, 411 NW2d 732 (1987).

A court may clarify the meaning of a judgment where a subsequent event frustrates the purpose of a provision. *Molnar v Molnar*, 110 Mich App 622, 313 NW2d 171 (1981) (death of minor child nullified purposes of provision regarding marital home).

A trial court has broad discretion in construing divorce judgments, but only if the judgment was entered pursuant to the court's decision. *Vigil*. The court must construe the judgment by referring to the trial court's findings of fact and conclusions of law. *Vigil*. The court may review testimony from the original divorce proceedings. *White v Michigan Life Ins Co*, 43 Mich App 653, 204 NW2d 772 (1972); *see also Kasper v Metropolitan Life Ins Co*, 412 Mich 232, 313 NW2d 904 (1981). *But cf. Andrusz v Andrusz*, 320 Mich App 445, 904 NW2d 636 (2017) (court may consider parties' conduct to determine intent where consent judgment is ambiguous); *DenHeeten v DenHeeten*, 163 Mich App 85, 413 NW2d 739 (1987) (transcript cannot be introduced to contradict unambiguous terms of judgment).

When the parties consent to the judgment, they have a right to present evidence relevant to the intent or meaning of the terms, including testimony of the parties and trial counsel. *Vigil; cf. Mitchell v Mitchell*, 198 Mich App 393, 499 NW2d 386 (1993) (evidentiary hearing to resolve ambiguity or factual dispute required only if specifically requested). The parties' actions after entry of the original judgment are relevant to ascertain the parties' construction of a provision. *Ettinger v Ettinger*, 368 Mich 426, 118 NW2d 277 (1962) (defendant's payments for more than seven years supported plaintiff's construction of disputed provision); *Vigil* (defendant paid disputed amount for nearly two years before seeking relief).

E. Stipulations to Set Aside

§1.74 Stipulations to modifications are valid, even if there is no allegation of the fraud or coercion required before a court may modify a property settlement. *Corrigan v Aetna Life & Cas*, 140 Mich App 467, 364 NW2d 728 (1985). An agreed-on modification may be entered as a consent order. *See Woolf v Woolf*, 10 Mich App 109, 158 NW2d 820 (1968) (divorce judgment was res judicata on issue of support, even though it had been terminated by mutual consent but without court approval).

Parties may stipulate to set aside a divorce judgment in its entirety, remaining married, if they do so soon after entry of the judgment and no third parties are affected by their action. Michigan public policy encourages parties to remain married if they desire. *St Clair Commercial & Sav Bank v Macauley*, 66 Mich App 210, 238 NW2d 806 (1975) (judgment set aside $3^1/_2$ weeks after entry and both parties and their attorneys signed).

F. Motions to Set Aside: MCR 2.612

1. In General

§1.75 The grounds for setting aside a judgment or order are set out in MCR 2.612.

Every minor irregularity is not grounds for relief from a judgment. *Banner v Estate of Banner*, 45 Mich App 148, 206 NW2d 234 (1973). Unless there is a lack of jurisdiction or fraud—which includes coercion or duress in the broad sense—a court will not set aside a divorce judgment after the time period for rehearing or

appeal expires. *Moffatt v Moffatt*, 322 Mich 555, 34 NW2d 70 (1948); *Graybiel v Graybiel*, 99 Mich App 30, 297 NW2d 614 (1980). Moreover, the parties' conduct during the proceedings may effectively waive irregularities that occurred during those proceedings. *Buzynski v Buzynski*, 369 Mich 129, 119 NW2d 591 (1963) (by moving to have judgment entered on her counterclaim for divorce, defendant waived requirement of local rule that plaintiff submit proposed judgment to judge before hearing).

Since there is no due process right to appointed counsel in a divorce action, a party may not seek relief from a judgment based on a constitutional right to the effective assistance of counsel. *Haller v Haller*, 168 Mich App 198, 423 NW2d 617 (1988).

Note that after the time period for seeking rehearing or appeal expires, the property settlement provision of a divorce judgment is final and conclusive in the absence of fraud, clerical error, or a mistake. *See, e.g., Colestock v Colestock*, 135 Mich App 393, 354 NW2d 354 (1984); *Graybiel.*

MCR 2.612(B). A defendant over whom jurisdiction was acquired but who did not know of the divorce action has one year after entry of the judgment to file an appearance and a motion for relief. The party must show an adequate reason for relief and that innocent third persons will not be prejudiced. MCR 2.612(B).

MCR 2.612(C). A divorce judgment may be set aside under the same rules applied to any other judgment. *Colestock v Colestock*, 135 Mich App 393, 354 NW2d 354 (1984). In brief, the grounds for relief from judgment under MCR 2.612(C)(1) are

> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

A motion based on MCR 2.612(C)(1)(a), (b), or (c) must be brought within one year. MCR 2.612(C)(2); *Marshall v Marshall*, 135 Mich App 702, 355 NW2d 661 (1984).

In *Neville v Neville*, 295 Mich App 460, 469, 812 NW2d 816 (2012), the court of appeals held that the trial court erroneously determined that "MCR 2.612(C) did not apply to defendant's request for substantive changes" to the QDRO to make it more consistent with the property settlement provisions in the judgment of divorce. The entry of the QDRO was explicitly required by the terms of the divorce judgment, and the court should have treated the QDRO as part of the judgment of divorce when ruling on the motion. Note, however, that the court

of appeals clarified that its finding is "not to say that the trial court could not *interpret* and *clarify* the parties' agreement, without considering MCR 2.612." *Id.* The trial court may do so "provided it does not *change* the parties' substantive rights as reflected in the parties' agreement." *Id.*

In *Adler v Dormio*, 309 Mich App 702, 709, 872 NW2d 721 (2015), the court found that "MCL 722.1433(3) [since renumbered MCL 722.1433(c)] allows a person who has obtained a judgment under the RPA to seek relief from prior child support orders under MCR 2.612."

2. Judgment Is Void for Lack of Jurisdiction: MCR 2.612(C)(1)(d)

§1.76 Lack of subject-matter jurisdiction or jurisdiction over the parties renders a judgment void. This issue can be raised by the court or on the motion of either party, including the one who originally invoked jurisdiction. *Banner v Estate of Banner*, 45 Mich App 148, 206 NW2d 234 (1973). Errors in the exercise of proper jurisdiction do not make a judgment void *ab initio* but do make it voidable on direct attack. *See, e.g., Calo v Calo*, 143 Mich App 749, 373 NW2d 207 (1985) (judgment set aside for failure to comply with statutory six-month waiting period).

Accepting the benefits of a judgment estops a party from challenging jurisdiction. *Norris v Norris*, 342 Mich 83, 69 NW2d 208, *cert denied,* 350 US 903 (1955). However, accepting personal property under a judgment does not estop an appeal of a provision disposing of real property. *Hibbard v Hibbard*, 27 Mich App 112, 183 NW2d 358 (1970).

Time limit. There is no time limit for attacking a judgment or order as void. *Hoffman v Hoffman*, 125 Mich App 488, 336 NW2d 34 (1983) (citing GCR 1963, 528.3(4), now MCR 2.612(C)(1)(d)); *but see Zoellner v Zoellner*, 46 Mich 511, 514–515, 9 NW 831 (1881) (motion based on improper service rejected when filed nine years after judgment and almost one year after other party's death).

3. Fraud, Misrepresentation, or Other Misconduct: MCR 2.612(C)(1)(c)

§1.77 If fraud has been perpetrated on the court by the concealment of facts that affect a party's property rights, the court can void its decree. *Berg v Berg*, 336 Mich 284, 57 NW2d 889 (1953).

A party suspecting fraud by the other party during a divorce proceeding may seek relief from judgment within one year after entry of the judgment. *Nederlander v Nederlander*, 205 Mich App 123, 517 NW2d 768 (1994). The concealment or misrepresentation must be material to the judgment. *Banner v Estate of Banner*, 45 Mich App 148, 206 NW2d 234 (1973).

There must be sufficient facts alleged to support the claim. *Young v Young*, 342 Mich 505, 70 NW2d 730 (1955); *see also Domzalski v Domzalski*, 346 Mich 399, 78 NW2d 140 (1956). An evidentiary hearing is required on a proper motion

alleging fraud on the court. *Kiefer v Kiefer*, 212 Mich App 176, 536 NW2d 873 (1995).

Fraud vitiates the judgment as a whole; it does not allow for modification of selected portions of the judgment. *Edgar v Edgar*, 366 Mich 580, 115 NW2d 286 (1962). *But see Kaleal v Kaleal*, 73 Mich App 181, 250 NW2d 799 (1977) (partial relief appropriate under specific facts of case).

A party to a divorce does not commit fraud on the court by concealing a fact from an arbitrator or by making a material misrepresentation during an arbitration when the relevant information is known by the opposing party. *Matley v Matley (On Remand)*, 242 Mich App 100, 617 NW2d 718 (2000).

Time limit. A motion under MCR 2.612(C)(1)(c) must be brought within one year of the judgment or order. MCR 2.612(C)(2). An allegation of fraud on the court may be raised at any time; it is not limited to this one-year restriction. *See* MCR 2.612(C)(3).

4. Any Other Reason Justifying Relief: MCR 2.612(C)(1)(f)

§1.78 The moving party must satisfy three conditions:

1. the reason for setting aside the judgment must not fall under any other subrules of MCR 2.612(C)(1),
2. the substantial rights of the opposing party must not be detrimentally affected, and
3. extraordinary circumstances must exist that mandate setting aside the judgment to achieve justice.

Colestock v Colestock, 135 Mich App 393, 354 NW2d 354 (1984) (trial court's determination that tort cause of action was not marital asset was not extraordinary circumstance); *Kaleal v Kaleal*, 73 Mich App 181, 250 NW2d 799 (1977) (extraordinary circumstances found when wife was unrepresented by counsel because husband told her that divorce was temporary and he was obtaining divorce solely to marry cousin so she could come to the United States).

Generally, this claim requires improper conduct by the party in whose favor the judgment was rendered, not a mistake by the trial court that was never appealed. *Altman v Nelson*, 197 Mich App 467, 495 NW2d 826 (1992).

A judgment can be set aside under MCR 2.612(C)(1)(f), even if other bases for setting aside the judgment under subrules (a) through (e) apply, when additional factors exist that persuade a court that injustice will result if the judgment is allowed to stand. *Heugel v Heugel*, 237 Mich App 471, 603 NW2d 121 (1999) (trial court properly granted wife's motion to partially set aside divorce judgment where both fraud and extraordinary circumstances existed).

Time limit. This challenge must be brought within a reasonable time. *Boonstra v Boonstra*, 209 Mich App 558, 531 NW2d 777 (1995) (motion brought $7^1/_2$ years after judgment not timely).

Laches. Laches is a defense to a motion to set aside a divorce judgment. *See, e.g., McKenzie v McKenzie*, 349 Mich 18, 84 NW2d 333 (1957) (spousal support

paid for five years before judgment attacked for failing to conform to property settlement agreement); *Harbin v Harbin*, 12 Mich App 320, 162 NW2d 822 (1968) (not only had one year elapsed, but others had changed position in reliance on amendment).

G. Setting Aside a Default Judgment

§1.79 Under MCR 3.210(B)(3), a motion to set aside a default or a default judgment before its entry, except when grounded on a lack of jurisdiction over the defendant or the subject matter, may be granted only on verified motion of the defaulted party showing good cause. Good cause requires a showing that

- there was a substantial defect or irregularity in the proceedings,
- a reasonable excuse exists for the defaulted party's failure to plead, or
- allowing the default to stand would cause manifest injustice.

O'Neill v O'Neill, 65 Mich App 332, 237 NW2d 315 (1975).

A procedural defect must significantly affect the defaulted party's ability to protect their rights. *Bradley v Fulgham*, 200 Mich App 156, 503 NW2d 714 (1993) (sufficient: failure to notify party of entry of default); *Emmons v Emmons*, 136 Mich App 157, 355 NW2d 898 (1984) (not sufficient: failure to file nonmilitary affidavit when defaulted party had appeared and consented to entry of default judgment).

The court may also set aside entry of a default or a default judgment in accordance with MCR 2.612.

H. Attorney Fees in Proceedings for Relief

§1.80 A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a postjudgment proceeding. MCR 3.206(D); *e.g., Curylo v Curylo*, 104 Mich App 340, 304 NW2d 575 (1981) (discretion under predecessor court rules to award attorney fees for unnecessary legal fees caused on motion for new trial); *see Burke v Burke*, 169 Mich App 348, 425 NW2d 550 (1988) (defendant's attorney ordered to pay attorney fees when motion for postjudgment brought because of defendant's attorney's personal desire to change Michigan law); *cf. Gramer v Gramer*, 207 Mich App 123, 126, 523 NW2d 861 (1994) (denial of fees was appropriate where frivolous claim was directly contrary to unambiguous terms of judgment). MCR 3.206(D)(2) provides that a party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to pay, including the expense of engaging in discovery appropriate for the matter, and the other party is able to pay. MCR 3.206(D)(2)(b) "considers only a party's behavior, without reference to the ability to pay," and allows attorney fees and expenses if they were incurred because the other party was able to comply with a previous court order but refused. *Richards v Richards*, 310 Mich App 683, 701, 874 NW2d 704 (2015). A motion for attorney fees under MCR 3.206(D) must be brought within a reasonable time after the fees sought were incurred and what constitutes a reasonable time depends on the particular facts and circum-

stances of each case. *Colen v Colen*, 331 Mich App 295, 952 NW2d 558 (2020) (trial court did not abuse its discretion in denying plaintiff's motion for attorney fees on ground that by neglecting matter for almost two years, plaintiff had failed to timely pursue attorney fees).

XV. Enforcement

A. In General

§1.81 A trial court has inherent power as a court of equity to enforce its own directives and to mold its relief according to the character of a case and may make any order necessary to fully enforce its orders. *See, e.g., Walworth v Wimmer*, 200 Mich App 562, 564, 504 NW2d 708 (1993). A court has authority to enforce divorce judgment provisions that the parties have agreed to, even if the court would not have had authority to order the provision without the parties' agreement. *Kasper v Metropolitan Life Ins Co*, 412 Mich 232, 313 NW2d 904 (1981) (insurance securing support payments).

In general, enforcement methods differ for continuing support and maintenance provisions of judgments (by contempt proceedings, income withholding under the SPTEA, and other SPTEA methods) and property settlement provisions (by usual methods for enforcing judgments at law, including execution, attachment, and garnishment). Provisions that are not clearly periodic spousal support subject to continuing revision are treated like property settlements. The chapters discussing issues, such as property division or child support, discuss the enforcement of those provisions in more detail. See, e.g., §§5.38–5.70 and §§8.83–8.91. Sections 1.82–1.85 focus on issues common to any enforcement action.

B. Service of Process in Enforcement Proceedings

§1.82 In enforcement actions, if the trial court had jurisdiction over the parties at the time the divorce judgment was granted, service of process is not required. The moving party need only give notice to the respondent. *Ewing v Bolden*, 194 Mich App 95, 486 NW2d 96 (1992). As a result, inability to serve the respondent does not toll the statute of limitations and is not grounds for failing to enforce a judgment within the limitations period. *Id.*

C. Limitations of Actions

§1.83 Actions to enforce divorce judgments are governed by the 10-year statute of limitations for actions on judgments and judicial decrees. MCL 600.5809(3); *see also Peabody v DiMeglio (In re DiMeglio Estate)*, 306 Mich App 397, 407, 856 NW2d 245 (2014) (10-year statutory limitations period applied to plaintiff's enforcement claim because property settlement agreement was incorporated by reference, but not merged, into divorce judgment); *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992). The 10-year period begins to run when the cause of action accrues; for support orders enforced under the SPTEA, the limitations period begins when the last support installment is due, regardless of whether the last payment is made. MCL 600.5809(4). See §5.49 and §6.28.

Payments on past-due child support, including income withholding payments, are payments on a debt and therefore act to lengthen the 10-year limitations period of MCL 600.5809(3). *Wayne Cty Soc Servs Dir v Yates*, 261 Mich App 152, 155–156, 681 NW2d 5 (2004), citing the reasoning of *Yeiter v Knights of St Casimir Aid Soc'y*, 461 Mich 493, 497, 607 NW2d 68 (2000). A past-due child support obligation is a debt and payments made pursuant to income withholding renew the full child support obligation and extend the period of limitations.

Actions to enforce divorce judgment liens on real property are governed by the 15-year limitations period for the foreclosure of liens. MCL 600.5803; *see also Sullivan v Sullivan*, 300 Mich 640, 2 NW2d 799 (1942) (action barred by laches after delay of 30 years before seeking enforcement).

The doctrines of laches and estoppel apply to enforcing divorce judgments. Failing to request payment or to institute proceedings for years may bar a claim for arrearages. *Rybinski v Rybinski*, 333 Mich 592, 53 NW2d 386 (1952); *Sonenfeld v Sonenfeld*, 331 Mich 60, 49 NW2d 60 (1951). However, a mere lapse of time, without a showing of prejudice, does not give rise to the defense of laches. *Rybinski* (finding no prejudice); *Cantor v Cantor*, 87 Mich App 485, 274 NW2d 825 (1978) (spousal support).

D. Enforcing Foreign Judgments

§1.84 A final provision of a sister-state judgment is protected by the Full Faith and Credit Clause of US Const art IV, §1. *Henry v Henry*, 362 Mich 85, 106 NW2d 570 (1960); *Cantor v Cantor*, 87 Mich App 485, 274 NW2d 825 (1978) (enforcement of property settlement provisions of Kentucky judgment).

A foreign divorce decree may be attacked on jurisdictional grounds. However, a collateral attack on jurisdiction is barred under the doctrines of res judicata and full faith and credit if both parties participated in the prior proceedings. *Albaugh v Albaugh*, 320 Mich 16, 30 NW2d 415 (1948); *Suski v Suski*, 34 Mich App 694, 192 NW2d 65 (1971). The court will examine whether the foreign state had proper jurisdiction in the divorce proceedings. *See Gray v Gray*, 320 Mich 49, 30 NW2d 426 (1948).

Under the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171 et seq., a foreign judgment authenticated and filed under the act is enforced like a Michigan judgment. A judgment that is filed in this manner is subject to the same procedures, defenses, and proceedings for reopening, vacating, and staying as a Michigan judgment and may be enforced or satisfied in a similar manner. MCL 691.1173.

The Uniform Foreign Money-Judgments Recognition Act, MCL 691.1151 et seq., was repealed by 2008 PA 20, which precludes recognition of a judgment for divorce, support, or maintenance or other judgment rendered in connection with domestic relations. The official comment said this was because of other applicable uniform state laws, such as the UIFSA.

See §§3.38–3.47, §4.16, §§5.53–5.70, §§6.37–6.42, and §§8.83–8.91 for further discussion of interstate and international enforcement.

E. Attorney Fees in Enforcement Proceedings

1. In General

§1.85 A party may be entitled to attorney fees if the divorce judgment provides for attorney fees to the prevailing party in enforcement proceedings. *In re Estate of Lobaina*, 267 Mich App 415, 424, 705 NW2d 34 (2005).

A court may award attorney fees in enforcement proceedings if one party is unable to bear all or part of the expense and the other party has the ability to pay. MCR 3.206(D); *Kosch v Kosch*, 233 Mich App 346, 592 NW2d 434 (1999); *Schaeffer v Schaeffer*, 106 Mich App 452, 308 NW2d 226 (1981) (spousal support enforcement). The requesting party must show sufficient facts to justify the award. *Teran v Rittley*, 313 Mich App 197, 882 NW2d 181 (2015). Overhead, including the expense of staff, can be included in the reasonable attorney fee determination. *Teran* (finding counsel's retention of Spanish-speaking attorney in Florida was necessary expense because plaintiff resided in Ecuador and did not speak English).

The court may award fees based on the unreasonable conduct of a party. *Stackhouse v Stackhouse*, 193 Mich App 437, 445, 484 NW2d 723 (1992), and its progeny provide as follows:

> [A]n award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. See, e.g., [*Thames v Thames*, 191 Mich App 299, 310, 477 NW2d 496 (1991)].

See also Keinz v Keinz, 290 Mich App 137, 799 NW2d 576 (2010) (trial court should have awarded attorney fees and costs pursuant to MCL 600.2591(1) where plaintiff, primary custodian of parties' two minor children, was prevailing party after parties' modification proceedings resulted in higher child support award, and defendant caused additional proceedings and delayed resolution of matter by frivolously offering evidence that his income was less than it actually was); *Milligan v Milligan*, 197 Mich App 665, 496 NW2d 394 (1992) (repeated delinquencies forced recipient to go to court and recipient's enforcement action was designed to prevent future litigation); *Mauro v Mauro*, 196 Mich App 1, 492 NW2d 758 (1992) (attorney fees permitted when plaintiff was committing continued flagrant violation of custody and parenting time orders).

MCR 3.206(D)(2)(b) provides that attorney fees and expenses may be awarded if the fees and expenses were incurred because the other party was able to comply with a previous court order but refused to do so or engaged in discovery practices in violation of the rules. The court must find that the party's conduct was unreasonable, that a causal connection existed between the misconduct and the fees incurred, and the fees incurred were reasonable. *Reed v Reed*, 265 Mich App 131, 164, 693 NW2d 825 (2005); *see also Sands v Sands*, 442 Mich 30, 36, 497 NW2d 493 (1993) (concealed assets); *Borowsky v Borowsky*, 273 Mich App 666, 687, 733 NW2d 71 (2007) (fees not awarded despite "protracted nature of the litigation"). Other fees may also be awarded. *See Cohen v Cohen*, 125 Mich App 206, 335 NW2d 661 (1983) (ordering payment of court-appointed receiver's compensation and appellate counsel fees).

Practice Tip

- *The 2020 amendments to the civil discovery rules added the language "unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter," to MCR 3.206(D)(2)(a) and the language "or engaged in discovery practices in violation of these rules" to MCR 3.206(D)(2)(b). Those discovery rule amendments now focus on the parties filing SCAO verified financial information forms as initial disclosure documents, MCR 2.302, and discovery "proportional to the needs of the case, taking into account all pertinent factors," set forth in MCR 2.302(B)(1). No cases have explored attorney fees under the new discovery rules, so judges granting fees under MCR 3.206(D)(2)(a) and (b) to permit discovery or address violation of discovery rules should fully explain the rationale for those decisions. Reviewing Fed R Civ P 26(b)(1) regarding its "common sense notion of proportionality" may provide some guidance in these uncharted waters. See also State Bar of Michigan, Civil Discovery: The Guidebook to the New Civil Discovery Rules 22–25 (2019) regarding proportionality.*

Further authority authorizing attorney fee requests include the following:

- Discovery disproportionate to the case. MCR 2.302(B).
- Failure to provide disclosure of the verified financial information form. MCR 3.206(C)(2), (5).
- Failure to make admission of fact. MCR 2.313(C).
- Improper venue. MCR 2.223(B)(1).
- Failure to appear at a motion hearing. MCR 2.119(E)(4).
- Failure to attend a deposition or serve a witness subpoena. MCR 2.306(G), .313(D)(2).
- False interrogatory answers. *Jackson Cty Hog Producers v Consumer Power Co*, 234 Mich App 72, 592 NW2d 112 (1999).
- Violation of an order compelling discovery. MCR 2.313(A)(5), (B), (D).
- Frivolous claims or defenses. MCR 2.625(A)(2).
- Bad-faith signature on papers filed with court. MCR 1.109(E).
- Offer of judgment rejection. MCR 2.405.
- Vexatious appeal. MCR 7.216(C), .316(C). Appeals "taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal" are considered vexatious. *See* MCR 7.216(C)(1)(a). The court of appeals may assess actual and punitive damages or take disciplinary action, including a grant of reasonable attorney fees. MCR 7.216(C)(2); *see Morris v Schnoor*, No 315006 (Mich Ct App May 29, 2014) (unpublished), *vacated in part on other grounds,* 498 Mich 953, 872 NW2d 488 (2015).
- Discretion of the trial court when the amount of the attorney fee is "reasonable" or "actual." MCR 2.313(C)–(D).

- Order setting aside a default or a default judgment. MCR 2.603(D).

See §1.80 for more discussion on attorney fees.

2. Proof of Attorney Fees

§1.86 The Michigan Supreme Court's decision in *Smith v Khouri*, 481 Mich 519, 528 n12, 751 NW2d 472 (2008), later refined in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274, 884 NW2d 257 (2016), articulates the standard for determining a fee's reasonableness through a specific multifactor approach. *Powers v Brown*, 328 Mich App 617, 939 NW2d 733 (2019). If the fees are challenged, a Michigan court must conduct an evidentiary hearing to determine the services actually rendered and the reasonableness of them. *Adair v State of Michigan (On Fourth Remand)*, 301 Mich App 547, 552–554, 836 NW2d 742 (2013); *Reed v Reed*, 265 Mich App 131, 164, 693 NW2d 825 (2005). Attorneys are prohibited from charging an illegal or an excessive fee, i.e., when a "lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." MRPC 1.5(a).

Before January 1, 2022, fees could be awarded as case evaluation sanctions under MCR 2.403(O). That part of the court rule was deleted under ADM File No 2020-06. Previously in those instances, a court would use the three-part test set forth in *Smith,* as follows:

1. "Determine a baseline reasonable hourly or daily fee rate derived from 'reliable surveys or other credible evidence' showing the fee customarily charged in the locality for similar legal services."
2. Once the hourly rate is determined, the court "must multiply this rate by the reasonable number of hours expended in the case."
3. Finally, the court must consider all of the following factors to determine whether an up or down adjustment is necessary:
    a. the experience, reputation, and ability of the lawyer or lawyers performing the services;
    b. the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
    c. the amount in question and the results obtained;
    d. the expenses incurred;
    e. the nature and length of the professional relationship with the client;
    f. the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;
    g. the time limitations imposed by the client or by the circumstances;
    h. whether the fee is fixed or contingent; and
    i. any additional factors the court considers relevant.

Pirgu ("distill[ing] the remaining [*Wood v DAIIE*, 413 Mich 573, 321 NW2d 653 (1982)] and MRPC 1.5(a) factors into one list to assist trial courts" in calculating

reasonable attorney fees); *Adair,* 301 Mich App at 552 (citing *Smith,* 481 Mich at 529, 530–531, 537). Trial courts should analyze all of the factors and justify the relevance and use of any additional factors. *Pirgu,* 499 Mich at 282–283 ("trial court erred by not starting its analysis by multiplying a reasonable hourly rate by the reasonable number of hours expended [and] … by primarily relying on only one factor—the amount sought and results achieved—and failing to briefly discuss its view of the other factors"); *see also Riemer v Johnson*, 311 Mich App 632, 876 NW2d 279 (2015) (trial court did not err in failing to use detailed procedure in *Smith* because purpose for attorney fee award under MCR 3.206(D)(2)). It is an abuse of discretion for a trial court to address only a few factors and fail to comprehensively review and state its findings regarding all of the factors in the combined *Smith/Pirgu* framework. *Powers.* It is an abuse of discretion for a trial court to address only a few factors and fail to comprehensively review and state its findings regarding all of the factors in the combined *Smith/Pirgu* framework. *Powers; see also Woodman v Department of Corr*, 511 Mich 427, 999 NW2d 463 (2023) (Michigan Court of Claims abused its discretion by failing to address *Smith/Pirgu* factors or otherwise justify its 90 percent reduction in plaintiff's pro bono firm's requested attorney fees).

3. Enforcement of Attorney Fee Liens in Judgments

§1.87 A lien by an attorney in a judgment is enforceable against the attorney's client in the divorce action. *Souden v Souden*, 303 Mich App 406, 420, 844 NW2d 151 (2013). This "special or charging lien is 'an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit.'" *Id.* at 411 (quoting *George v Sandor M Gelman, PC*, 201 Mich App 474, 476, 506 NW2d 583 (1993)). The lien "'creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services.'" *Id.* Enforcing the lien is "'part of the court's inherent power to oversee the relationship of attorneys, as officers of the court, with their clients.'" *Souden,* 303 Mich App at 411 (quoting *Kysor Indus Corp v DM Liquidating Co*, 11 Mich App 438, 445, 161 NW2d 452 (1968)).

Form 1.1
Order Denying Ex Parte Relief in Divorce Case

STATE OF MICHIGAN
[COUNTY] CIRCUIT COURT
FAMILY DIVISION

[Plaintiff's name],
Plaintiff,
v
Case No. *[number]-[case-type code]*
Judge *[name]*

[Defendant's name],
Defendant.
_____/

[Attorney's name] (P*[number]*)
Attorney for Plaintiff
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Defendant
[Address, telephone, email]

ORDER DENYING EX PARTE RELIEF

[Plaintiff / Defendant] has filed a motion for ex parte relief pursuant to MCR 3.207. The Court has reviewed the motion and attached exhibits, if any. The motion is denied for the following reasons:

____ The request was not supported by an affidavit or verified complaint.

____ The request for child support lacked child support formula information.

____ The parties appear to still be residing together and there are inadequate facts to justify a custody, parenting time, or support order.

____ The moving party has failed to notify counsel for the opposing party.

____ The exhibits referred to in the motion were not attached.

____ The moving party failed to demonstrate by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice or that notice itself will precipitate adverse action before an order can be issued.

____ The proposed order regarding child support, custody, or parenting time fails to comply with MCR 3.207(B)(5), as cited below:

"NOTICE:

"1. You may file a written objection to the order or a motion to modify or rescind the order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve a true copy of the objection or motion on the friend of the court and the party who obtained the order.

"2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.

"3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing. Even if an objection is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."

____ The proposed ex parte order fails to comply with MCR 3.207(B)(6), which provides:

> In all other cases, the ex parte order must state that it will automatically become a temporary order if the other party does not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing.

NOTICE: ALL ORDERS INCLUDING EX PARTE ORDERS PERTAINING TO CHILD CUSTODY, PARENTING TIME, AND CHILD SUPPORT MUST CONFORM TO MCR 3.211(C) AND MCR 3.211(D).

Dated: *[date]*

[Signature line]
[Name of court] Court Judge

Form 1.2
Divorce Pretrial Conference Order Checklist

STATE OF MICHIGAN
[COUNTY] CIRCUIT COURT
FAMILY DIVISION

[Plaintiff's name],
Plaintiff,
v
Case No. *[number]-[case-type code]*
Judge *[name]*

[Defendant's name],
Defendant.
_____/

[Attorney's name] (P*[number]*)
Attorney for Plaintiff
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Defendant
[Address, telephone, email]

PRETRIAL CONFERENCE ORDER

At a session of court held in the courthouse in
[city, county], Michigan, on *[date]*.
Present: Honorable *[name of judge]*
[name of court] Court Judge

IT IS ORDERED:

1. DISCOVERY.

   All discovery shall be completed no later than *[date]*. Failure to comply with this paragraph may bar the introduction of the testimony or evidence at trial.

2. WITNESSES AND EXPERTS.

   The names, addresses, and field of expertise of all witnesses and experts any party intends to call and photocopies of all documentary evidence any party intends to introduce at trial will be furnished to all remaining counsel by *[date]*. Failure to comply with this paragraph may bar the introduction of the testimony or evidence at trial.

3. MEDIATION: ___ Court Ordered ___ On Motion ___ By Stipulation

Matter to be mediated:

____ Child Custody

____ Child Support

____ Parenting Time

____ Real Property

____ Spousal Support

____ Business Interest

____ Other:

This case shall be mediated no later than: *[date]*. *[Mediator's name]* is hereby appointed as Mediator. *[Mediator]* can be reached at *[Mediator's telephone number]* to arrange time and place for mediation. The Mediator's fee will be paid by:

___ Plaintiff _____%___ Defendant _____%___ Divided Equally.

4. IN LIEU OF MEDIATION, if the parties cannot agree as to the distribution of the equity in the real estate or as to the value of the same, *[Appraiser's name]* is appointed to appraise the property(ies) located at *[address(es)]*. The Appraiser's fee will be paid by:

   ___ Plaintiff _____%___ Defendant _____%___ Divided Equally.

   The Appraiser shall provide the Court with a written report upon payment of the costs. The court's ruling as to the final allocation of said costs shall be reserved.

5. IN LIEU OF MEDIATION FOR THE VALUATION OF BUSINESS, *[Expert's name]* is appointed to provide the Court with a valuation of *[name of business]* located at *[address]*. The parties are to contact the Expert at *[Expert's telephone number]* and the Court will be provided with a written report upon payment of the costs. The Expert's fee will be paid by:

   ___ Plaintiff _____%___ Defendant _____%___ Divided Equally.

   The court's ruling as to the final allocation of said costs shall be reserved.

6. APPRAISAL OF PERSONAL PROPERTY IN DISPUTE.

   If the parties cannot agree as to the distribution of personal property or as to the value of any personal property, *[Appraiser's name]* is appointed to appraise the personal property located at *[address]*. The parties are to contact the Appraiser at *[Appraiser's telephone number]* and the Court will be provided with a written report upon payment of the costs. The Appraiser's fee will be paid by:

   ___ Plaintiff _____%___ Defendant _____%___ Divided Equally.

   The court's ruling as to the final allocation of said costs shall be reserved.

7. TRIAL REQUIREMENTS.

   If the case is not resolved at least one week (7 days) before trial, all parties will tender to the Court and provide all remaining counsel with trial briefs containing:

   ____ A short statement of facts and issues in dispute

   ____ A list of witnesses to be called

   ____ An itemized list of all assets and their values

   ____ A proposed schedule of property division

   ____ A proposed schedule of custody and parenting time (if applicable)

   ____ A proposed schedule of child support payments (if applicable) including:

      ____ proof of income, underemployment, or unemployment

      ____ a copy of the Michigan Child Support Formula calculation

   ____ If a business owner, a copy of the Michigan Occupational Guidelines for the type of business to show potential or imputed ability to earn

   ____ Argument of laws (including proper citations) and facts supporting the relief prayed for

   Note: All parties will be personally present at the conference trial. Failure to comply with this paragraph may result in dismissal or judgment by default.

8. MANDATORY SETTLEMENT CONFERENCE.

   The Mandatory Settlement Conference is scheduled on: *[date]*.

9. TRIAL: The case is scheduled to be tried on: *[date]*.

   Note: Contested disputes will be done by the conference trial method. Objections to this method shall be filed with the Court together with a Judge's copy at least 14 days before trial.

10. THE PARTIES STIPULATE TO THE FOLLOWING ISSUES.

    ____ SPOUSAL SUPPORT of $_____

       ____ 1 year

       ____ None

       ____ Other:

    ____ CHILD SUPPORT of $_____

       ____ Monthly

       ____ Child Support Guidelines

       ____ Other:

    ____ FEDERAL TAX DEPENDENCY EXEMPTION

       ____ Plaintiff

____ Defendant

____ Third Party _____

____ Yearly Review

____ Permanent

____ LEGAL CUSTODY

____ Plaintiff

____ Defendant

____ Joint

____ Other:

____ PHYSICAL CUSTODY

____ Plaintiff

____ Defendant

____ Joint

____ Other:

____ PARENTING TIME

____ Weekly S M T W Th F S from _____ to _____

____ Bi-weekly S M T W Th F S from _____ to _____

____ Other:

____ SUMMER BREAK

____ 2 weeks from _____ to _____

____ 1 month from _____ to _____

____ Other:

____ CHRISTMAS

____ Christmas Eve from _____ to _____

____ Christmas Day from _____ to _____

____ Alternate years

____ Plaintiff ___ Defendant gets Christmas this year.

____ Other:

____ REAL PROPERTY DIVISION

____ BUSINESS ASSET(S) DIVISION

____ PERSONAL PROPERTY DIVISION

Note: Counsel has discussed above issues with Client and opposing counsel and, with Client, does agree to the above stipulations.

11. ISSUES TO BE RESOLVED:

    ____ Spousal support

    ____ Child support

    ____ Federal tax dependency exemption

    ____ Legal custody

    ____ Physical custody

    ____ Parenting time

    ____ OTHER ISSUES STILL PENDING:

12. ___ FRIEND OF THE COURT REFEREE REPORT ORDERED BY COURT FOR DISPUTE CONCERNING:

    ____ Custody

    ____ Support

    ____ Parenting time

    ____ Proof of employment

13. ___ PARTIES HAVE OPTED OUT OF FRIEND OF THE COURT INVOLVEMENT

14. ___ PARTIES ARE REFERRED TO CHILDREN OF DIVORCE PROGRAM AT COMMUNITY MENTAL HEALTH FOR:

    ____ Evaluation of parenting ability

    ____ Mediation

    ____ Family treatment

15. SETTLEMENT IS:

    ____ Likely

    ____ Unlikely

    ____ Unknown

    Note: Counsel shall make reasonable, good-faith efforts to resolve this litigation without trial.

I agree to comply with all requirements detailed above in this Pretrial Conference Order.

[Signature line]
Attorney for Plaintiff
Dated: *[date]*

[Signature line]
Attorney for Defendant

[Signature line]
[Judge]
Family Court Judge

___ Copy given at pretrial

___ Copy mailed to the parties

Form 1.3
Divorce Pretrial Conference Statement of Counsel

STATE OF MICHIGAN
[COUNTY] CIRCUIT COURT
FAMILY DIVISION

[Plaintiff's name],
Plaintiff,

v

Case No. *[number]-[case-type code]*
Judge *[name]*

[Defendant's name],
Defendant.
_____/

[Attorney's name] (P*[number]*)
Attorney for Plaintiff
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Defendant
[Address, telephone, email]

DIVORCE PRETRIAL CONFERENCE STATEMENT OF COUNSEL

1. I will supply the names of all witnesses I will call at trial together with a synopsis of the witness's testimony on all relevant issues to opposing counsel and to the court within ___ days of today's date. I will call no witnesses at trial whose names and addresses and testimony synopses have not been furnished as agreed unless a motion to the court is made and granted.
2. I will supply a copy of all exhibits I plan to introduce at trial together with a list of such exhibits to counsel and to the court within ___ days of today's date. No others will be offered at trial unless a motion to the court is made and granted.
3. I will submit a trial brief to counsel and to the court within ___ days of today's date.
4. I will submit to the court and to counsel the following within ___ days of today's date:
    a. an itemized list of real and personal property, in which either party has an interest, value of each, and proposed distribution
    b. level of child support requested

c. level of spousal support requested

d. itemized list of pension and other benefit plans, their value, and proposed distribution

e. a proposed plan for parenting time

f. a proposed plan for child custody and decision making

g. a proposed Judgment of Divorce

5. I request enforcement of this statement at trial and acknowledge that failure to comply with the terms of this statement may result in assessment of fees, costs, or both, or other sanctions, to the extent allowable by applicable court rule, case, or statute.

Dated: *[date]*

[Signature line]
Attorney for Plaintiff

[Signature line]
Attorney for Defendant

Form 1.4
Order Allowing Withdrawal of Attorney

STATE OF MICHIGAN
[COUNTY] CIRCUIT COURT
FAMILY DIVISION

[Plaintiff's name],
Plaintiff,

v

Case No. *[number]-[case-type code]*
Judge *[name]*

[Defendant's name],
Defendant.
_____/

[Attorney's name] (P*[number]*)
Attorney for Plaintiff
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Defendant
[Address, telephone, email]

ORDER ALLOWING WITHDRAWAL

The attorney for *[Plaintiff / Defendant]* has filed a Motion to Withdraw. The motion is granted. Until the unrepresented party's address is changed with the Court, the unrepresented party may be served by the clerk of the court and the opposing party at the following address: *[address]*.

All dates currently scheduled in this case remain unchanged, and the unrepresented party must comply with the requirements of the Case Scheduling Order. The unrepresented party is required to be present in court for the following currently scheduled court hearings:

Pretrial conference	*[date]*
Trial	*[date]*
Other	*[date]*

This order is not effective until the withdrawing counsel has served a copy of this order on the former client and filed a proof of service with the court.

Dated: *[date]*

[Signature line]
[Name of court] Court Judge

OPTIONAL:
I consent to entry of the above order.

[Signature line]
[Plaintiff / Defendant]

Form 1.5
Questions to Witness for Hearing to Enter Divorce Judgment

In an attempt at judicial economy, after the witness is identified, questions to the witness at a pro confesso hearing are limited to the following, absent good cause shown:

1. Were the allegations contained in the Complaint for Divorce true at the time it was signed? Are they still true now?
2. **DM**—Are all the living minor children, who were adopted, born, or conceived during this marriage, listed in the Judgment?

   DO—Are there any living minor children who were adopted, born, or conceived during this marriage?
3. To the best of your knowledge, *[are you pregnant / is your spouse pregnant]*?
4. In the Complaint, you stated that there had been a breakdown of the marriage relationship. Are you reasonably certain that this marriage cannot be preserved under the circumstances?
5. You have signed the proposed Judgment of Divorce. Do you understand the terms? Have you voluntarily approved the proposed Judgment? Is the marital property being equitably divided between you and your spouse?

   Practice Tip

   In the case of a default judgment, where a party is proceeding in pro per, the Court may wish to ask questions to develop facts to support the equity and propriety of the proposed property and support provisions. Appropriate questions would include: Does the proposed default judgment of divorce accurately reflect your and the defendant's marital property? Could you briefly explain to the Court why you believe the proposed division of property is equitable under the circumstances of your case?
6. In cases with children, counsel or unrepresented parties should advise the court as follows:
   a. Have you prepared a Uniform Support Order in this case for child support and/or spousal support? Have you prepared and filed with the Friend of the Court the Judgment Information Form?

      Practice Tip

      It should also be established by the client's testimony that provisions concerning child support follow the Michigan Child Support Formula or that there are reasons that deviation from the formula is appropriate.
   b. Briefly indicate why the child custody provisions of the proposed default judgment of divorce are in the best interests of your and the other party's child(ren).
   c. Has the proposed Judgment been approved by the Friend of the Court?

If the Judgment is not signed at the time of the pro confesso hearing, the proofs will be preserved for 28 days. If a Judgment is not presented within 28 days, an additional pro confesso hearing will be necessary.

Form 1.6
Model Bench Opinion in Divorce Proceedings

STATE OF MICHIGAN
[COUNTY] CIRCUIT COURT
FAMILY DIVISION

[Plaintiff's name],
Plaintiff,
v
Case No. *[number]-[case-type code]*
Judge *[name]*

[Defendant's name],
Defendant.
_____/

[Attorney's name] (P*[number]*)
Attorney for Plaintiff
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Defendant
[Address, telephone, email]

OPINION

Background

Date of Marriage:

Date of Separation:

Date Divorce Filed:

Children (DOB):

Dates of Trial:

Witnesses:

Issues: Custody, Parenting Time, Child Support, Spousal Support, Real Property, Personal Property, Marital/Nonmarital Property, Debts, Insurance, Tax Exemptions

I find there is a breakdown of the marriage relationship to the extent that the objects of matrimony can no longer be preserved. I am granting the Plaintiff a divorce from the Defendant.

Custody

Contested custody cases must be decided on the best interests of the child involved. Before I can make such a determination, I must first decide if there is an established custodial environment, which is defined by statute as follows:

Established Custodial Environment

Applicable Law.

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> …
>
> (c) Subject to subsection (3), modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age, and, subject to section 4a, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. *The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.*

MCL 722.27.

Findings. I find that there *[is / is not]* an established custodial environment for the following reasons:

Best Interests

Applicable Law.

> Sec. 3. "[B]est interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

MCL 722.23.

Findings. I make the following findings of fact on each of the best interests factors:

The law does not require that the best interests factors be weighed equally. I find the most weight should be given to the following factors:

I am doing this for the following reasons:

Parenting Time

Applicable Law.

(1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

(2) If the parents of a child agree on parenting time terms, the court shall order the parenting time terms unless the court determines on the record by clear and convincing evidence that the parenting time terms are not in the best interests of the child.

(3) A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.

…

(6) The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:

(a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

(7) Parenting time shall be granted in specific terms if requested by either party at any time.

(8) A parenting time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent, including 1 or more of the following:

(a) Division of the responsibility to transport the child.

(b) Division of the cost of transporting the child.

(c) Restrictions on the presence of third persons during parenting time.

(d) Requirements that the child be ready for parenting time at a specific time.

(e) Requirements that the parent arrive for parenting time and return the child from parenting time at specific times.

(f) Requirements that parenting time occur in the presence of a third person or agency.

(g) Requirements that a party post a bond to assure compliance with a parenting time order.

(h) Requirements of reasonable notice when parenting time will not occur.

(i) Any other reasonable condition determined to be appropriate in the particular case.

(9) Except as provided in this subsection, a parenting time order shall contain a prohibition on exercising parenting time in a country that is not a party to the Hague convention on the civil aspects of international child abduction. This

> subsection does not apply if both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.
>
> (10) During the time a child is with a parent to whom parenting time has been awarded, that parent shall decide all routine matters concerning the child.
>
> …

MCL 722.27a.

Findings. I find that the noncustodial parent may have parenting time in accordance with the Friend of the Court standard parenting time provisions. In addition, the noncustodial parent may have the following additional parenting time:

____ Transportation will be by the noncustodial parent

- ____ midweek
- ____ weekends
- ____ summer
- ____ holidays

____ The parents will split the transportation, with the noncustodial parent picking up at the beginning of parenting time and the custodial parent picking up at the end of parenting time as follows:

- ____ midweek
- ____ weekends
- ____ summer
- ____ holidays

Tax Exemptions

____ The custodial parent will be entitled to the tax exemptions for the minor children.

____ The parties will *[alternate / split]* the tax exemptions on the minor children.

This provision is not considered part of the property settlement but is being considered as part of the child support award. The noncustodial parent's right to a tax exemption is contingent on the noncustodial parent being no more than two weeks in arrears on child support.

Child Support

Child support will be paid as set forth in the Uniform Support Order, which is incorporated by reference.

Spousal Support

Spousal support will be paid as set forth in the Uniform Support Order, which is incorporated by reference.

Applicable Law.

The following factors should be considered in determining whether spousal support should be awarded:

1. The past relations and conduct of the parties.
2. The length of the marriage.
3. The ability of the parties to work.
4. The source of and amount of property awarded to the parties.
5. The age of the parties.
6. The ability of the parties to pay spousal support.
7. The present situation of the parties.
8. The needs of the parties.
9. The health of the parties.
10. The prior standard of living of the parties and whether either is responsible for the support of others.
11. General principles of equity.

McLain v McLain, 108 Mich App 166, 171–172, 310 NW2d 316 (1981); *see also Parrish v Parrish*, 138 Mich App 546, 554, 361 NW2d 366 (1984). A party's responsibility for the support of others is not limited to legal responsibility. The overriding concern of the courts is that the award be equitable. *Van Tine v Van Tine*, 348 Mich 189, 82 NW2d 486 (1957); *Wells v Wells*, 330 Mich 448, 47 NW2d 687 (1951).

Findings. I *[am / am not]* awarding spousal support for the following reasons:

The spousal support is *[modifiable / nonmodifiable]*.

Insurance

The *[Plaintiff / Defendant]* will be responsible for paying the cost of the other party's COBRA insurance coverage for ___ months. The present approximate monthly cost is $____.

Real Property

I make the following findings as to the net value of the marital assets of the parties and am dividing the marital property as follows:

Description	**Value**	*[Name of spouse]*	*[Name of spouse]*
House			
Lot			

Personal Property

Description	**Value**	*[Name of spouse]*	*[Name of spouse]*

I find the following net values and award the disputed personal property as follows. Any debt or lien is to be paid by the person who is awarded the property unless otherwise noted.

Debt

The debts of the parties will be paid as follows:

Description	**Value**	*[Name of spouse]*	*[Name of spouse]*

I find the following property is not marital property:

Miscellaneous Issues

The Judgment must contain all provisions required by statute or court rule.

The Plaintiff must promptly prepare the Judgment and submit it to the Court.

Dated: *[date]*

[Signature line]
[Name of court] Court Judge

Form 1.7
Divorce Judgment Provision Checklist

FRIEND OF THE COURT
ORDER APPROVAL/DISAPPROVAL FORM

STATE OF MICHIGAN
[COUNTY] CIRCUIT COURT
FAMILY DIVISION

Date: *[date]*
[Plaintiff's name],
Plaintiff,
v
Case No. *[number]-[case-type code]*
Friend of the Court Reviewer
[name]
[Defendant's name],
Defendant.
_____/

[Attorney's name] (P*[number]*)
Preparing Attorney
[Address, telephone, email]

The attached proposed Order of Judgment is

____ Approved

____ Not Approved (see below)

____ Approved, but please note:

General Provisions:

____ 1. Each separate subject is not set forth in a separate paragraph with an appropriate heading. MCR 3.211(A).

Custody Provisions:

____ 2. The provision for custody and written change of address for the child(ren) is ____omitted ____incomplete. MCR 3.211(C)(2).

____ 3. The provision for domicile is ____ omitted ____ incomplete. MCR 3.211(C)(1). If omitted and the order pertains to a joint custody arrangement, the following statement appears: "A parent whose custody or parent-

ing time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the 'Child Custody Act of 1970,'1970 PA 91, MCL 722.31." MCL 722.31(5).

____ 4. The provision for the inalienable rights of the child is omitted. MCL 722.24(1).

Parenting Time Provisions:

____ 5. The parenting time provision is

Support Provisions:

____ 6. The party has failed to complete the appropriate Uniform Order for Child Support and/or Spousal Support.

Property Provisions:

____ 7. The insurance provision required by MCL 552.101 is omitted. MCR 3.211(B)(1).

____ 8. A determination of the parties' rights in pension, annuity, and retirement benefits is omitted. MCL 552.101(3); MCR 3.211(B)(2).

____ 9. A determination of the property rights of the parties is omitted. MCL 552.103; MCR 3.211(B)(3).

____ 10. A provision granting, reserving, or denying spousal support is omitted (reserved if judgment is silent). MCL 552.13; MCR 3.211(B)(4).

____ Additional Comments:

Friend of the Court Involvement:

____ 11. The order leaves open issues by referring matters to the Friend of the Court, but not specifying how or whether an order is to be prepared. Unless an order allows, the Friend of the Court cannot prepare an order or prepare a notice of entry of a proposed order. If the investigation concerns support only, a scheduling conference will be set up to complete the review. In all other cases, the recommendation will be forwarded to the parties and attorneys for further action once it is completed.

____ 12. If the parties wish to opt out of the Friend of the Court system and have full responsibility for enforcing the judgment, an order allowing opting out must be granted. MCL 552.505a(2).

Form 1.8
Qualification of Expert Witness

The following is a list of questions a judge may ask of a proposed expert witness to determine whether the person is qualified to testify pursuant to MRE 702.

1. Please state your name.
2. What is your area of expertise?
3. I show you exhibit *[number]*. Is this your vitae?
4. Is it a current and accurate reflection of your education, experience, and professional activities?
5. What are the principles and methods you employed in this case to reach your conclusions?
6. In what manner did you apply them?
7. Can you state in your professional opinion whether the principles and methods you employed are reliable?
8. What is that opinion?
9. Can you state in your professional opinion whether the principles and methods were reliably applied to the facts in this case to reach your conclusions?
10. What is that opinion?

Form 1.9
Friend of the Court Referral to Community Resource (Expert)

STATE OF MICHIGAN
[COUNTY] CIRCUIT COURT
FAMILY DIVISION

[Plaintiff's name],
Plaintiff,
v
Case No. *[number]-[case-type code]*
Judge *[name]*

[Defendant's name],
Defendant.
_____/

[Attorney's name] (P*[number]*)
Attorney for Plaintiff
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Defendant
[Address, telephone, email]

Friend of the Court Referral to Community Resource (Expert)

To: *[name]*

Pursuant to MCL 552.505(1)(g)–(h) and the enclosed order of the Court, you have been requested to prepare a report and recommendation regarding the following:

____ custody

____ parenting time

____ spousal abuse

____ change of domicile of a minor child

____ alcohol/substance abuse

____ mental health issue

____ other *[describe]*

____ Attached to this letter is the legal framework you are to consider.

____ Attached to this letter is the form your report is to follow.

____ Attached to this letter are further instructions or information you are to consider.

When completed, please send copies of your report to this office, the judge, and counsel for the parties.

Unless otherwise specified in the attached order, the fee for your services will be shared equally by counsel.

Sincerely,

[Signature line]
Friend of the Court

Exhibit 1.1
Table of Domestic Relations Referees' Statutory Authority

A domestic relations referee has the following authority:

- hear motions in a domestic relations matter referred by the court, except motions pertaining to an increase or decrease in spousal support
- administer oaths, compel the attendance of witnesses and the production of documents, and examine witnesses and parties
- make a written, signed report, or make a statement of findings on the record, and submit a recommended order
- hold hearings as provided for in the Support and Parenting Time Enforcement Act
- accept voluntary acknowledgments of support liability; review and make a recommendation to the court concerning a stipulated agreement to pay support
- recommend a default order establishing, modifying, or enforcing a support obligation in a domestic relations matter.

MCL 552.507. A domestic relations referee may also be authorized by the judge to whom the case is assigned or the chief judge by administrative order to conduct settlement conferences and, subject to judicial review, scheduling conferences. MCR 3.215(B)(3).

A domestic relations referee may hold hearings on a variety of issues, including

- child support
- spousal support (except for motions to increase or decrease)
- family support
- custody
- parenting time
- paternity
- UIFSA/RURESA
- objection to income withholding
- show cause—support
- show cause—custody
- show cause—parenting time
- show cause—other
- objections to makeup parenting time
- hearings to set specific parenting time
- bench warrant arraignments

- property settlement
- name change
- temporary restraining order
- emancipation of minors
- proofs of final divorce hearings

Exhibit 1.2
Serving *Pro Per* Litigants in Divorce Cases

Introduction

When I started practicing law in the late 70's, working with *pro per* litigants appeared to be a "sport" for some circuit judges. These judges clearly wanted to discourage *pro per* litigants and seemed to go out of their way to embarrass or humiliate them. I recall witnessing a circuit judge tell a *pro per* litigant that the file was not "in proper order" to allow him to proceed with a *pro con.* I am not sure if the file lacked a signed Default, or the Non-Military Affidavit, but when the litigant asked what was missing, the judge stated that he could not give any "legal advice" as to the necessary paperwork, or some such cryptic message. The litigant was then shuffled aside by the court officer and the next case was called. The judge was an otherwise friendly person who often told attorneys, young or old, what was missing if he felt there was some problem with the paperwork.

Times have changed in my 14 years on the bench. We are seeing more and more *pro per* litigants. More forms are available and it is easier for litigants to access and use them. In some areas, such as Personal Protection Orders, it is anticipated that most of the litigants will be representing themselves.

Tips for Judges

1. **Basic Types:**
    a. Litigants unable to afford an attorney. In addition, in domestic cases, we now see people who can afford an attorney but are unwilling to pay that expense because they want to do it themselves. Many of these people are assisted by others in preparing forms.
    b. Grumpy litigants. These self-represented litigants are more often seen in the civil docket, but they also represent themselves in domestic cases. Many have a grudge against the system or have unrealistic expectations, e.g., "I should receive 100% of the marital assets because my spouse had an affair." Many of these litigants started with attorneys who then withdrew because of the client's attitude.
2. **Points to Remember:**
    - Most *pro per* litigants are in the first group.
    - It is possible to be in both the first and the second group at the same time.
    - The first group is much, much easier to deal with.
3. **Tip #1—Treat them fairly.** Of course, most of you believe that you do treat *pro per* litigants fairly. However, it is common practice in many areas of the state to first call cases in which attorneys are involved and to make the unrepresented litigants wait until last. Imagine how you would feel if you were treated this way. The bar will protest if you call matters in the order they appear on the schedule or in the order the parties have checked in,

because they do not want to wait while some *pro per* litigants struggle with the process.

Possible solutions: To the extent possible, schedule *pro per* motions for a different time than attorney motions. Sometimes only one party is represented by an attorney, so this is not completely possible, but in many instances, you expect both sides to be unrepresented or you expect an attorney to be involved. Schedule accordingly.

4. **Tip #2—Explain your procedure.** For example, at a motion hearing where both parties are unrepresented, tell them what you are going to do. I usually tell them that I am going to swear them in, allow each of them to make a statement about the dispute, and then ask each of them questions. I also explain that I will ask each of them if they want to ask any questions of the other person. I find out if they have any other witnesses present that they want to testify. I explain to them that I do not want any interruptions and that if they have exhibits or documents, they should first show them to the other side and then give them to the bailiff, who will bring them to me.
5. **Tip #3—Explain your order procedure.** You have several options:
    a. Treat them just like you would an attorney. Tell them to prepare an order and submit it under the seven-day rule. Take the next file and call the next case. Be oblivious to expressions of bewilderment and puzzlement.
    b. Do them yourself. Although this would seem like more work, it may not be. I know this may not be your job, and if you don't prepare orders for the attorneys, perhaps you shouldn't for the self-represented litigants. However, this will insure that the orders are done correctly and without delay.
    c. Provide blank orders for them to fill out. If you are bothered philosophically by option b, this may be a reasonable compromise.
6. **Friend of the Court assistance.**
    a. Many *pro per* litigants file motions concerning custody, change of domicile, support, or parenting time.
    b. 75% of these motions can be resolved by the Friend of the Court. Many of them will be uncontested.
    c. Establish a procedure where all *pro per* motions must first be "heard" by a Friend of the Court referee or reviewed/mediated by a Friend of the Court investigator. The Friend of the Court can do an initial assessment of the case, providing guidelines if necessary, and print any MiCSES report if needed. If the matter is uncontested, the Friend of the Court can prepare an order. Some cases will need a thorough Friend of the Court investigation. The Friend of the Court can prepare an order for that process.
    d. Provide for judicial review of unresolved matters either the same day or within a week.

e. Make sure your Friend of the Court internal procedures do not encourage litigants to file motions instead of trying to work matters out with the Friend of the Court. In some counties, it is easier to file a motion and get a hearing date within two weeks than it is to get an appointment with the Friend of the Court in two weeks. If you tell someone that it takes a month to get an appointment or three months to complete an investigation, but that they can file a motion and have a hearing in 7–10 days, you will have more people filing motions.

7. **Review of judgments.** When attorneys are involved, most judges sign any proposed divorce judgment that the attorneys agree on and assume that it is fair under the circumstances. Should you handle this any differently when one or both of the parties are not represented by counsel?

   a. Approach #1–Not my concern. Some judges take a traditional approach that if a party has been notified and has not appeared or objected, it is not the judge's responsibility to review the fairness of the proposal—that is not our job.

   b. Approach #2–Accepting responsibility for the fairness of your judgments and orders. Some judges are reluctant to sign judgments that are unopposed without some simple review of their fairness. Obviously, the judge is not in a position to conduct a detailed re-evaluation of every property division, but some judgments stand out as patently unfair. It is also easier to correct judgments before they are signed than it is to undo them.

      Example 1: 25-year marriage. Husband representing himself. Wife in default. Judgment provides parties own no real estate, each party gets the personal property in their possession; each party gets own life insurance, pensions, and retirement accounts.

      On its face, this does not appear to be unfair. However, what if you ask about employment history and find out the husband has worked for General Motors for 25 years and the wife had not worked until last week, when she started working at McDonalds? Should you have asked the question? What do you do when you know the answer? The GM pension may be the only valuable asset in this marriage. Should you ask why the wife is not present? Should you require court staff to call her or notify her by mail? Should you check the Circuit or District Court records for evidence of domestic violence cases?

      Example 2: Same facts as Example 1, except the husband is represented by an attorney. Do you handle the matter any differently?

      Example 3: The judgment states that the wife gets the house and the husband gets his pension. Should you inquire how much equity there is in the house and what the possible value of the pension is?

      Example 4: You granted the *pro con* in Example 1 without asking any questions. One year later, you receive a letter from the ex-wife who states that she was told by her husband before the divorce that

she had no right to any of "his" pension. She has now found out that some of her friends are receiving part of their ex-husbands' pensions and wonders if there is any way she can get something now. You should:

i. Tell her you are no longer in the family division and she should send her letter to a different judge?

ii. Tell her to talk to an attorney?

iii. Throw away the letter without responding?

Practical suggestion: Do nothing more than a cursory review of any property settlement where the parties have been married less than 5 years. Unless something jumps out, like a spousal support provision, almost anything that is submitted will be signed. I do a cursory review if both parties are represented by counsel, unless I question the fitness or sobriety of one of the attorneys. However, when parties have been married more than 15 years and one party is unrepresented, I generally make some inquiry to satisfy myself that the terms of the judgment are equitable. A few simple questions about the value of any pensions and equity in the real estate are all that is necessary. Although many people really do not have anything to fight about, I have had many cases where the judgments are clearly inequitable. There can be several reasons a party will not oppose an inequitable property distribution, such as a mistaken understanding about the law, domestic violence, or embarrassment about infidelity. In these cases, I am reluctant to grant a *pro con* unless the other side is in court, and when they are in court, I suggest to them that they obtain some legal advice before proceeding.

2
Marriage, Annulment, and Separate Maintenance

Richard A. Roane contributed to the portion of this chapter discussing same-sex marriage.

Summary of Marriage, Annulment, and Separate Maintenance

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Marriage

General rules regarding marriage. §2.1.

For a marriage *taking place in Michigan* to be valid, the parties must

- not be married already
- not be related within the prohibited degree of consanguinity or affinity
- be of marriageable age
- be capable in law of contracting
- enter the marriage without fraud or duress

For requirements for obtaining a license and solemnizing the marriage, see §2.1.

Rules regarding validity. §§2.2–2.7.

- Foreign marriages—generally, a marriage valid where contracted (another state or another country) is valid everywhere.
- Same-sex marriages—constitutional and statutory provisions making these marriages invalid in Michigan were held unconstitutional by the U.S. Supreme Court.
- Common-law marriages—not valid in Michigan, unless (1) entered into in Michigan before January 1, 1957, or (2) legally consummated in a state recognizing common-law marriages.
- The marriage of a minor—full guardians may consent to a ward's marriage; limited guardians may not.

Presumptions regarding validity.

- Strong presumption favors the validity of a marriage.
- Once marriage is shown, it is presumed that the marriage continues.
- If a person has been married to two different people, the presumption favors the validity of the second marriage. This prevails over the presumption of the prior marriage's continuity, but may be rebutted by facts conclusively showing the invalidity of the second marriage.

Secret marriages; orders *nunc pro tunc*. §2.5.

- If the judge finds that there is good reason, stated in a verified application, the judge may issue a marriage license without publicity.

- A judge may marry persons under marriageable age, without publicity, if the license application is accompanied by the written request of the underage party's parents or guardians. If the noncustodial parent has been notified by personal service or registered mail at the last known address and fails to object within five days of receipt of notice, only the custodial parent's consent is required.
- A judge may authorize an order *nunc pro tunc* regarding the date on the marriage license.

Annulment

General rules regarding annulment. §§2.8–2.9, §§2.20–2.23.

Annulment is a judicial determination that a valid marriage did not occur.

Annulment dissolves two categories of marriage:

- Marriages void *ab initio*—void from beginning (although not favored, can be attacked after death of one or both parties)
- Voidable marriages—valid until a party brings an action to annul (must be brought while both parties are living)

Either party may file a petition or complaint for annulment in the family division of the circuit court in the county where at least one party resides. There are no length-of-residence requirements.

Children of an annulled marriage:

- the children are legitimate (for nonage, incompetence, and bigamy, the children are the legitimate offspring of the party capable of contracting marriage)
- the court provides for the custody and support of the children of an annulled marriage, regardless of grounds (and while annulment action is pending)

Property awards—same principles as in a divorce.

Attorney fee awards—same principles as in a divorce.

Grounds.

Bigamy. §2.11.

- Marriage is void *ab initio.*
- Marriage is bigamous if performed while the prior spouse, from whom no divorce was granted, was living. (A prior spouse could include a common-law spouse if the common-law marriage was entered into in Michigan before January 1, 1957.)

Marriage prohibited by the relationship of the parties. §2.12.

- Marriage is void *ab initio* if solemnized in Michigan.
- Not void if solemnized in a state permitting the marriage or if Michigan residents go to another state to avoid the Michigan prohibition.
- Prohibited relatives—see list in §2.12.

Incompetence. §2.13.

- A marriage solemnized in Michigan while either party was not capable in law of contracting is void *ab initio.*
- If, at the time of a marriage, a party to the marriage was not capable in law of contracting, a next friend may bring an action to annul the marriage.
- A party to a marriage who is not capable in law of contracting at the time of the marriage, and who later becomes capable in law of contracting, may bring an action to annul the marriage. However, the court shall not annul the marriage if the court finds that the parties cohabited as husband and wife after the party became capable in law of contracting.

Underage marriages. §2.14.

- Age 18 or older—a marriage in Michigan must not be contracted by a person under 18 years old.
- Under age 18—a marriage entered into by an individual under 18 in this state is void.

Fraud and duress. §2.15.

If consent to marriage is obtained by force or fraud, the marriage is voidable, but not if the parties voluntarily cohabit after fraud is discovered and before the suit is filed.

Other grounds. §§2.16–2.18.

Inability to have children—an action for annulment must be brought within two years of the marriage ceremony; the only grounds for annulment are if the inability existed at the time of marriage, it is incurable, and the party knew of the inability and failed to disclose it.

Separate Maintenance

Procedure. §2.24.

- The action is filed in the same manner and on the same grounds as divorce (same residency requirements) (see §1.4).
- When a judgment of separate maintenance is entered, the parties are still married, but the court may divide marital property and order spousal support.
- A separate maintenance action will result in a divorce if the defendant files a counterclaim for divorce and the statutory grounds are met.
- If parties' wish to dissolve the marriage through a divorce after a separate maintenance decree is entered, a new action will need to be filed.

I. Marriage

A. Requirements for Marriage

§2.1 For a marriage to be valid in Michigan, the parties must

- not be married already,
- not be related within a prohibited degree of consanguinity or affinity,
- be of marriageable age,
- be capable in law of contracting, and
- enter the marriage without fraud or duress.

MCL 551.1, 552.1, .2.

People who wish to marry must first obtain a license from the clerk in the county where one of the parties resides. If neither party is a Michigan resident, the license should be obtained in the county where the marriage will be performed. MCL 551.101. *Note:* Same-sex marriage bans, such as the one in MCL 551.1, were held unconstitutional by the U.S. Supreme Court in *Obergefell v Hodges*, 576 US 644 (2015).

The county clerk may permit a party applying for a marriage license to submit the application electronically. However, the required information from the application must be printed in the form of an affidavit and signed by a party in the presence of the county clerk or a deputy clerk. MCL 551.102(1). The application is a nonpublic record and is exempt from disclosure under the Freedom of Information Act. MCL 551.102(4).

Applicants are required to state their ages on the affidavit for a license and must submit a birth certificate or other proof of age when requested by the county clerk. MCL 551.103(1). A person making a false statement on the marriage license application is guilty of perjury. MCL 551.108.

There is a three-day waiting period from the time of application until the license is issued, although the clerk may waive this requirement. Marriage licenses are valid for 33 days after the application is made. MCL 551.103a.

A county clerk may not issue a marriage license to an applicant who fails to sign and file with the county clerk an application for a marriage license that includes a statement with a check-off box indicating that the applicant has received the educational materials regarding the transmission and prevention of both sexually transmitted infection and HIV infection and has been advised of testing for both sexually transmitted infection and HIV infection. MCL 333.5119(2). If the test results of either marriage license applicant undergoing a test for HIV or an antibody to HIV indicate that an applicant is HIV infected, "the physician or a designee of the physician, the physician's assistant, the certified nurse midwife, the certified nurse practitioner, or local health officer or a designee of the local health officer administering the test" must immediately inform both applicants of the test results and counsel both applicants regarding the modes of HIV transmission, the potential for HIV transmission to a fetus, and protective measures. MCL 333.5119(3).

See MCL 551.7(1) for a list of people authorized to solemnize a marriage. No particular ceremony is required for the marriage to be valid. The parties must simply declare, in the presence of the person solemnizing the marriage and at least two other witnesses, that they take each other as husband and wife. MCL 551.9. But see §2.4 (discussing same-sex marriage after *Obergefell*). A marriage performed without two witnesses is still valid since the ceremonial or formal requirements are only directory. 1945–1946 OAG No 4370, at 604 (Feb 12, 1946).

A marriage solemnized by a person who professes to be an authorized official but actually lacks such authority or jurisdiction is valid as long as the parties consummating the marriage believe that they are lawfully married. MCL 551.16.

B. Validity of Marriages

1. Foreign Marriages

§2.2 A marriage valid where contracted is valid everywhere. *Toth v Toth*, 50 Mich App 150, 152, 212 NW2d 812 (1973); *see also Noble v Noble*, 299 Mich 565, 300 NW 885 (1941). This includes a marriage solemnized in another country, even though the marriage would not have been valid had it taken place in Michigan. *Toth* (court upheld validity of marriage of first cousins that occurred in Hungary and was valid under Hungarian law). However, a marriage that is valid in another country generally need not be recognized as valid if it is bigamous, incestuous, or otherwise violates a strong public policy of the forum state. 52 Am Jur 2d *Marriage* §§82–84.

A marriage that takes place on Indian territory and that conforms to local Indian laws or customs is recognized as valid. *See* 55 CJS *Marriage* §5 at 555, §12.

2. Common-Law Marriages

§2.3 Common-law marriages are invalid in Michigan as of January 1, 1957. MCL 551.2. The only common-law marriages recognized in Michigan are those (1) entered into before that date or (2) legally consummated in a state recognizing them. A common-law marriage is one that does not meet the requirements of a formal statutory marriage. Typically, it is an agreement to take each other as husband and wife, followed by cohabitation for a certain period of time. *See* John De Witt Gregory, Peter H. Swisher, & Sheryl L. Wolf, *Understanding Family Law* §2.05 (3d ed 2005). See also §2.4 (discussing same-sex marriage after *Obergefell v Hodges*, 576 US 644 (2015)). See *Michigan Family Law* exhibit 1.1 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for a list of states that recognize common-law marriages.

3. Same-Sex Marriages

§2.4 Today, same-sex marriages are afforded the same legal recognition and benefits as opposite-sex marriages. Historically, this was not the case. The U.S. Congress in 1996 enacted the Defense of Marriage Act (DOMA) that prohibited federal recognition of same-sex marriages if they were to become the law in the United States. *See* 1 USC 7; *see also* 28 USC 1738C (no person acting under color of state law may deny full faith and credit to any public act, record, or

judicial proceeding of any other state pertaining to marriage between two individuals on basis of sex, race, ethnicity, or national origin of those individuals). In 2013, the U.S. Supreme Court issued two landmark cases addressing same-sex marriage. *Hollingsworth v Perry*, 570 US 693 (2013), addressed California's voter-approved Proposition 8 resulting in a restoration of same-sex marriage in that state. *United States v Windsor*, 570 US 744 (2013), addressed Section 3 of DOMA, 1 USC 7, which defined a *marriage* under federal law as a legal union between one man and one woman as husband and wife and specified that "spouse" referred only to a person of the opposite sex who has a husband or a wife. The court held that Section 3 of DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. *Windsor.*

Michigan prohibited same-sex marriage as a result of its voter enacted Michigan Marriage Amendment (MMA), which states:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Mich Const 1963 art 1, §25; *see also* MCL 551.1; *Burnett v Burnett (In re Estate of Burnett)*, 300 Mich App 489, 834 NW2d 93 (2013) (although same-sex marriage is precluded under MCL 551.1, trial court had jurisdiction to enter divorce judgment between female plaintiff and defendant who was born male but became female through gender reassignment surgery during parties' marriage because marriage contract was valid under Michigan law at time it was made). Moreover, since Michigan was a prohibition state, Michigan trial courts, government agencies, and other state organizations were prohibited from recognizing the validity of same-sex marriages solemnized in jurisdictions where same-sex marriage is allowed. *See* MCL 551.272.

The Supreme Court, however, held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require states to issue marriage licenses to same-sex couples on the same terms and conditions as opposite-sex couples and to recognize lawful same-sex marriages performed in other states. Marriage is a fundamental right under the Due Process Clause that must be extended to same-sex couples. The rights of personal choice regarding marriage and intimate association are inherent in the Due Process Clause's concept of individual autonomy. Moreover, states accord a constellation of benefits to married couples, including the protection of children and families. Denying those benefits to same-sex couples abridges their equality and violates the Constitution. *Obergefell v Hodges*, 576 US 644 (2015).

Obergefell included the appeal of two plaintiffs who had challenged Michigan's marriage ban. *See DeBoer v Snyder*, 973 F Supp 2d 757 (ED Mich 2014) (*DeBoer I*) (Michigan's same-sex marriage ban unconstitutional under the Equal Protection Clause); *DeBoer v Snyder*, 772 F3d 388 (6th Cir 2014) (reversed *DeBoer I* bound by *Baker v Nelson*, 409 US 810 (1972); defending states' definitions of marriage as between one man and one woman did not violate Equal Protection or Due Process clauses).

Despite the holding in *Obergefell,* several Michigan statutes still include specific references to "husband" or "wife" and "mother" or "father," including the following cited in this chapter: MCL 551.1, .3, .4, .9, 552.1, .34, .36, 700.2801. HB 5192 (2021-2022) and HB 5214 (2021-2022) have been introduced to make these statutes gender neutral. The legislation is currently pending on both bills.

For more information on same-sex marriage in Michigan and the state of same-sex marriage nationwide and around the world, see *Michigan Family Law* ch 2 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed).

4. Secret Marriages; Orders *Nunc Pro Tunc*

§2.5 Secret marriages and orders *nunc pro tunc* are provided for by MCL 551.201. Secret marriages may occur when a person wants to keep the exact date of a marriage secret. The judge "may issue, without publicity, a marriage license to any individual making application, under oath, if there is good reason expressed in the application and determined to be sufficient by the probate judge." MCL 551.201(1).

The judge may authorize an order *nunc pro tunc* regarding the date on the marriage license, thus giving effect to the marriage at a date before the actual ceremony. MCL 551.201(2); *see Baum v Baum*, 20 Mich App 68, 173 NW2d 744 (1969). While *Baum* indicates that the intent of the statute is to protect a child conceived out of wedlock, a 1983 amendment deleted language regarding the woman's being with child.

5. Presumption of Validity; Retroactive Validation

§2.6 A strong presumption exists favoring a marriage's validity. Once the celebration of a marriage is shown, the contract of marriage, the capacity of the parties, and everything necessary to the validity of the marriage are presumed. *Doertch v Folwell Eng'g Co*, 252 Mich 76, 233 NW 211 (1930); *Mogk v Stroecker*, 243 Mich 668, 220 NW 730 (1928) (final divorce decree not entered in court files; based on equities of controversy, court recognized validity of second marriage). This presumption includes that the person officiating has the necessary authority to perform the ceremony. *In re Estate of Adams*, 362 Mich 624, 107 NW2d 764 (1961); *Boyce v McKenna*, 211 Mich 204, 214, 178 NW 701 (1920). The presumption of validity is one of the strongest presumptions known and its strength increases with the lapse of time, the birth of children, and the parties' acknowledgment of their marriage. *See May v Meade*, 236 Mich 109, 210 NW 305 (1926); 55 CJS *Marriage* §52.

Once a marriage has been shown, the presumption is that the marriage continues. *Doertch.* A seven-year absence of one of the parties, however, gives rise to a presumption of death. *Beckwith v Bates*, 228 Mich 400, 200 NW 151 (1924); *Heagany v National Union*, 143 Mich 186, 106 NW 700 (1906).

If a person has been married to two different people, the presumption favors the validity of the second marriage. *In re Williams Estate*, 164 Mich App 601, 417 NW2d 556 (1987). The presumption favoring the validity of a second marriage prevails over the presumption of a prior marriage's continuity. *Weinert v Tallman*,

346 Mich 388, 78 NW2d 141 (1956); *Doertch.* The presumption favoring the validity of a second ceremonial marriage may be rebutted by a showing of facts conclusively establishing the invalidity of the second marriage. *Beaudin v Suarez*, 365 Mich 534, 113 NW2d 818 (1962); *Starr-Pope v Pope (In re Pope Estate)*, 205 Mich App 174, 517 NW2d 281 (1994). See also *LeBlanc v Lentini*, 82 Mich App 5, 266 NW2d 643 (1978), where the Michigan court recognized a California court's order *nunc pro tunc* that changed the date of one of the spouse's California divorce to a date before the couple's marriage.

6. Persons with Disabilities; Incapacitated Persons

§2.7 Marriage is a civil contract and the parties must be capable in law of contracting. MCL 551.2; *May v Leneair*, 99 Mich App 209, 297 NW2d 882 (1980). MCL 551.6, which provided that a person was not capable of contracting marriage if they had "been adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction," was repealed in 2001. *See* 2001 PA 9. For challenges to the marriage of a person not capable in law of contracting, see §2.13. Effective July 12, 2023, 2023 PA 72 amended the Estates and Protected Individuals Code to eliminate the authority of a guardian or limited guardian to consent to a minor ward's marriage. *See* MCL 700.5206, .5215.

II. Annulment

A. In General

§2.8 An annulment is a judicial determination that a valid marriage never took place. *See* MCL 552.1–.4. Annulment is the appropriate means of dissolving two kinds of marriages—those that are void *ab initio* and those that are voidable. If a marriage is void *ab initio,* it is deemed never to have taken place since it was void from the beginning. Theoretically, no legal process is required to dissolve a marriage that is void *ab initio,* although judicial action may have to be taken to resolve any property disputes; clarify the rights of any children of the marriage; and prevent any subsequent complications, such as problems with creditors.

In contrast, if a marriage is voidable, it is valid until one of the parties brings an action to have it annulled. The action must be brought while both parties are living, and until a court declares the marriage annulled, it is legally binding.

B. Procedure

§2.9 If the validity of a marriage is doubtful, a party may file an action for annulment or may file an action to affirm the marriage. MCL 552.3–.4. An action to affirm is not appropriate where neither party doubts or denies the validity of the marriage. *Young v Wehmeier*, 369 Mich 110, 119 NW2d 642 (1963).

Either party may file a petition or complaint for an annulment in the family division of the circuit court in the county where at least one of the parties resides. MCL 552.3. Jurisdiction for annulment, unlike divorce, does not depend on a specific length of residence. A resident of another state or country may file a peti-

tion as long as one party to the marriage is a resident of the county where the petition is filed. *Hill v Hill*, 354 Mich 475, 93 NW2d 157 (1958).

The petition and subsequent proceedings are the same as in a divorce proceeding. MCL 552.3.

A marriage that is void *ab initio* can be collaterally or directly attacked even after the death of one or both parties. *Schelbe v Buckenhizer*, 338 Mich 601, 61 NW2d 808 (1953). However, the court does not look favorably on annulment proceedings after the deaths of the parties. *Mogk v Stroecker*, 243 Mich 668, 671, 220 NW 730 (1928).

C. Grounds for Annulment

1. In General

§2.10 There are two statutes in Michigan setting the grounds that invalidate a marriage. Under MCL 552.1, the grounds that make a marriage "absolutely void" are

- a bigamous marriage,
- a marriage prohibited by the relationship of the parties, or
- a marriage with a person who is not capable in law of contracting.

A marriage is voidable if either of the parties is under the age of consent or consent was obtained by force or fraud. MCL 552.2.

2. Prior Spouse of a Party; Bigamy

§2.11 A marriage is void *ab initio* if it is performed while a prior spouse, from whom no divorce was granted, is still living. MCL 552.1.

When presented with a petition for the annulment of an allegedly bigamous marriage, the court must determine the validity of the marriage and, on proof that the marriage is bigamous, declare it void. MCL 552.3; *Harris v Harris*, 201 Mich App 65, 506 NW2d 3 (1993) (equitable principles of estoppel and clean hands do not prevent party in void, bigamous marriage from seeking and obtaining annulment).

Even though common-law marriages are no longer valid in Michigan, MCL 551.2, a common-law marriage commenced before January 1, 1957, is valid and would make a subsequent ceremonial marriage of one of the spouses bigamous. *See generally People v Seaman*, 107 Mich 348, 65 NW 203 (1895).

3. Relationships of Consanguinity and Affinity

§2.12 Marriages between parties related within certain degrees of consanguinity or affinity are prohibited. Consanguinity refers to a blood relationship; affinity refers to the relationship between one spouse and a blood relative of the other spouse, such as that between a man and his stepdaughter. A marriage prohibited because of consanguinity or affinity is void if the marriage was solemnized in Michigan. MCL 552.1. It is not void if it was solemnized in a state that permits such marriages and the parties later move to Michigan or if Michigan res-

idents go to another state to avoid the Michigan prohibition. *In re Miller's Estate*, 239 Mich 455, 214 NW 428 (1927) (first cousins married in Kentucky); *see also Toth v Toth*, 50 Mich App 150, 212 NW2d 812 (1973) (first cousins validly married in Hungary).

Under MCL 551.3, a man may not marry his

> mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree, or another man.

Under MCL 551.4, a woman may not marry her

> father, brother, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, mother's brother, or cousin of the first degree, or another woman.

But see §2.4 (discussing same-sex marriage after *Obergefell v Hodges*, 576 US 644 (2015)).

4. Incompetence

§2.13 If solemnized in Michigan, a marriage that is prohibited by law because either party was not capable in law of contracting at the time of solemnization is absolutely void. The issue of such a marriage is legitimate. MCL 552.1. A court-appointed next friend may bring an action to annul the marriage on grounds that a party was not capable in law of contracting. MCL 552.35. A party who, at the time of the marriage, was not capable in law of contracting and who later becomes capable in law of contracting, may bring an action to annul the marriage. The court shall not, however, annul the marriage if the court finds that the parties cohabited as husband and wife after the party became capable in law of contracting. MCL 552.36. But see §2.4 (discussing same-sex marriage after *Obergefell v Hodges*, 576 US 644 (2015)).

References in these statutes to the marriage of a person who is "insane," an "idiot," or a "lunatic" were replaced in 2001 with references to the marriage of a person who is "not capable in law of contracting" at the time of marriage. *See* 2001 PA 107.

5. Nonage or Being Under the Age of Consent

§2.14 **18 or older.** In Michigan, a person who is 18 years of age or older is capable by law of contracting marriage. MCL 551.103.

Under 18 years old. A marriage in Michigan must not be contracted by a person under 18 years old. MCL 551.51, *amended by* 2023 PA 71 (eff. Sept 19, 2023). A marriage entered into by an individual under 18 in this state is void. *Id. Note:* The section applies to a marriage entered into on or after the effective dates of the amendatory acts 2023 PA 71 (eff. Sept 19, 2023) and 2023 PA 76 (eff. July 12, 2023).

An action to annul a marriage on the ground that one of the parties was under the age of legal consent may be brought by the parent or guardian entitled to the custody of the minor or by the next of friend of the minor. MCL 552.34, *amended by* 2023 PA 76 (eff. July 12, 2023). However, the marriage will not be annulled on the application of a party who was of the age of legal consent at the time of the marriage. *Id.* But see §2.4 (discussing same-sex marriage after *Obergefell v Hodges*, 576 US 644 (2015)).

6. Fraud and Duress

§2.15 If consent to marriage is obtained by force or fraud, the marriage is void. MCL 552.2. However, an annulment based on this claim will be denied if it appears that the parties cohabited voluntarily after the fraud was discovered but before the suit was commenced. MCL 552.37. A complaint for annulment based on fraud can be brought only by one of the parties to the marriage; third parties have no standing to bring such an action. *Estate of Mullin v Duenas*, 296 Mich App 268, 818 NW2d 465 (2012).

The fraud necessary to vitiate the marriage contract must relate to an essential element of the contract, be of a nature wholly subversive to the true essence of the relationship, affect the free conduct of the wronged party, and be clearly established. *Yanoff v Yanoff*, 237 Mich 383, 211 NW 735 (1927).

Fraud in obtaining consent was found in the following situations:

- The marriage was induced by fraud on defendant's part, for the purpose of defendant's emigrating to the United States. *Stojcevska v Anic*, No 210144 (Mich Ct App Jan 11, 2000) (unpublished).
- A wife induced her husband to marry her by fraudulently claiming that he was the father of her child. *Yager v Yager*, 313 Mich 300, 21 NW2d 138 (1946); *Gard v Gard*, 204 Mich 255, 169 NW 908 (1918); *Sissung v Sissung*, 65 Mich 168, 31 NW 770 (1887).
- A wife entered the marriage knowing that she was barren and incapable of conceiving and bearing children and did not disclose this fact to her husband. *Stegienko v Stegienko*, 295 Mich 530, 295 NW 252 (1940).
- One party was placed under the influence of alcohol or drugs so that free will was destroyed. *Gillett v Gillett*, 78 Mich 184, 43 NW 1101 (1889).
- A young man was threatened with prison unless he married a woman who had brought bastardy charges against him. *Smith v Smith*, 51 Mich 607, 17 NW 76 (1883).

Premarital unchastity alone is not sufficient to show fraud, even if the wife might have deliberately lied about her virtue. *Leavitt v Leavitt*, 13 Mich 452 (1865). In *Hess v Pettigrew*, 261 Mich 618, 247 NW 90 (1933), the concealment of a prior marriage was not fraud after the parties lived together for nine years in a common-law marriage.

7. Venereal Disease

§2.16 Before May 29, 2001, a person who had communicable syphilis or gonorrhea was incapable of contracting marriage and was guilty of a felony if the person entered into marriage. MCL 551.6. This provision has been repealed. *See* 2001 PA 9.

8. Sterility or Impotence

§2.17 A marriage in which one of the parties has a physical incapacity to have children is valid until the wronged party seeks a judicial decree annulling it. An action for an annulment under this ground must be brought within two years from the date of the marriage ceremony. MCL 552.39. The inability must have existed at the time of the marriage and be incurable.

The inability to conceive or bear children is not in itself grounds for an annulment, unless the party knew of the incapacity before the marriage and failed to disclose it. *Stegienko v Stegienko*, 295 Mich 530, 295 NW 252 (1940).

9. Other Grounds

§2.18 An annulment has been granted when there was a concealed intent at the time of the marriage not to have sexual intercourse. *Stegienko v Stegienko*, 295 Mich 530, 295 NW 252 (1940).

Fraudulent and deliberate concealment of homosexuality has been found to be grounds for an annulment. *Sampson v Sampson*, 332 Mich 214, 50 NW2d 764 (1952).

A number of *American Law Reports* annotations have addressed issues that may affect the validity of a marriage. *See, e.g.,* A. Della Porta, Annotation, *Validity of Marriage as Affected by Intention of the Parties That It Should Be Only a Matter of Form or Jest,* 14 ALR2d 624; David B. Perlmutter, Annotation, *Incapacity for Sexual Intercourse as Ground for Annulment,* 52 ALR3d 589; T. C. Williams, Annotation, *Avoidance of Procreation of Children as Ground for Divorce or Annulment of Marriage,* 4 ALR2d 227.

D. Defenses to Annulment

§2.19 As mentioned above, some of the specific grounds for annulment also provide their own defenses if the parties continue to live together after the problem is discovered or resolved. *See* MCL 552.2 (nonage); MCL 552.37 (fraud and duress).

As a general principle, the complaining party is denied relief if the party has voluntarily cohabited after learning of the impediment to or the illegality of the marriage. *Sampson v Sampson*, 332 Mich 214, 50 NW2d 764 (1952). To preserve the right to an annulment, the injured party must leave the marital relationship promptly after discovering the truth. Relief is not barred if the injured party continues to cohabit after relying on a spouse's statements that a former spouse has died. *Boyce v McKenna*, 211 Mich 204, 178 NW 701 (1920).

E. Children Born During an Annulled Marriage

1. Legitimacy

§2.20 In general, children born of any marriage, whether void *ab initio* or not, are deemed to be legitimate. MCL 552.1, .29.

Nonage or incompetence. Children born of a marriage that is dissolved because of a party's nonage or because a party was not otherwise capable of contracting are considered to be the legitimate children of the party who was capable of contracting when the marriage was solemnized. MCL 552.30.

Bigamy. Children born of a bigamous marriage, which was entered into in good faith, are the legitimate issue of the spouse who was legally capable of marrying at the time of the marriage. MCL 552.31.

2. Child Custody and Support

§2.21 The court will provide for the custody and support of the children of an annulled marriage regardless of the grounds on which an annulment is sought. MCL 552.16; *Gallison v Gallison*, 5 Mich App 460, 146 NW2d 812 (1966).

While an annulment action is pending, a court may enter orders concerning the care, custody, and support of any minor children. MCL 552.15(1). See chapters 3 and 5 for further discussion of child custody and support.

When a marriage is annulled for force or fraud, custody of the children must be awarded to the innocent parent and support may be awarded from the guilty party's estate and property. MCL 552.38.

Under both MCL 552.15 and 552.16, orders concerning the support of the parties' children are enforceable under the Support and Parenting Time Enforcement Act, MCL 552.601 et seq. See §§5.38–5.52 for a discussion of child support enforcement.

F. Property Division and Spousal Support

§2.22 MCL 552.19, which provides for property division in a divorce, also applies to an annulment. The few cases specifically concerning an annulled marriage confirm the use of the same basic principles. The property award must be just and reasonable under all the circumstances. *Mixon v Mixon*, 51 Mich App 696, 216 NW2d 625 (1974). The court may restore to each party all or part of the property that was brought to the marriage. If the marriage has lasted for some time, the court attempts to make an equitable distribution of the property based on the contribution of each party to the marriage. *Walker v Walker*, 330 Mich 332, 47 NW2d 633 (1951).

In *Stevenson v Detroit*, 42 Mich App 294, 201 NW2d 688 (1972), a situation involving a bigamous marriage, a putative widow was held to be entitled to survivor benefits from the deceased's employer where she had entered the marriage in good faith and was unaware of a prior undissolved marriage.

Permanent spousal support is not generally granted in annulment actions, unless there is a statute providing otherwise. John S. Herbrand, Annotation, *Right to Allowance of Permanent Alimony in Connection with Decree of Annulment,* 81 ALR3d 281. Michigan has no such provision. MCL 552.23 provides for spousal support only on the entry of a judgment of divorce or separate maintenance.

G. Awards of Attorney Fees and Expenses

§2.23 A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay. MCR 3.206(D)(2)(a). Alternatively, a party who requests attorney fees and expenses must allege facts sufficient to show that the fees and expenses were incurred because the other party was able to comply with a previous court order but refused. MCR 3.206(D)(2)(b). This rule applies to annulment actions. MCR 3.201(A)(1).

See also MCL 552.13, which provides for an award of sums necessary for a spouse to pursue the action. While this statute does not specifically mention annulment actions, the court in *Mixon v Mixon*, 51 Mich App 696, 216 NW2d 625 (1974), an annulment case, considered awarding attorney fees but denied them on the ground that the wife, who earned more than the husband, did not need them to proceed with her action.

III. Separate Maintenance

§2.24 Married persons may request separate maintenance because the parties have a religious objection to divorce, or want to stay married for other reasons. Separate maintenance may allow both parties to have continued health care coverage, but some employers and health insurance providers treat an action for separate maintenance as a triggering event disqualifying a nonemployee spouse from continued health insurance coverage. This is not uniformly applied by either employers or health insurance providers.

An action for separate maintenance is filed in the same manner and on the same grounds as a divorce. MCL 552.7. Either the plaintiff or the defendant must have resided in the state for at least 180 days and in the county of filing for at least 10 days immediately preceding the filing of the complaint. MCL 552.7(1), .9(1). Both of these residency requirements are jurisdictional and must be met on the date of filing. If the requirements are not met, the action may be dismissed or the judgment set aside. *Lewis v Lewis*, 153 Mich App 164, 395 NW2d 44 (1986) (circuit court lacks jurisdiction in separate maintenance action if neither party met residency requirement before filing). See chapter 1 for a complete discussion of the procedural requirements for a divorce.

When the matter is concluded, the parties are still technically married, but the marital property may be divided, MCL 552.19, and the court may order support for a spouse who requires it, MCL 552.23(1).

A separate maintenance action will result in a divorce judgment if the defendant files a counterclaim for divorce and the statutory grounds are established.

MCL 552.7(4)(b). If a party wishes to divorce after a final judgment has been issued in a separate maintenance action, the party should file an entirely new cause of action. Although many issues will already have been decided and are enforceable under the judgment, any remaining issues like dissolution of the marriage should occur under the new action.

In *Kresnak v Kresnak*, 190 Mich App 643, 476 NW2d 650 (1991), even though the husband died before the entry of the judgment, a property settlement agreement in a separate maintenance action was enforced where the parties had placed it on the record and it had been generally approved by the court. The general rule that the divorce court lacks jurisdiction to render a divorce after the death of one of the parties did not apply. The issue was not the severing of the relationship, but the enforcement of a contractually binding agreement. *Id.* at 649–650.

MCL 700.2801(1) of the Estates and Protected Individuals Code excludes an individual from surviving spouse status when that individual is divorced from the decedent or the marriage has been annulled. A decree of separation does not terminate the status of husband and wife and is not a divorce for purposes of MCL 700.2801(1). However, MCL 700.2801(2)(c) provides that a surviving spouse does not include "[a]n individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights." Although a judgment of separate maintenance does not terminate the status of husband and wife, it is a court proceeding "purporting to terminate all marital property rights." But see §2.4 (discussing same-sex marriage after *Obergefell v Hodges*, 576 US 644 (2015)).

Unless it provides to the contrary, a waiver of "all rights" in the property or estate of a spouse or a complete property settlement entered into after or in anticipation of separate maintenance is a waiver of all rights to homestead allowance, election, exempt property, and family allowance by the spouse in the property of the other and is an irrevocable renunciation by the spouse of all benefits that would otherwise pass to the spouse from the other spouse by intestate succession or by virtue of a will executed before the waiver or property settlement. MCL 700.2205.

3
Child Custody

Summary of Child Custody

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Is there an established custodial environment? §§3.2–3.5

The court must make findings on this issue before deciding custody.

Statutory standard.

There is an established custodial environment if over an appreciable period of time, the child naturally looks to the custodian in that environment. The court must also consider

- the age of the child,
- the physical environment, and
- the inclination of the custodian and the child as to the permanency of the relationship.

The court makes a factual determination regarding whether there is an established custodial environment; the court is not bound by the parties' stipulation.

Determine burden of proof.

- If there is an established custodial environment, a change of custody may be made only on *clear and convincing evidence* that the change is in the best interests of the child.
- If no established custodial environment exists, custody may be changed on showing by a *preponderance of the evidence* that the custodial arrangement is in the best interests of the child.

Effect of certain facts.

- Prior custody orders—mere existence does not create an established custodial environment.
- Custodial parent voluntarily relinquishes custody—all factors must be examined to determine if a new custodial environment is created. Public policy encourages a parent with difficulties to temporarily relinquish custody to resolve any problems.
- In prejudgment cases where the parties are residing together, the judge makes the determination on a preponderance of the evidence.

A biological parent convicted of criminal sexual conduct or assault with intent to commit criminal sexual conduct or found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual penetration. §3.6.

A parent may *not* be awarded custody.

- Custody of a child conceived as a result of criminal sexual conduct may not be awarded to the convicted biological parent (except if the criminal sexual conduct

was based solely on the victim's being between 13 and 16 years old), unless, after conviction, the biological parents cohabit and establish a mutual custodial environment for the child.

- When the victim is the parent's child or a sibling of that child, custody may not be awarded unless the child's other parent and the child or sibling (of age to express an opinion) consent to custody.

Best interests of the child. §§3.6–3.19.

The best interests of the child is the standard used in custody disputes between parents, agencies, and third parties.

The court must consider each factor and make findings on the record.

The factors need not have equal weight; the court determines the weight of each factor.

Factors.

- **(a) The love, affection, and other emotional ties existing between the parties involved and the child.** This factor focuses on the emotional bond that already exists between the parent and the child.
- **(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.** This factor tries to project the parent's ability to foster an emotional bond in the future and the parent's impact on such matters as education, guidance, and religious training.
- **(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.**
- **(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.**
- **(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.** This factor focuses solely on the permanence of the family environment, not the acceptability of the home or child care arrangements.
- **(f) The moral fitness of the parties involved.** This factor evaluates the parties' moral fitness only as it relates to how they will function as a parent and not as to who is the morally superior adult.
- **(g) The mental and physical health of the parties involved.** This factor should not impair or defeat the public policy goal of integrating disabled persons into the mainstream of society.
- **(h) The home, school, and community record of the child.**
- **(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.** The court must take the preference of the child into account if it decides that the child is old enough to express a preference. The court is not required to disclose the child's preference. The child's pref-

erence does not automatically outweigh other factors; it is only one element used to make the determination.

- **(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.**
- **(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.**
- **(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.** The court may not consider the race of a parent's spouse in considering whether to change custody.

Sole or joint custody. §§3.21–3.22.

Joint custody means that the parents have joint *physical* custody (the child resides for alternate periods with each parent) and/or that the parents have joint *legal* custody (the parents share decision-making authority on important decisions affecting the child's welfare).

In a joint custody arrangement, the order determining custody or parenting time must contain a provision stating the parents' agreement on how they will handle a change in either of the child's legal residences that is more than 100 miles from the child's residence at the time the action was filed. If the parents do not agree on such a provision, the order must state: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the 'Child Custody Act of 1970,' 1970 PA 91, MCL 722.31."

Awarding joint custody.

- In custody disputes, parents must be advised of the availability of joint custody.
- If the parents agree on joint custody, the court must order it unless it finds on the record by clear and convincing evidence that joint custody is not in the best interests of the child.
- At the request of either party, the court must consider joint custody and must state on the record the reasons for granting or denying the request.
- The court determines whether joint custody would be in the best interests of the child by considering the statutory best interests factors and whether the parents will be able to cooperate and generally agree on important decisions concerning the child's welfare.

Modification of the custody order. §§3.24–3.25.

Child custody orders are subject to modification at any time in the best interests of the child.

Issues the court must consider before modifying a custody order:

- Has the petitioner shown "proper cause" or a "change of circumstances"?
- Is there an established custodial environment? If so, the standard is clear and convincing evidence that the change is in the best interests of the child.
- Is the modification in the best interests of the child (same standard as in initial determination)? In modifying a custody order, the court, on the record, must make specific findings and conclusions on the best interests factors.

Change of legal residence. §§3.26–3.29.

No court approval is necessary to make an intrastate change of residence within 100 miles.

For requests to move interstate or more than 100 miles away, the court must determine

- whether the move has the capacity to improve the quality of life of both the relocating parent and the child;
- the degree to which each parent has complied with the parenting time order, and whether the move is inspired by the relocating parent's desire to frustrate parenting time;
- the extent to which the parent opposing the move is motivated by a desire to secure financial advantage with respect to the support obligation;
- the degree to which the court is satisfied there will be a realistic opportunity for parenting time and the likelihood that each parent will comply with any modified parenting time order; and
- in cases of intrastate relocation, the presence of domestic violence.

The child should be the primary focus in the court's deliberations.

Third-person custody. §§3.30–3.38.

A third person is anyone other than the child's biological or adoptive parents.

Parental presumption.

In a custody dispute between a parent and a third party with whom there is an established custodial environment, Michigan's statutory parental presumption, MCL 722.25(1), must be given priority over the established custodial environment presumption, MCL 722.27(1)(c), and the third person must prove by clear and convincing evidence that all relevant factors, taken together, demonstrate that the child's best interests require placement with the third person. *Heltzel v Heltzel*, 248 Mich App 1, 638 NW2d 123 (2001). The parental presumption applies and prevails regardless of whether the parent is a fit parent. The natural parent's fitness is an intrinsic component of the trial court's evaluation of the best interests factors. *Hunter v Hunter*, 484 Mich 247, 771 NW2d 694 (2009).

Standing of third persons.

Who may bring an original action for custody?

- Prospective adoptive parents (the child was placed for adoption with the third person under the adoption laws of Michigan or another state and the placement order is still in effect, and since placement, the child has resided with the third person for at least six months)—yes
- Unmarried parents and related third parties (the child's biological parents were never married; the child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order; and the third person is related to the child within the fifth degree by marriage, blood, or adoption)—yes
- Guardians: full guardians—yes; temporary guardians—yes; limited guardians—yes, unless the parents have substantially complied with the limited guardianship placement plan
- Domestic partners—no
- Foster parents—no
- Putative father—only if he has established paternity (acknowledgment of paternity is sufficient)

Interstate custody disputes. §§3.41–3.48.

Interstate custody disputes are governed by the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA).

There are three steps for determining whether to exercise jurisdiction under the UCCJEA:

1. The Michigan court ascertains whether it has jurisdiction over the case.
2. It determines if another state also has jurisdiction.
3. If more than one state has jurisdiction, the court must determine which state should decide the custody dispute.

Enforcement.

If another state's custody order substantially conforms to the UCCJEA, it must be recognized and enforced in Michigan.

Modification.

A Michigan court will not modify another state's custody decree unless the Michigan court has jurisdiction to make an initial custody determination and either (1) the court of the other state determines that it no longer has exclusive, continuing jurisdiction or that a Michigan court would be a more convenient forum or (2) neither the child, the child's parent, nor a person acting as a parent resides in the other state.

Determining jurisdiction. §3.45.

A Michigan court has jurisdiction over a custody dispute if one of the following jurisdictional bases is met:

1. **Home state jurisdiction.** Either the child and at least one parent have resided in Michigan for at least six consecutive months (or since birth if the child is less

than six months old) or the child is absent from Michigan, but Michigan was the child's home state within six months before the proceedings began, and a parent continues to live in Michigan.

2. **Significant connection jurisdiction.** No other state has home state jurisdiction, the child and at least one parent have a significant connection with Michigan and there is substantial evidence available in Michigan concerning the child's care, protection, training, and personal relationships. If a court exerts jurisdiction under this basis without deferring to the child's home state, its order will not be afforded full faith and credit.
3. **Temporary emergency jurisdiction.** The child is present in Michigan and there is an emergency requiring the court to act. There is an emergency if the child has been abandoned or it is necessary to protect a child because the child, or a sibling or parent of the child, "is subjected to or threatened with mistreatment or abuse."
4. **Last resort jurisdiction.** No other state has jurisdiction or another state with jurisdiction has declined to exercise it.

Deferring jurisdiction. §3.46.

Michigan will not exercise jurisdiction if a custody proceeding has been commenced in another state when the petition is filed.

If the other state stays proceedings because Michigan is a more appropriate forum or for other reasons, or if an emergency requires temporary action, Michigan may exercise jurisdiction.

In an emergency, the court must communicate with the other state's court with pending jurisdiction to avoid a problem with the prohibition on exercising jurisdiction when there is a pending proceeding.

Declining jurisdiction. §3.47.

A court may decline to exercise jurisdiction even after determining it has jurisdiction.

Considerations include

- whether domestic violence has occurred,
- the length of time the child has resided outside Michigan,
- the distance between the Michigan court and the court in the state that would assume jurisdiction,
- the parties' relative financial circumstances, and
- the familiarity of the court of each state with the facts and issues of the pending litigation.

The Uniform Child Abduction Prevention Act (UCAPA). §3.49.

The UCAPA allows courts to order abduction prevention measures in a custody proceeding sua sponte if the evidence establishes a credible risk of child abduction. A party or other individual entitled to seek a custody determination for the child may also file a verified petition seeking prevention measures. If the court finds a credible

risk of child abduction, it must enter an abduction prevention order that is reasonably calculated to prevent the child's abduction. The order may include

- travel restrictions and documentation requirements,
- restrictions on the child's passport,
- prerequisites to exercising custody or visitation,
- a requirement that the respondent obtain a custody order with identical terms from the relevant foreign jurisdiction,
- limited or supervised visitation,
- a requirement that the respondent post a bond or give security as a financial deterrent to abduction,
- education on the potential harm to the child from abduction, and
- other measures designed to prevent the child's imminent abduction.

International custody disputes. §3.50.

The general policies of the UCCJEA extend to international custody disputes. Foreign custody judgments rendered by legal institutions and appropriate authorities are recognized and enforced in Michigan under the same policies applied to other states.

The Hague Convention. §3.51

The Hague Convention applies to disputes between parties from signatory nations in cases where a child is wrongfully removed or retained by the noncustodial parent as well as in cases where the custodial parent refuses to grant visitation or access rights.

A civil action is filed where the child is located at the time of filing.

State and federal courts have concurrent jurisdiction.

A petitioner seeking the return of a child has the burden of establishing by a preponderance of the evidence that the child was wrongfully removed or retained or that visitation rights are being wrongfully denied. The standard is not the best interests of the child.

A finding of wrongful retention requires the return of the child to the other country, where any remaining custody issue is decided.

There are several exceptions to the mandatory return of the child that the respondent can establish, see §3.51.

I. Authority to Decide Child Custody Disputes

§3.1 The Michigan Child Custody Act of 1970, MCL 722.21 et seq., establishes the criteria and procedures for resolving child custody disputes. The family division of the circuit court has exclusive jurisdiction over this act. MCL 600.1021(1)(g).

Under the Child Custody Act, the court may award custody to one or more of the parties involved or to third persons and provide for the child's support, provide for reasonable parenting or grandparenting time, use a guardian ad litem or the community resources in the behavioral sciences and other professions in the investigation and study of the custody dispute and consider their recommendations for the resolution of the dispute, and take any other action necessary. MCL 722.27(1). The court may also modify or amend its judgments or orders until the child attains the age of 18 (support orders may be modified until the child is 19 ½ if specific statutory requirements are met and the child is attending high school full time). *Id.*

Per the Child Custody Act, a *parent* is defined as "the natural or adoptive parent of a child." MCL 722.22(i). MCL 722.22(i) "applies equally to same-sex and opposite-sex married couples." *Stankevich v Milliron*, 313 Mich App 233, n2, 882 NW2d 194 (2015). Because MCL 722.22(i) applies equally to same-sex and opposite-sex couples, the statute is constitutional. *Sheardown v Guastella*, 324 Mich App 251, 258, 920 NW2d 172 (2018) (trial court dismissed plaintiff's custody complaint holding that she lacked standing as nonbiological mother because she was not "natural" or "adoptive" parent under MCL 722.22(i), and "under an equal-protection analysis, plaintiff is simply not subject to dissimilar treatment under the statute compared to a heterosexual unmarried individual").

In an action for divorce, separate maintenance, or annulment, the family division of the circuit court can enter ex parte or temporary orders for the care, custody, and maintenance of minor children during the pendency of the action, MCL 552.15, as well as in its final order or judgment, MCL 552.16. After a final order or judgment is entered, either party may move for a modification of the custody award. MCL 552.17. A circuit court has continued jurisdiction to consider motions involving a child custody dispute while the underlying judgment is pending on appeal. MCL 722.27(1)(c); MCR 7.208(A)(4); *Safdar v Aziz*, 501 Mich 213, 912 NW2d 511 (2018), *aff'd on other grounds*, 327 Mich App 252, 933 NW2d 708 (2019) (finding change of domicile falls within child custody dispute under MCL 722.27(1)(c)). MCL 722.27(1)(c) is an exception to MCR 7.208(A), which precludes modification of orders pending appeals. *Safdar.*

A circuit judge presiding over a juvenile matter may determine custody pursuant to the Child Custody Act, ancillary to making determinations under the juvenile code, so long as the judge abides by the Child Custody Act's procedural and substantive requirements and the judge has not yet dismissed its jurisdiction over the minor child under the juvenile code. *Department of Human Servs v Johnson (In re AP)*, 283 Mich App 574, 770 NW2d 403 (2009). *See also* MCR 3.205.

If a foreign language interpreter is "necessary for a person to meaningfully participate in the case or court proceeding," the court will appoint an interpreter

(either in response to a request or sua sponte) for a party or a testifying witness. MCR 1.111(B)(1). The court may appoint an interpreter for a person other than a party or a witness who has a "substantial interest" in the proceeding. MCR 1.111(B)(2).

The federal Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., establishes minimum standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes. The Michigan Indian Family Preservation Act, MCL 712B.1 et seq., is the state's version of ICWA. Neither act applies to custody disputes between divorcing parents. 25 USC 1903(1); MCL 712B.3(b)(vi); MCR 3.002(2).

A court may appoint a private psychologist to perform an evaluation of a familial unit and provide a custody recommendation to the court. The psychologist would not be entitled to immunity under the governmental immunity statute, MCL 691.1407. However, the doctrine of quasi-judicial immunity extends to court-appointed psychologists ordered to conduct evaluations and make recommendations to the court. *Diehl v Danuloff*, 242 Mich App 120, 618 NW2d 83 (2000).

Incarcerated defendants. In a domestic relations action involving minor children, where one of the parties is incarcerated, the party seeking an order regarding a minor child must

- contact the Department of Corrections to confirm the incarcerated party's prison number and location;
- serve the incarcerated person, and file proof of service with the court; and
- state in the petition or motion that a party is incarcerated and provide the party's prison number and location.

MCR 2.004(B). The caption of the petition or motion must state that a telephonic or video hearing is required by MCR 2.004. The court must issue an order requesting that the department or the facility where the party is located allow that party to participate with the court or its designee in a hearing or conference, including a Friend of the Court adjudicative hearing or meeting, by way of a noncollect and unmonitored telephone call or video conference. The order must include the date and time for the hearing, include the prisoner's name and prison identification number, and be served by the court on the parties and the warden or supervisor of the facility where the incarcerated party resides. MCR 2.004(C). Where the incarcerated respondent in a child protective proceeding was not given the opportunity to be available telephonically at the adjudication, the dispositional hearing, or the first three dispositional review hearings, the prosecutor, the court, and respondent's counsel failed to adhere to the procedures set out in MCR 2.004(B) and (C); therefore, the court of appeals held that the trial court erred in terminating respondent's parental rights. *In re DMK*, 289 Mich App 246, 796 NW2d 129 (2010). "[E]xcluding a[n incarcerated party from the opportunity to participate] for a prolonged period of the proceedings can[not] be considered harmless error." *Id.* at 255.

A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings. MCR 2.004(F). This provision does not apply if the incarcerated party actually participates in a telephone call or video conference. *Id.* The opportunity to participate in the proceedings must be offered for each proceeding, and "participation through 'a telephone call' during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the [incarcerated party] was not offered the opportunity to participate." *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 154, 782 NW2d 747 (2010).

The court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts. MCR 2.004(G).

The protections of MCR 2.004 apply only to parents incarcerated by the Michigan Department of Corrections. *Family Indep Agency v Davis (In re BAD)*, 264 Mich App 66, 690 NW2d 287 (2004). MCR 2.004(G) does not apply if the parent is in county jail. Parents should still get notice of the court hearing while in jail and can write to the court to ask to participate by phone. SBM Justice Initiatives, *Quick Guide, Got a Record? Know Your Rights: Children, Child Support, and Parental Rights*. However, in practice, some courts apply this rule when the parent is lodged in the county jail, which is not within the jurisdiction of the Michigan Department of Corrections. A parent incarcerated in another state cannot cite this court rule in a domestic relations matter.

Parent in active duty. Generally, the court must not enter an order that changes the child's placement that existed on the date a parent was called to deployment. However, the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interests of the child. The parent can request a stay or an extension of the stay at any time before the final judgment by filing a signed, written statement certified to be true under penalty of perjury. MCL 722.27(3); *see also* MCL 722.22(e). See §3.24.

II. Is There an Established Custodial Environment?

A. Necessity of Findings; Definition

§3.2 A court cannot enter a new custody order or amend an existing order without first determining if there is an established custodial environment. MCL 722.27(1)(c). Whether an established custodial environment exists is a preliminary and essential determination. *Ireland v Smith*, 214 Mich App 235, 542 NW2d 344 (1995), *aff'd*, 451 Mich 457, 547 NW2d 686 (1996). The trial court must make clear findings on this issue before deciding custody. *Stringer v Vincent*, 161 Mich App 429, 411 NW2d 474 (1987). Before changing a child's established custodial environment, the trial court must hold an evidentiary hearing. *O'Brien v D'Annunzio*, 507 Mich 976, 959 NW2d 713 (2021) (trial court's failure to hold evidentiary hearing before changing children's established custodial environment was not harmless error). Note that the court must determine whether there was an established custodial environment with either or both parents before making its initial custody determination. *Kessler v Kessler*, 295 Mich App 54, 811 NW2d 39

(2011). The court can also find that neither parent had an established custodial environment with the minor child. *Bowers v Bowers*, 198 Mich App 320, 327, 497 NW2d 602 (1993). This includes a request for sole custody when the initial order was for joint custody. *See Duperon v Duperon*, 175 Mich App 77, 437 NW2d 318 (1989); *Nielsen v Nielsen*, 163 Mich App 430, 415 NW2d 6 (1987).

Whether an established custodial environment exists fixes the burden of proof on the parent wanting to establish or change the type of custody granted to each parent. If an established custodial environment exists, a change may be made only on clear and convincing evidence that the change is in the best interests of the child. MCL 722.27; *Duperon*; *Arndt v Kasem*, 156 Mich App 706, 402 NW2d 77 (1986); *see also Kuebler v Kuebler*, No 362488, ___ Mich App ___, ___ NW3d ___ (May 11, 2023) (court of appeals held that trial court committed clear legal error by failing to apply clear and convincing evidence standard to mother's request to change legal custody and parenting time); *LaFleche v Ybarra*, 242 Mich App 692, 619 NW2d 738 (2000) (when custody dispute is between parents, change may be made only on clear and convincing evidence even if custodial environment actually exists with child's grandparents).

If no established custodial environment exists, custody may be decided by showing by a preponderance of the evidence that the proposed custodial arrangement would be in the best interests of the child, using the best interests factors identified in MCL 722.23. *See Pierron v Pierron*, 486 Mich 81, 782 NW2d 480 (2010); *Hall v Hall*, 156 Mich App 286, 401 NW2d 353 (1986).

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

MCL 722.27(1)(c).

The existence of an established custodial environment depends on a custodial relationship of a significant duration in which the child is provided the parental care, discipline, love, guidance, and attention appropriate to the child's age and individual needs. It is an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 309 NW2d 532 (1981).

Whether an established custodial environment exists is entirely a factual determination. *Ireland*; *Blaskowski v Blaskowski*, 115 Mich App 1, 320 NW2d 268 (1982). The court is not concerned with why the custodial environment exists, but only that it does. *Treutle v Treutle*, 197 Mich App 690, 495 NW2d 836 (1992); *Schwiesow v Schwiesow*, 159 Mich App 548, 406 NW2d 878 (1987). The trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Ireland*; *see also Thames v Thames*, 191 Mich App 299, 477 NW2d 496 (1991).

An established custodial environment may exist with both parents even if one parent provides the children's primary residence and the majority of financial support. *Jack v Jack*, 239 Mich App 668, 610 NW2d 231 (2000). In addition, the fact that one parent works outside the home is insufficient on its own to show that there is an established custodial environment solely with the stay-at-home parent. *Bofysil v Bofysil*, 332 Mich App 232, 956 NW2d 544 (2020).

Generally, the parties' stipulations as to facts are binding on the court. However, the existence of an established custodial environment is a question too important to be left to the parties and is a question of fact for the trial judge to resolve based on the statutory factors. *Wilson v Gauck*, 167 Mich App 90, 421 NW2d 582 (1988).

Where there is joint custody, a court can find an established custodial environment in both homes based on the stability and continuity of the living arrangements. *Duperon* (initially, children stayed in marital home and parents took weekly turns living with children); *Nielsen.* In determining whether a proposed change would alter the child's established custodial environment, the court should consider the time the child will spend with each parent as a result of the proposed change. *See Pierron* (finding that proposed change of school to one that is 60 miles from children's present school would, under the facts in that case, require only minor adjustments to plaintiff's parenting time with children and, accordingly, did not result in change in established custodial environment).

B. Facts Considered

1. Prior Custody Orders

§3.3 The mere existence of a temporary custody order does not create an established custodial environment. The court must examine the underlying facts and apply the statutory definition. *See Jack v Jack*, 239 Mich App 668, 610 NW2d 231 (2000); *Baker v Baker*, 411 Mich 567, 309 NW2d 532 (1981) (two temporary custody orders did not by themselves establish custodial environment). Even if a custody order is labeled permanent, the trial court must still determine if there is an established custodial environment by looking to the actual circumstances of each case. *Wealton v Wealton*, 120 Mich App 406, 327 NW2d 493 (1982).

While the parties may stipulate to a temporary custody arrangement during the pendency of a divorce and the court may enter a temporary order pursuant to that stipulation, the resulting order is not a "previous" judgment or order for the purposes of MCL 722.27(1)(c). While MCL 722.27(1)(c) provides that a previous judgment or order may not be modified unless there is a showing of proper cause and a change of circumstances, a temporary order entered without an evidentiary hearing and based solely on the stipulation of the parties is not a "previous" judgment or order. Modification of such an order is governed by that portion of MCL 722.27(1)(c) governing a new order. To create a new order and modify an established custodial environment, the movant is not required to show proper cause or a change of circumstances but must present clear and convincing evidence

that it is in the best interests of the child to modify the established custodial environment. *Thompson v Thompson*, 261 Mich App 353, 683 NW2d 250 (2004).

The facts regarding prior custody orders were examined in the following circumstances to determine whether there was an established custodial environment:

- Repeated changes in physical custody and the uncertainty of the situation because of the upcoming custody trial precluded the establishment of a custodial environment. *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993).
- Temporary custody of the children for approximately 15 months did not establish a custodial environment. *Moser v Moser*, 184 Mich App 111, 457 NW2d 70 (1990); *see also Meyer v Meyer*, 153 Mich App 419, 395 NW2d 65 (1986) (two temporary orders over six months were not "appreciable" period of time to establish custodial environment); *Breas v Breas*, 149 Mich App 103, 385 NW2d 743 (1986) (that custody lasted nine months did not give rise to established custodial environment given instability of home and that child looked to other parent for guidance and discipline); *but see De Vries v De Vries*, 163 Mich App 266, 413 NW2d 764 (1987) (established custodial environment was established during temporary order that lasted ten months).
- An established custodial environment was not found where, although temporary custody was given to the mother, the father actively pursued a relationship with the children. *Curless v Curless*, 137 Mich App 673, 357 NW2d 921 (1984); *see also Wealton v Wealton*, 120 Mich App 406, 327 NW2d 493 (1982) (child had spent more of past year with noncustodial parent than with custodial parent).
- That one parent had been given temporary custody by an invalid order should not have been the basis for establishing a custodial environment and modifying custody. *Pluta v Pluta*, 165 Mich App 55, 418 NW2d 400 (1987).
- The father consented to the child primarily living with the mother for safety and health reasons during the COVID-19 pandemic. The trial court erred by failing to make findings regarding the child's established custodial environment before ordering a change in the parenting time that so drastically altered the father's parenting time. Although the father previously had equal parenting time with the mother, the father was effectively relegated to the role of a "weekend parent." The father's previous established custodial environment may not be deemed relinquished and the established custodial environment remains established with both parents as a matter of law. *Stoudemire v Thomas*, 344 Mich App 34, 999 NW2d 43 (2022).

2. The Stability of the Relationship

§3.4 The facts regarding the stability of the parent-child relationship were examined in the following circumstances to determine whether there was an established custodial environment:

- No established custodial environment was created with the mother where the father maintained frequent parenting time with the children and was the primary caretaker. *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492, 417 NW2d 542 (1987).
- The mother did not establish a custodial environment where the conduct and attitude of the parents and the children did not show a desire for the arrangement to continue. The children did not look solely to the mother for guidance, discipline, the necessities of life, and parental comfort. *Vander Molen v Vander Molen*, 164 Mich App 448, 418 NW2d 108 (1987).
- Repeated changes in the children's physical custody and uncertainty because of the custody trial destroyed an established custodial environment. *Hayes v Hayes*, 209 Mich App 385, 532 NW2d 190 (1995).
- Where the trial court found that the children looked to both their mother and father, with the same frequency, for guidance, discipline, and the necessities of life, it was an abuse of discretion not to find an established custodial environment with both parents. *Foskett v Foskett*, 247 Mich App 1, 634 NW2d 363 (2001).

3. Voluntarily Relinquished Custody

§3.5 Even if a custodial parent temporarily relinquishes custody, all the circumstances must be reviewed in determining if a new custodial relationship has been established. Public policy encourages parents experiencing difficulties to transfer custody temporarily while they resolve their problems. However, a mother who gave temporary physical custody to the paternal grandparents during her divorce was later required to show by a preponderance of the evidence that returning custody to her was in the child's best interests. *Straub v Straub*, 209 Mich App 77, 530 NW2d 125 (1995) (best interests factors were equal between parties, but fact that all parties had agreed that voluntary relinquishment was temporary tipped scales in favor of mother).

In *Theroux v Doerr*, 137 Mich App 147, 357 NW2d 327 (1984), no custodial environment was created when the custodial parent agreed to place the children with the father for nine months after he objected to her taking the children out of state for nine months. It is in the children's best interests to encourage a parent to relinquish custody temporarily when feeling unable to provide for the children.

In contrast, a mother's established custodial environment was successfully challenged in *Hall v Hall*, 156 Mich App 286, 401 NW2d 353 (1986), where the mother voluntarily relinquished physical custody of the child to her parents. The father sought and was awarded temporary custody, and petitioned for permanent custody. The court found that there was no longer an established custodial environment with the mother, where the father had provided a stable environment for 17 months.

In *Sedlar v Sedlar*, 165 Mich App 71, 419 NW2d 18 (1987), a mother who relinquished custody was unsuccessful in challenging the father's custodial envi-

ronment. It was not persuasive that the mother thought the order was temporary, especially when that was not stated in the custody order.

Permanent custody was granted to the father in *Moser v Moser*, 130 Mich App 97, 343 NW2d 246 (1983), even though the mother claimed they had a verbal agreement that the father would return custody to her once she was financially ready. The court of appeals stated that it did not matter how the father had established the custodial environment, as long as he had.

III. The "Best Interests of the Child" Standard

A. In General

§3.6 Once the trial court makes findings on the record on whether an established custodial environment exists and determines the appropriate burden of proof, it must then apply that burden to the best interests factors. *Underwood v Underwood*, 163 Mich App 383, 414 NW2d 171 (1987).

The best interests of the child are the controlling consideration in custody disputes between parents, between agencies, and between third persons. MCL 722.27a. The best interests factors are set forth at MCL 722.23 (see §3.8). Before granting primary physical custody to a party in a custody determination, the trial court must consider each of the statutory factors and make specific findings on the record. *Overall v Overall*, 203 Mich App 450, 512 NW2d 851 (1994); *Schubring v Schubring*, 190 Mich App 468, 476 NW2d 434 (1991); *Meyer v Meyer*, 153 Mich App 419, 395 NW2d 65 (1986). However, this articulation requirement does not require the court to comment on every matter in evidence or every proposition argued. *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994); *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452, 705 NW2d 144 (2005). The trial court's failure to comment cannot be construed to mean that it did not consider the evidence. *Sinicropi v Mazurek*, 273 Mich App 149, 729 NW2d 256 (2006).

The Child Custody Act precludes an award of custody where the parent has been convicted of criminal sexual conduct in the following circumstances:

- A biological parent convicted of criminal sexual conduct or assault with intent to commit criminal sexual conduct or found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration may not receive custody of the child conceived as a result of that crime (unless the conviction was based solely on the victim's being between 13 and 16 years old). However, this does not apply if, after the conviction, the biological parents cohabit and establish a mutual custodial environment for the child.
- A parent convicted of criminal sexual conduct or assault with intent to commit criminal sexual conduct or found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration with their own child may not receive custody of that child or a sibling of that child, unless both the child's other parent and the child or sibling (if of sufficient age to express an opinion) consent to custody.

MCL 722.25(2)–(3), (6). This does not relieve an offending parent of any support or maintenance obligations to the child. MCL 722.25(4).

B. Burden of Proof

§3.7 The burden of proof is established by the court's initial finding on whether an established custodial environment exists.

If an established custodial environment exists, a change may be made only on clear and convincing evidence that the change is in the best interests of the child. MCL 722.27; *Duperon v Duperon*, 175 Mich App 77, 437 NW2d 318 (1989); *Arndt v Kasem*, 156 Mich App 706, 402 NW2d 77 (1986).

A party challenging an established custodial environment has a heavy burden, "intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child … except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 576–577, 309 NW2d 532 (1981). A finding of equality or near equality on the best interests factors will not necessarily prevent a party from satisfying this burden on a motion to change custody. *Heid v Aaasulewski*, 209 Mich App 587, 532 NW2d 205 (1995).

To meet the burden, it was not enough to show that the child preferred the father, that the father had a better standard of living, and that he was more conscientious than the mother, who tended to be tardy. *Carson v Carson*, 156 Mich App 291, 401 NW2d 632 (1986). More than a marginal improvement in the child's life is required to justify a change under this standard. *Harper v Harper*, 199 Mich App 409, 502 NW2d 731 (1993).

If no established custodial environment exists, custody may be modified by showing by a preponderance of the evidence that a change would be in the best interests of the child, using the best interests factors identified in MCL 722.23. *Pierron v Pierron*, 486 Mich 81, 782 NW2d 480 (2010); *Hall v Hall*, 156 Mich App 286, 401 NW2d 353 (1986).

C. The Statutory Factors

§3.8 No one factor indicates how custody should be awarded. The *best interests of the child* means the sum total of the following 12 factors to be considered, evaluated, and determined by the court:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

MCL 722.23.

D. Evaluating the Best Interests Factors

1. In General

§3.9 Evaluation of the 12 best interests factors depends on the facts and circumstances of each case. Custody is not awarded on the basis of which parent "scores" the most points. *Lustig v Lustig*, 99 Mich App 716, 299 NW2d 375 (1980). If each parent "wins" on six of the factors, it does not mean that the party with the burden of proof cannot be awarded custody. *Heid v Aasulewski*, 209 Mich App 587, 532 NW2d 205 (1995).

Factors need not be given equal weight. The weight to be given any factor is ultimately left to the court's discretion. *Riemer v Johnson*, 311 Mich App 632, 876 NW2d 279 (2015) (not error for court to order joint physical custody when more best interests factors favored father because court could value factors differently); *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998) (that father's vindictiveness would probably act to destroy parent-child relationship with mother did not outweigh other factors so as to award custody to mother).

Also, several of the factors have some natural overlap, so that the same facts may be relevant to more than one factor. For example, evidence going to show one parent's negative influence on the emotional ties of the other parent and the child (factor "a") may also be relevant to evaluating the ability of that parent to facilitate a parent-child relationship between the child and the other parent (factor "j"). *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 581 NW2d 11 (1998); *see also Carson v Carson*, 156 Mich App 291, 401 NW2d 632 (1986) (overlap of factor "a" (emotional ties) and its impact on factor "i" (reasonable preference of child)).

The court must consider all of the best interests factors even if the issue involved does not result in a change in the established custodial environment. *Pierron v Pierron*, 486 Mich 81, 782 NW2d 480 (2010). However, if the court determines that a factor is not relevant to a decision that will not affect the established custodial environment, the court need not make substantive factual findings concerning the factor beyond this determination, but it does need to state that conclusion on the record. *Id.*

Sections 3.10–3.19 discuss additional issues for selected factors. Form 3.1, a decision tree developed by the Hon. John N. Kirkendall, provides one approach to evaluating the best interests factors.

2. The Difference Between Factor "a" (Emotional Ties) and Factor "b" (Capacity to Give the Child Love, Affection, and Guidance)

§3.10 Factor "a" focuses on the emotional bond that already exists between the parent and the child. That a parent would like to have a better relationship is not relevant. *See Glover v McRipley*, 159 Mich App 130, 406 NW2d 246 (1987). Factor "b" is different because it both tries to project the ability of a parent to foster an emotional bond in the future and to evaluate the parent's impact on other issues such as guidance, education, and religious training, if any. *See Diez v Davey*, 307 Mich App 366, 861 NW2d 323 (2014) (factor "b" favored stay-at-home mother who was responsible for children's daily care, medical decisions, discipline, and school-related matters); *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998) (continued involvement in religious services); *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 581 NW2d 11 (1998) (consideration of discipline techniques); *Fletcher v Fletcher*, 200 Mich App 505, 504 NW2d 684 (1993) (involvement in academic affairs, extracurricular activities, and which parent likely to answer questions on sexual maturation), *aff'd in part and rev'd in part on other grounds,* 447 Mich 871, 526 NW2d 889 (1994); *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993) (father's drinking problems, verbally abusive displays, and questionable living arrangements affected his ability to provide guidance). *But see Bofysil v Bofysil*, 332 Mich App 232, 956 NW2d 544 (2020) (trial court erred when it found that factors "a" and "b" favored stay-at-home mother because it failed to credit working parent for ability and willingness to earn income and provide health insurance for minor child, and evidence showed that working parent was regularly and routinely involved in minor child's daily care despite working outside home).

In *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 705 NW2d 144 (2005), plaintiff's negative results on an objective psychological exam, Minnesota Multiphasic Personality Inventory (MMPI), did not tip factor "a" in defendant's favor because the examiner testified that plaintiff presented himself quite differently during interviews, defendant's expert testified that the examiner acted within professional standards, and the record evidence revealed that the child loved and was bonded with both parents. Factor "b" slightly favored plaintiff where, although each party equally assisted the child with his schoolwork, hobbies, and religious education, plaintiff was the "rule giver" and was better able to

provide guidance, and defendant often placed her need for the child's affection above his need for discipline.

3. Factor "c": Providing for the Child's Needs

§3.11 Factor "c" can include the disposition to provide for the child's material needs as shown by a parent's having little inclination to pursue a job with more than a minimal income, *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998), or by a parent's failure to inform the other parent that medical insurance coverage is now available, *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993). It is proper to rely on the facts established at the custody hearing rather than speculating on a party's future employment. *Hilliard v Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998). In *Barringer v Barringer*, 191 Mich App 639, 479 NW2d 3 (1991), the trial court did not improperly emphasize defendant's higher earning capacity in finding that this factor favored defendant over plaintiff, who was a homemaker.

"Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity* and *disposition* to provide for the children's material and medical needs. Thus, this factor looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income." *Berger v Berger*, 277 Mich App 700, 712, 747 NW2d 336 (2008).

In *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 705 NW2d 144 (2005), the evidence showed that both parties were willing and able to provide for the child. However, the trial court weighed factor "c" in favor of plaintiff based on defendant's evasive testimony regarding her reasons for discontinuing the child's therapy sessions.

4. Factors "d" and "e": Stability and Permanence

§3.12 Factor "d" is the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. Factor "e" is the permanence, as a family unit, of the existing or proposed custodial home. These factors focus on stability and permanence, not the acceptability of the home or child care arrangements. *See Ireland v Smith*, 451 Mich 457, 547 NW2d 686 (1996) (father's proposal to have his mother provide child care in grandparents' home, where father was living, was not more acceptable than child attending university-provided day care while mother was in college); *Kubicki v Sharpe*, 306 Mich App 525, 858 NW2d 57 (2014) (father's proposal to separate child from his siblings was not less disruptive than moving child to Kansas); *Mogle v Scriver*, 241 Mich App 192, 614 NW2d 696 (2000) (mother's marriage was additional factor that weighed in favor of granting custody to mother where (1) it was in child's best interests to live with traditional nuclear family and (2) father's single status made finding of long-term stability problematic; consideration of mother's marriage did not amount to finding that two-parent home was preferable to single-parent home simply because it was more "acceptable").

In *Sinicropi v Mazurek*, 273 Mich App 149, 729 NW2d 256 (2006), the court of appeals rejected the mother's argument that, in considering factors d and e, the trial court found in favor of the father's city, rather than the father. "The trial court stated that it was desirable to maintain continuity by having the child be with [the father] and his extended family in Jackson. The court did not find in favor of a city." *Id.* at 180.

5. Factor "f": Moral Fitness

§3.13 The concept of fault can be factored into a custody decision even given Michigan's no-fault divorce statute. *Feldman v Feldman*, 55 Mich App 147, 222 NW2d 2 (1974); *Kretzschmar v Kretzschmar*, 48 Mich App 279, 210 NW2d 352 (1973).

Factor "f" evaluates the *parties'* relative moral fitness only as it relates to how they will function as a parent and not as to who is the morally superior adult. *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994) (error in finding that this factor favored plaintiff; there was no evidence that defendant's extramarital affairs had any adverse effect on her ability to raise children); *Kubicki v Sharpe*, 306 Mich App 525, 858 NW2d 57 (2014) (error to consider nonparty stepfather's conduct and mental health under factor "f"; "f" pertains only to child's mother and father); *Wardell v Hincka*, 297 Mich App 127, 822 NW2d 278 (2012).

Although an extramarital affair is not necessarily a reliable indicator of the party's parenting ability, in *Berger v Berger*, 277 Mich App 700, 747 NW2d 336 (2008), the court found that the unique nature of defendant's affair, i.e., seducing the children's nanny, plaintiff's cousin, in the marital home, demonstrated extraordinarily poor judgment and lack of insight about the effect his conduct could have on everyone in the household, including, ultimately, the children.

Unmarried cohabitation by itself does not show a lack of moral fitness for the purposes of the Child Custody Act. *Hilliard v Schmidt*, 231 Mich App 316, 323–324, 586 NW2d 263 (1998); *Truitt v Truitt*, 172 Mich App 38, 431 NW2d 454 (1988); *Williamson v Williamson*, 122 Mich App 667, 673–674, 333 NW2d 6 (1982). However, in *Helms v Helms*, 185 Mich App 680, 684, 462 NW2d 812 (1990), it was not error for the court to consider the fact that plaintiff was pregnant, unmarried, and living with her boyfriend as one factor in its decision to award custody to the father.

In *Berger,* defendant argued that plaintiff's decision to seek a divorce, with its inevitable disruptive effect on the children, was "questionable conduct" relevant to factor "f" as bearing on a party's parental ability. However, because defendant offered no legal support for his argument, the court of appeals deemed it abandoned.

6. Factor "g": The Mental and Physical Health of the Parties

§3.14 Given the strong state and federal policies of pursuing the total integration of disabled persons into the mainstream of society, trial courts must avoid impairing or defeating this public policy in formulating custody awards. *Bednarski v Bednarski*, 141 Mich App 15, 27–28, 366 NW2d 69 (1985).

Factor "g" favored plaintiff in *MacIntyre,* where the record was replete with evidence of defendant's uncontrollable and inappropriate displays of anger in the child's presence.

In *Sinicropi v Mazurek*, 273 Mich App 149, 729 NW2d 256 (2006), the mother contended that the trial court did not address the father's acknowledgment of the danger of drinking while he was taking anti-depressants. The trial court found that the factor weighed equally. The trial court did mention the father's depression and that it did not appear to interfere with his ability to parent effectively, and there was no evidence that the father drank regularly or that his depression was not under control. Therefore, the trial court's finding was not against the great weight of the evidence.

7. Factor "h": The Home, School, and Community Record of the Child

§3.15 In cases where the courts have found the children too young to express a preference, the court may also determine that the children are too young to have established a home, community, and school record. Therefore, in very young children, this may turn out not to be a relevant factor.

Factor "h" favored plaintiff in *MacIntyre,* where the child's grades and behavior at school declined following an incident in which defendant rearranged the child's room and damaged his belongings after he and plaintiff had worked together to clean the room. *See also Diez v Davey*, 307 Mich App 366, 861 NW2d 323 (2014) ("h" favored mother because she had primary responsibility for child's education).

8. Factor "i": The Reasonable Preference of the Child

§3.16 **Mandatory.** The court must take the preference of the child into account if it decides that the child is old enough to express a preference. MCL 722.23(i); *Flaherty v Smith*, 87 Mich App 561, 274 NW2d 72 (1978). This is true even if the parents prefer the child not to be interviewed. *Kubicki v Sharpe*, 306 Mich App 525, 858 NW2d 57 (2014) (although parents did not want child interviewed, trial court was required to take into account the 10-year-old child's wishes). In *Maier v Maier*, 311 Mich App 218, 224, 874 NW2d 725 (2015), the court clarified that *Kubicki* "did not announce a new legal mandate that every child over a certain age be interviewed to ascertain a reasonable preference"; rather, "a court may not abrogate its responsibility to consider each of the enumerated best-interest child custody factors on the basis of a stipulation of the adults in a case."

In *Pierron v Pierron*, 486 Mich 81, 92, 782 NW2d 480 (2010), the supreme court accepted the court of appeals reasoning that "factor i does not 'require that a child's preference be accompanied by detailed thought or critical analysis' and that the 'reasonable preference' standard merely 'exclude[s] those preferences that are arbitrary or inherently indefensible'" (citing *Pierron v Pierron*, 282 Mich App 222, 259, 765 NW2d 345 (2009)). The supreme court concluded that the trial court would have to find that the children's stated preference violated this minimal standard of reasonableness before it could refuse to consider the children's preference.

Declining to interview. A trial judge's unexplained refusal to interview the children is itself reversible error. *Bowers v Bowers*, 190 Mich App 51, 475 NW2d 394 (1991) (at nine and six years of age, children were old enough to have their preferences given some weight), *appeal after remand,* 198 Mich App 320, 497 NW2d 602 (1993); *see also Quint v Quint*, No 368002, ___ Mich App ___, ___ NW3d ___ (Apr 4, 2024) (it was plain error to decline to determine whether seven-year-old child could express reasonable preference because parties did not request child interview); *Kubicki*; *Stringer v Vincent*, 161 Mich App 429, 411 NW2d 474 (1987). However, the trial court in *Treutle v Treutle*, 197 Mich App 690, 495 NW2d 836 (1992), did not err in failing to question a six-year-old child where the court analyzed the best interests factors as if the child had expressed a preference contrary to the eventual custody ruling. In *Duperon v Duperon*, 175 Mich App 77, 437 NW2d 318 (1989), the trial court did not err in its failure to interview the children; it was sufficient that the court was aware of their preference and took it into account in reaching its decision. In *Maier,* the trial court was not required to interview the nine-year-old child about his reasonable preference under MCL 722.23(i) when the trial court found that the child's emotional state and parental efforts to influence his preference rendered him unable to form a reasonable preference. The court noted that an interview is "merely one avenue from which to adduce a child's capacity to form a preference and the preference itself, and not the sine qua non from which that determination must be made." 311 Mich App at 225. Trial judges may not be the best people to talk to the child about this topic. In many cases, children are already working with trained mental health care professionals who can give input on the best interests factors, including the child's preference, to the court. *Id.*

On the record. Generally, the trial court must state on the record whether a child was able to express a preference and whether the court considered the preference. *Wilson v Gauck*, 167 Mich App 90, 421 NW2d 582 (1988). However, it is not error to fail to state on the record that the child was of sufficient age to state a preference and that preference was reasonable and unbiased. *Vander Molen v Vander Molen*, 164 Mich App 448, 418 NW2d 108 (1987).

The trial judge does not err if the judge fails to ascertain on the record the child's ability to testify truthfully. That issue may affect the weight the court gives this factor, but it is not a prerequisite to the child's being able to state a preference. *Burghdoff v Burghdoff*, 66 Mich App 608, 239 NW2d 679 (1976).

In camera interviews. A trial court does not deny a party due process rights by questioning the child in camera to determine the child's preference without the presence of the parties or counsel. *Lesauskis v Lesauskis*, 111 Mich App 811, 314 NW2d 767 (1981). An in camera interview properly protects the child from the trauma of choosing between the parents in open court. *Impullitti v Impullitti*, 163 Mich App 507, 415 NW2d 261 (1987). Courts should not cover matters other than the child's preference in their in camera interviews.

In *Molloy v Molloy*, 247 Mich App 348, 637 NW2d 803 (2001), a special panel resolved the conflict between the prior *Molloy* opinion, 243 Mich App 595, 628 NW2d 587 (2000), and *Hilliard v Schmidt*, 231 Mich App 316, 586 NW2d

263 (1998), by deciding that the purpose and questioning of an in camera interview is limited to determining the child's preference. The panel also mandated that all in camera interviews with children in custody cases be recorded and sealed for appellate review. In *Molloy v Molloy*, 466 Mich 852, 643 NW2d 574 (2002), the supreme court affirmed the special panel's decision, with the exception of the requirement that all future in camera interviews with children in custody cases be recorded. The court opened an administrative file to examine the extent to which, and the procedures by which, in camera testimony may be taken in custody cases.

Pursuant to an amendment to MCR 3.210(C)(5), such in camera interviews are limited to a child's custodial preference. There is no requirement that the interviews be recorded.

The court's questions to a child during a preference interview about which parent took him to the doctor, cooked meals, cleaned, or helped with homework and about whether the parents fought did not represent an improper fact-seeking expedition by the court. Instead, these questions were the court's effort to engage the child and encourage him to speak freely. *Thompson v Thompson*, 261 Mich App 353, 364–365, 683 NW2d 250 (2004). However, the court's language indicates that reversible error might have been found if the trial court had used the examination information when determining the best interests of the child and the parties had not fully litigated the topics on which the child was questioned.

The judge may wish to find out, before the interview is scheduled, whether the parents or their attorneys will agree to waive the *Molloy* restrictions. Many parents/attorneys are happy to waive them. If there is no waiver, the interview is limited to the child's preference and the basis for that preference.

Practice Tip

- *See exhibit 3.1, Guidelines for Interviewing Children About Custody Preference.*

Confidentiality. The court is not required to disclose the child's preference. *Fletcher v Fletcher*, 200 Mich App 505, 504 NW2d 684 (1993), *rev'd on other grounds,* 447 Mich 871, 526 NW2d 889 (1994), *appeal after remand,* 229 Mich App 19, 581 NW2d 11 (1998); *see also Hilliard.* It is not error to keep the child's preference confidential to avoid lessening either parent's love for the child. *Gulyas v Gulyas*, 75 Mich App 138, 254 NW2d 818 (1977).

The parties are not to be informed of any preference expressed by the child during the best interests evaluation done by the Friend of the Court. MCL 552.507a(2). However, a child's court-appointed guardian may be informed of the child's preference if considered by the court. MCL 552.507a(3).

See also §7.11.

Practice Tip

- *The court may want to remind the parties and the attorneys before the interview of its confidential nature. Some courts have the parties acknowledge and stipulate to the confidentiality on the record.*

Weight to be given. The child's preference does not automatically outweigh the other best interests factors; it is only one element used to make a determination. *Treutle*; *DeGrow v DeGrow*, 112 Mich App 260, 315 NW2d 915 (1982); *see also Quint* ("A child's preference is just that—a preference —and a trial court must evaluate that preference along with all of the other relevant evidence when making its best-interest determination. But, even if the child's preference does not carry the day, there is independent value in knowing on some level that one's voice has been heard."). However, where the trial court in *Lustig v Lustig*, 99 Mich App 716, 299 NW2d 375 (1980), changed a custody order based primarily on a nine-year-old's preference, the court of appeals found no abuse of discretion.

Practice Tip

- *There are different developmental considerations depending on a child's age. While there is no rule that a teenager's preference must be given great weight, that child's preference may be paramount given the circumstances. There is also no set rule on the minimum age at which to interview or consider the preference of a child.*

9. Factor "j": Encouraging Parent-Child Relationships

§3.17 In *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998), the trial court's belief that defendant would attempt to destroy the relationship between plaintiff and her children did not outweigh the other best interests findings that tended to favor him.

The fact that the mother in *Barringer v Barringer*, 191 Mich App 639, 479 NW2d 3 (1991), had interfered with the father's parenting time weighed against her in the trial court's custody determination. *See also Butler v Simmons-Butler*, 308 Mich App 195, 863 NW2d 677 (2014) (mother's continued baseless accusations of abuse against father, unwillingness to foster relationship between children and father, and her willful violation of previous parenting time order weighed against her). However, in *Hilliard v Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998), this factor was not weighed against the father where the record showed that he had not actively discouraged parenting time, but rather, on the advice of a psychologist, allowed the child to decide for himself whether to visit because the visits were usually tumultuous.

Factor "j" favored plaintiff in *MacIntyre,* where there was ample evidence to support the finding that defendant was unwilling to facilitate and encourage a close relationship between plaintiff and the child. She denigrated plaintiff in front of the child and interfered with plaintiff's parenting time. Conversely, the child reported that plaintiff did not verbally attack defendant, and plaintiff allowed the child to stay with defendant when he had to go out of town during his scheduled parenting time.

10. Factor "k": Domestic Violence

§3.18 Factor "k" favored plaintiff in *MacIntyre.* Both parties admitted spanking the child. However, the child witnessed defendant physically attack plaintiff and defendant did not deny these allegations of domestic violence.

This factor also favored plaintiff in *Butler v Simmons-Butler*, 308 Mich App 195, 863 NW2d 677 (2014), due to defendant's history of domestic violence against plaintiff, including incidents in front of the children.

In *Brown v Brown*, 332 Mich App 1, 955 NW2d 515 (2020), the court of appeals held that the plaintiff's corporal punishment of the children and abusive treatment of family pets supported the trial court's findings of domestic violence under factor "k."

Although courts should seek to avoid subjecting children to the distress and trauma resulting from testifying in court subject to cross-examination, concerns over the child's welfare are outweighed when balanced against the parent's due process rights. In *Surman v Surman*, 277 Mich App 287, 745 NW2d 802 (2007), the trial court properly allowed the parties' child to testify in open court regarding alleged physical abuse by his father.

Further discussion of this factor also appears in Michigan Judicial Institute, *Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings* §8.4 (4th ed 2024).

11. Factor "*l*": Any Other Relevant Factor

§3.19 Race. The U.S. Supreme Court has held that the Equal Protection clause of the Constitution prohibits a trial court from considering the race of a parent's spouse as a factor in determining whether to change custody. *Palmore v Sidoti*, 466 US 429 (1984); *see also Edel v Edel*, 97 Mich App 266, 293 NW2d 792 (1980) (mother's interracial association not relevant to child custody determination).

Keeping siblings together. In most cases, it is in the best interests of each child to keep brothers and sisters together. However, this does not outweigh the best interests of an individual child. *Wiechmann v Wiechmann*, 212 Mich App 436, 538 NW2d 57 (1995).

Biological preference. It is an abuse of discretion to base custody solely on an unsubstantiated biological preference in favor of the parent who is the same gender as the child. *Freeman v Freeman*, 163 Mich App 493, 414 NW2d 914 (1987).

Child care arrangements. While child care arrangements are properly considered under the best interests standard, the supreme court in *Ireland v Smith*, 451 Mich 457, 547 NW2d 686 (1996), declined to establish any broad rules regarding whether in-home child care or day care is more acceptable.

Emotional pressure placed on the child. In *Hilliard v Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998), the court properly considered the emotional pressure endured by the child by being caught between the two parties and noted that plaintiff did not take responsibility. There was evidence that plaintiff's anger toward her ex-husband interfered with her ability to consider the needs of her children and that she tended to blame others, including her children, for her problems.

Financial manipulation. In *Diez v Davey*, 307 Mich App 366, 861 NW2d 323 (2014), the court properly considered financial pressure plaintiff placed on

defendant during the proceedings. The evidence showed plaintiff forced defendant out of her home, took her credit cards, and stopped paying her for her work as an employee of plaintiff's company.

Practice Tips

- *Testimony by a psychologist or other professional regarding the best interests factors, such as "parental alienation syndrome" and "spousal abuse syndrome," is governed by MRE 702, amended by ADM File No 2021-10 (eff. Jan 1, 2024), Testimony by Experts, which provides that an expert witness may testify if*

> *(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
>
> *(b) the testimony is based on sufficient facts or data;*
>
> *(c) the testimony is the product of reliable principles and methods; and*
>
> *(d) the expert has reliably applied the principles and methods to the facts of the case.*

- *The court is authorized by the Child Custody Act to use "a guardian ad litem or the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes." MCL 722.27(1)(d). See form 1.9.*
- *For a discussion of guidelines for child custody evaluations, and suggested readings, see the Guidelines for Child Custody Evaluations in Family Law Proceedings, adopted by the American Psychological Association (APA), 65 Am Psychologist 863–867 (2010), available on the APA website. For a list of psychological tests commonly used in child custody evaluations, see exhibit 3.2. For suggested readings on the ethics of psychological assessments in custody cases, see exhibit 3.3.*

IV. The Lawyer–Guardian ad Litem

§3.20 The court, if it determines that the minor's interests are inadequately represented, may appoint a lawyer–guardian ad litem. MCL 722.24(2). The role of the lawyer–guardian ad litem is to represent the minor and advocate for the minor's wishes. The lawyer–guardian ad litem may file a written recommendation and report, which the court may read but not admit into evidence unless all parties stipulate to the admission. The report may also be used for a settlement conference. MCL 722.24(3). The court or parties cannot call the lawyer–guardian ad litem as a witness to testify regarding matters related to the case, and the lawyer–guardian ad litem's file of the case is not discoverable. MCL 712A.17d(3).

The court must approve any fee to the lawyer–guardian ad litem. After determining the ability to pay, the court may charge costs and reasonable fees of the lawyer–guardian ad litem against one or more of the parties or against fees allocated for family counseling services. MCL 722.24(4). After conducting an independent investigation, a guardian ad litem may make a report in court or file a written report of the investigation and their recommendations. MCR 5.121(C).

Parties have the right to "examine and controvert reports received into evidence" and cross-examine the guardian ad litem. MCR 5.121(D)(2).

In *Kuebler v Kuebler*, No 362488, ___ Mich App ___, ___ NW3d ___ (May 11, 2023), the trial court committed legal error by admitting the guardian ad litem's report into evidence over defendant's proper hearsay objection. In this case, the guardian ad litem's report constituted hearsay because the report contained statements from the guardian ad litem's interviews as well as conversations with numerous people including the children's therapist, the parties, the parties' lawyers, and family members. *Id.* The trial court noted the hearsay but admitted the reports under the "catch-all exception" to the hearsay rule, MRE 803(24) (effective January 1, 2024, MRE 803(24) was deleted pursuant to ADM File No 2021-10). Slip op at *6. The court of appeals found that the trial court failed to consider each requirement of the rule and erred as a matter of law with its overly broad application of the exception. Slip op at *9. The court of appeals further found that automatic admission of a guardian ad litem's report without regards for the rules of evidence is not supported by the Child Custody Act. In reading MCR 3.204(D) and MCL 722.27(1)(d) together, a guardian ad litem may offer recommendations to be considered by the trial court. Slip op at *12. However, these recommendations are still subject to the rules of evidence. *Id.* Therefore, a guardian ad litem's report containing hearsay may not be admitted into evidence over a proper objection of a party. *Id.*

The biggest difference between a lawyer–guardian ad litem and a guardian ad litem is that the appointment of a guardian ad litem "does not create an attorney-client relationship" and "[c]ommunications between that person and the guardian ad litem are not subject to the attorney-client privilege." MCR 5.121(E)(1); *see Strech v Bush*, No 351196 (Mich Ct App Sept 10, 2020) (unpublished) (citing *Farris v McKaig*, 324 Mich App 349, 358, 920 NW2d 377 (2018)).

The court may also appoint a guardian ad litem, who need not be a lawyer, to assist the court in determining the child's best interests. MCL 722.22(g).

V. Sole and Joint Custody

§3.21 The Child Custody Act provides for both sole and joint custody. MCL 722.27. *Joint custody* means an order of the court in which one or both of the following is specified:

> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

MCL 722.26a(7).

The court may award joint *legal* custody as to decision-making but find an award of joint *physical* custody to be inappropriate. *Wellman v Wellman*, 203 Mich App 277, 512 NW2d 68 (1994) (joint physical custody denied based on parties' inability to cooperate and communicate).

Standards for awarding sole or joint custody. In custody disputes, the parents must be advised of the availability of joint custody. MCL 722.26a(1). If the parents agree on joint custody, the court must award joint custody unless the court determines on the record, based on clear and convincing evidence, that joint custody is not in the best interests of the child. MCL 722.26a(2).

At the request of either party, the court must consider joint custody and must state on the record the reasons for granting or denying the request. MCL 722.26a(1); *see Mixon v Mixon*, 237 Mich App 159, 602 NW2d 406 (1999) (trial court erred in not stating on the record its reasons for denying request for joint physical custody); *see also Arndt v Kasem*, 156 Mich App 706, 402 NW2d 77 (1986); *Wilcox v Wilcox (On Remand)*, 108 Mich App 488, 310 NW2d 434 (1981). However, the fact that the trial court must consider an award of joint custody does not create a presumption in favor of it. *Wellman.*

The court determines whether joint custody is in the best interests of the child by considering the statutory best interests factors (see §3.8) and whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. MCL 722.26a(1).

If the parents cannot agree on essential decisions, sole legal custody should be awarded. *Fisher v Fisher*, 118 Mich App 227, 324 NW2d 582 (1982). The question is whether the parents can cooperate on child-rearing issues not whether the parents necessarily get along. *Shulick v Richards*, 273 Mich App 320, 729 NW2d 533 (2006) (although parties harbored some personal animosity and had some difficulty communicating, not abuse of discretion to award joint legal and physical custody because parties were able to cooperate and reach compromises for best interests of children); *Nielsen v Nielsen*, 163 Mich App 430, 415 NW2d 6 (1987). Depending on the facts of the individual case, it is not inconsistent to grant joint physical custody while denying joint legal custody. *See Dailey v Kloenhamer*, 291 Mich App 660, 811 NW2d 501 (2011) (holding that escalation of disagreements between parties and expansion of topics that parties disagreed about constituted sufficient basis for trial court to revisit custody decision and that due to its equitable nature, MCL 722.26a(7) authorizes courts in proper circumstances to grant joint physical custody to parties while granting sole legal custody to one party); *Wellman.*

When parents with joint legal custody cannot agree on essential matters, the court decides the issue based on the child's best interests and must make specific findings of fact on the record. *Bowers v Vandermeulen-Bowers*, 278 Mich App 287, 750 NW2d 597 (2008); *Lombardo v Lombardo*, 202 Mich App 151, 507 NW2d 788 (1993) (decision regarding child's educational program). The trial court may not apportion decision-making authority between the parties in the event they cannot agree. *Shulick.*

It is an abuse of discretion to award joint custody based solely on the court's preference that custody should be awarded to the parent of the same sex as the child when all other custody factors are equal or weigh in favor of the parent who is not the same gender as the child. *Freeman v Freeman*, 163 Mich App 493, 414

NW2d 914 (1987) (error to award joint custody when court had found one parent equal or superior to other on nearly all custody criteria).

Dual residences but only one domicile. A child may have "a legal residence with each parent," MCL 722.31, however, "a child may have only a single domicile at any given point in time." *Grange Ins Co v Lawrence*, 494 Mich 475, 507, 835 NW2d 363 (2013). A child's domicile can change by the parents' actions or "by operation of law" as a result of a custody order. *Id.* at 503. Once a custody order is entered, parents can no longer choose their child's domicile because they are bound by the terms of the order, which is dispositive of a child's domicile for all purposes. *Id.* at 505, 508–509. The relevant consideration for a court determining a child's domicile from a custody order is "which parent has *physical custody*." *Id.* at 512 (emphasis in original). For example, a child's domicile will be with the parent who has sole or primary physical custody under the order (unless otherwise stated in a domicile provision in the order), regardless of whether the parties have joint legal custody. *Id.* In the rare case in which a custody order equally divides physical custody, the child's domicile "alternate[s] between the parents so as to be the same as that of the parent with whom he [or she] is living at the time." *Id.* at 512 n78. Note that an order of joint physical custody does not automatically constitute an order granting both parents an equal division of physical custody. *Id.; see* MCL 722.26a(7).

If there is a dispute regarding where the child will reside, the court must state the basis for a residency award on the record or in writing. MCL 722.26a(5).

VI. The Custody Order

§3.22 A judgment or order awarding custody of a minor must include

- a prohibition against moving the child's residence outside Michigan, MCR 3.211(C)(1);
- a requirement that the custodial parent promptly notify the Friend of the Court in writing of any change of the child's address, MCR 3.211(C)(2);
- a statement by the court declaring the child's inherent rights and establishing the rights and duties as to the child's custody, support, and parenting time, MCL 722.24(1); and
- in joint custody arrangements, the parents' agreement regarding relocation of the child's legal residence or, if the parents do not agree on a relocation provision, the following statement: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the 'Child Custody Act of 1970,' 1970 PA 91, MCL 722.31.", MCR 3.211(C)(3).

The party submitting the first temporary order awarding child custody, parenting time, or support must serve the Friend of the Court and the parties with a Judgment Information Form (SCAO form FOC 100) and proof of service. MCR 3.211(F)(2). This form, which contains personal identifying information like social security numbers and driver's license numbers, is filed with the FOC only,

with copies to the opposing party and attorney. Because of the risk of identity theft, this kind of information should not be included in judgments and orders that go into the public court file. See MCR 1.109(D)(9) regarding protecting personal identifying information.

Any provisions regarding child support must be prepared on a Uniform Support Order. MCR 3.211(D). SCAO form FOC 10, Uniform Child Support Order, should be used when payments go through the Friend of the Court or the Michigan State Disbursement Unit. SCAO form FOC 10a, Uniform Child Support Order, No Friend of Court Services, should be used when payments go directly to the recipient. If the support ordered does not follow the Michigan Child Support Formula, FOC 10d, Uniform Child Support Order Deviation Addendum, must also be used. The final judgment must either incorporate the Uniform Order by reference or state that none is required. MCR 3.211(D)(2).

VII. Reaching an Agreement on Custody

§3.23 The parties can agree to alternative dispute resolution under MCL 552.513. *See* MCR 3.210(C)(1)(b). A court may submit any matter to mediation to attempt to settle contested issues, including custody disputes. MCR 3.216(A)(1).

The parties may stipulate to binding arbitration, pursuant to the Domestic Relations Arbitration Act (DRAA), MCL 600.5070 et seq., and MCR 3.602. Issues that may be resolved by arbitration include child-related issues including child custody, child support, and parenting time. MCL 600.5071. Matters involving child abuse and neglect are excluded from arbitration. MCL 600.5071(a)–(i).

The DRAA requires a record to be made of that portion of the arbitration hearing that concerns child-related matters. MCL 600.5077(2). The record is to be made in the same manner as that required by the Michigan Court Rules for the record of a witness's testimony in a deposition.

The Child Custody Act requires that a court ensure that any arbitration award deciding custody is in the best interests of the child. *Harvey v Harvey*, 470 Mich 186, 680 NW2d 835 (2004). The parties' election to submit a custody matter to arbitration does not circumvent the authority of the court to analyze the custody of the children under the best interests of the child standard. *Id.* If a trial court merely enters the arbitration decision without any independent consideration, the judgment of divorce incorporating the arbitration decision must be vacated and the matter remanded. *Rivette v Rose-Molina*, 278 Mich App 327, 750 NW2d 603 (2008) (even assuming that referee was under no duty to consider best interest factors, trial court committed its own error by entering final custody order without satisfying itself that best interests factors were considered); *Bayati v Bayati*, 264 Mich App 595, 691 NW2d 812 (2004). However, if the trial court is able to independently determine what custodial placement is in the best interests of the child, an evidentiary hearing is not required. *MacIntyre v MacIntyre*, 472 Mich 882, 693 NW2d 822 (2005), *reversing in part and remanding MacIntyre v MacIntyre*, 264 Mich App 690, 692 NW2d 411 (2005).

Taken together, *Harvey* and *MacIntyre* indicate that (1) the arbitrator must conduct a hearing with all parties present unless otherwise agreed to in the parties' arbitration agreement, (2) the trial court must make an "independent determination" regarding the best interests of the minor children, and (3) the trial court may make independent findings based on the record made in the arbitration hearing.

See §§1.37–1.45 for a fuller discussion of mediation and arbitration in domestic relations actions. Friend of the Court mediation is discussed more fully in §§7.7–7.10.

Practice Tips

- *Educating the parents on how divorce affects the child may help parents resolve disputes over custody and parenting time without court intervention.*
- *Some courts order the parents early in the proceedings to attend a SMILE (Start Making It Livable for Everyone) program in all actions involving child custody or parenting time decisions. Course content typically includes the developmental stages and needs of children, as well as approaches to conflict management and dispute resolution. Each parent may be required to bring to their court appearance a certificate showing completion of the program. However, a parent's refusal or delay in completing the seminar does not delay action on a petition.*
- *Individual judges have also developed strategies for focusing the parents on the long-term effects of custody and parenting time disputes on the entire family. See exhibit 3.4 for one judge's suggestions for encouraging the parties to resolve problems without court intervention.*
- *Another way to diminish custody disputes is to require resolution of property disputes first so that the parties are free to focus on the children without the distractions that property disputes can create.*

VIII. Modification of Custody Orders or Judgments

A. In General

§3.24 The Child Custody Act authorizes a trial court to modify child custody orders "for proper cause shown or because of change of circumstances," and if in the child's best interests. MCL 722.27(1)(c).

While the parties may stipulate to a temporary custody arrangement during the pendency of a divorce and the court may enter a temporary order pursuant to that stipulation, the resulting order is not a "previous" judgment or order for the purposes of MCL 722.27(1)(c). Under the statute, no previous judgment or order may be modified unless there is a showing of proper cause or a change of circumstances. However, where no evidentiary hearing setting custody is held and the parties' stipulation is the sole basis for a temporary order, that order is not a "previous" judgment or order and therefore, no change of circumstances need be shown for the order to be modified. To have the custody arrangement modified, the movant must present clear and convincing evidence that the modification is in the best interests of the child. *Thompson v Thompson*, 261 Mich App 353, 683 NW2d 250 (2004).

If the modification of a custody order has no direct bearing on the custodial environment or parenting time, the trial court may modify the order without determining proper cause or changed circumstances. *Kostreva v Kostreva*, 337 Mich App 648, 976 NW2d 889 (2021) (custody of child's passport has no direct bearing on custodial environment or parenting time). Modification of a condition to the exercise of parenting time does not ordinarily affect a child's established custodial environment or change the length and frequency of parenting time; therefore, "the proponent of such modification need show only 'that there is an appropriate ground for taking legal action.'" 337 Mich App at 657 (quoting *Kaeb v Kaeb*, 309 Mich App 556, 571, 873 NW2d 319 (2015)).

If the change of custody is raised in a juvenile proceeding, the circuit court must make clear that it is exercising its jurisdiction under the Child Custody Act and comply with the statutory and procedural requirements of the act, including making findings under the best interests factors. *Department of Human Servs v Johnson (In re AP)*, 283 Mich App 574, 608, 770 NW2d 403 (2009).

Once a postjudgment motion for change of custody is filed, the parties may engage in discovery. *See* MCR 2.301(A)(4).

There is ample caselaw holding that a trial court cannot order a change of custody without first holding a hearing. *See generally Dick v Dick*, 210 Mich App 576, 587, 534 NW2d 185 (1995); *Mann v Mann*, 190 Mich App 526, 532–533, 476 NW2d 439 (1991); *Schlender v Schlender*, 235 Mich App 230, 233, 596 NW2d 643 (1999). However, in 2001, the supreme court amended MCR 3.210 to include a new subsection that provides: "In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion." MCR 3.210(C)(8).

A request for an evidentiary hearing should be granted when factual questions are contested. *Bielawski v Bielawski*, 137 Mich App 587, 358 NW2d 383 (1984) (no abuse of discretion in denying evidentiary hearing on motion for change of residence where nonmoving party did not contest issues material to decision); *see also Schlender v Schlender*, 235 Mich App 230, 596 NW2d 643 (1999) (local court rule that conditioned right to custody hearing on offer of proof of anticipated evidence improperly restricted parties' right to evidentiary hearing on motion for change of custody). The court may not change custody solely on the basis of a Friend of the Court recommendation. *Mann v Mann*, 190 Mich App 526, 476 NW2d 439 (1991). It was error for the trial court to enter a stipulated order to change custody without making any independent determination regarding the best interests of the child. *Phillips v Jordan*, 241 Mich App 17, 614 NW2d 183 (2000).

The evidentiary hearing held to determine if a change in a child's residence is warranted under the 100-mile rule of MCL 722.31 is not sufficient to also determine a change of custody request under MCL 722.23. The trial court is obligated to hold a separate hearing on a change of custody request. *Grew v Knox*, 265 Mich

App 333, 694 NW2d 772 (2005). An evidentiary hearing is mandated before custody can be modified, even on a temporary basis. *Id.*

If a motion for change of custody is filed *while* a parent is active duty, *see* MCL 722.22(a), the court must not consider the parent's absence due to that active duty status in a best interests of the child determination. MCL 722.27(1)(c); *see Kubicki v Sharpe*, 306 Mich App 525, 858 NW2d 57 (2014) (MCL 722.27(1)(c) did not preclude trial court from deciding father's change of custody motion filed two months before mother's enlistment). However, a trial court is not prohibited from considering a parent's future absences from a child due to that active duty status when making a determination about the child's best interests. *Griffin v Griffin*, 323 Mich App 110, 916 NW2d 292 (2018). Generally, the court must not enter an order that changes the child's placement that existed on the date the parent was called to deployment. However, the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interests of the child. MCL 722.27(3). The temporary order may be for a limited period of time. *Id.*

If a motion for change of custody is filed when a parent is on deployment, the parent may file and the court must consider a stay application. MCL 722.27(3). The parent can request a stay or an extension of the stay at any time before the final judgment by filing a signed, written statement certified to be true under penalty of perjury. Neither the parent nor the child need to be present for the court to consider the stay application. *Id.* The parent must notify the court of the parent's deployment end date before or within 30 days after that deployment ends. Once the court receives this notification, it must reinstate the custody order in effect immediately preceding that deployment period. MCL 722.27(4). If a motion for change of custody is filed after a parent returns from deployment, the court must not consider the parent's absence due to that deployment or future deployments in a best interests of the child determination. *Id.* When two parents share custody, "the deploying parent must notify the other parent of an upcoming deployment within a reasonable period of time." MCL 722.27(5). The Servicemembers Civil Relief Act also applies when a parent has active duty status, and it provides protections against certain default judgments and allows a court to stay proceedings. *See* 50 USC 3931, 3932. For more on the Servicemembers Civil Relief Act, see *Michigan Family Law* §§27.7–27.12 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed).

A circuit court has continuing jurisdiction to consider a motion to change a minor child's domicile established by a custody award in a divorce judgment even when the underlying judgment is pending on appeal. *Safdar v Aziz*, 501 Mich 213, 215, 219, 912 NW2d 511 (2018) (because MCL 722.27(1) authorizes continuing jurisdiction to modify or amend its previous judgments when proper cause is shown or when there has been change of circumstances as long as modification is in best interests of child, "it would be contrary to the pain language of the [Child Custody Act, MCL 722.21 et seq.] to require a court to wait for the conclusion of an appeal to address a change in circumstances that would affect the interests of the child").

B. Procedure

§3.25 The court must consider three issues before modifying a custody order.

1. **Has the petitioner carried the initial burden of establishing either "proper cause shown" or a "change of circumstances?"**

When there is a request for a change in custody from an existing custody determination, the first issue to be considered is whether the movant has shown the requisite "proper cause" or "change of circumstances" directed by MCL 722.27(1)(c). *Vodvarka v Grasmeyer*, 259 Mich App 499, 675 NW2d 847 (2003). *But see Marik v Marik*, 325 Mich App 353, 363 n2, 925 NW2d 885 (2018) (where there was no prior order addressing children's current or future school enrollment, trial court need not determine whether there was proper cause or change of circumstances before considering request to change schools). The existence of proper cause or a change of circumstances is a threshold matter in any consideration of a change to a prior custody order. The movant has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists before the court may consider whether there is an established custodial environment. The court need not hold a separate hearing to determine if proper cause or a change of circumstances exists; rather "[t]he trial court is merely required to preliminarily determine whether proper cause or a change of circumstances exists before reviewing the statutory best-interest factors with an eye to possibly modifying a prior custody order." *Mitchell v Mitchell*, 296 Mich App 513, 518, 823 NW2d 153 (2012). However, if the facts showing proper cause or change of circumstance are in dispute, the court may have to resolve the issue at an evidentiary hearing before making the threshold determination. *Sprenger v Bickle*, 307 Mich App 411, 421 n5, 861 NW2d 52 (2014).

A "proper cause" is one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken. The court may look to the 12 factors of the best interests of the child test in determining whether proper cause is shown. While this standard for a proper cause is fact specific, an evidentiary hearing is not required in every case. However, every case does require that the facts be "legally sufficient" to satisfy the proper-cause standard. The appropriate grounds should be relevant to at least one of the 12 best interests factors.

Temporally, pre-order events will not generally be significant enough to constitute proper cause to revisit a custody order. A parent's conviction of child abuse, loss of custody of other children, use of intimidating behavior, and hampering of the other parent's visits with the child all constitute proper cause to trigger the trial court's obligation to review the child's custodial environment, determine if there is an established custodial environment, and then review under the best interests factors.

What must be shown to prove a change of circumstances? "[A] movant must prove that, since the entry of the last custody order, the conditions sur-

rounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka,* 259 Mich App at 513. The evidence must demonstrate something more than normal life changes. There must be some evidence that material changes have had or will have an effect on the child and the facts must be gauged by the best interests factors.

The movant cannot rely on facts existing before entry of the custody order to establish a change of circumstances. The change of circumstances must have occurred since the entry of the last custody order.

In *Dehring v Dehring*, 220 Mich App 163, 559 NW2d 59 (1996), the court of appeals held that a custodial parent's move within Michigan did not, in and of itself, constitute a change of circumstances sufficient to reopen a custody matter. However, in *Sehlke v VanDerMaas*, 268 Mich App 262, 707 NW2d 603 (2005), *rev'd on other grounds,* 474 Mich 1053, 708 NW2d 439 (2006), the court of appeals held that *Dehring* was overruled by the enactment of MCL 722.31 (the 100-mile rule), and a change in legal residence in excess of one hundred miles does constitute a change of circumstances. A move of fewer than 100 miles may also constitute a change of circumstances. *See Powery v Wells*, 278 Mich App 526, 752 NW2d 47 (2008) (move from Ludington to Traverse City (less than 100 miles) was sufficient to constitute change of circumstances warranting evidentiary hearing on best interests factors); *Sinicropi v Mazurek*, 273 Mich App 149, 729 NW2d 256 (2006) (move of custodial parent 89 miles from other custodial parent was sufficient for trial court to consider change in custody because move could have significant impact on child's life; move would change child's living environment and force child to attend two different schools).

A parent's financial problems do not constitute a change of circumstances sufficient to warrant a change of custody where the financial issues could be addressed by an increase in the amount of child support. *Corporan v Henton*, 282 Mich App 599, 766 NW2d 903 (2009).

When there was no medical evidence presented and the opinion of a Child Protective Services investigator and the father's own allegations constituted the only evidence offered in support of the father's contention that the mother had mental health problems, the trial court's conclusion that a change of circumstances and proper cause had been proven by a preponderance of the evidence was against the great weight of the evidence. *Pennington v Pennington*, 329 Mich App 562, 944 NW2d 131 (2019).

In *Merecki v Merecki*, 336 Mich App 639, 971 NW2d 659 (2021), the trial court erred in bifurcating the modification of legal custody and physical custody by denying a hearing on physical custody and referring legal custody to facilitation. Specifically, the court of appeals directed that *Vodvarka*'s reference to "custody" logically refers to both legal and physical custody, not distinguishing between the two. *Merecki.* Therefore, the requisite standard to modify custody under *Vodvarka* applied to modify legal and physical custody. *Merecki.*

A child's changes in needs and desires in the ordinary course of growing up does not constitute proper cause or change of circumstance that warrants consideration of a change in custody. *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 808 NW2d 811 (2011) (trial court erred when it determined that change of circumstances had occurred because child had changing needs and interests on becoming teenager). However, note that a child's preference or the move from middle school to high school with its attendant changes are sufficient to change parenting time. *Shade v Wright*, 291 Mich App 17, 805 NW2d 1 (2010).

The escalation of disagreements between parties and the expansion of topics that the parties disagreed about, including the child's medical care, constituted proper cause or a change of circumstance. *Dailey v Kloenhamer*, 291 Mich App 660, 811 NW2d 501 (2011). The removal of a child from the home by Child Protective Services is sufficient evidence of a change of circumstances. *Shann v Shann*, 293 Mich App 302, 809 NW2d 435 (2011).

2. **Is there an established custodial environment?**

Whether an established custodial environment exists may be crucial to the grant or modification of custody because it substantially alters the burden of proof the moving party must carry. "[A] trial court must not 'presume an established custodial environment by reference only to' the most recent custody order, but must 'look into the actual circumstances of the case.'" *Marik,* 325 Mich App at 370. If an established custodial environment exists, the trial court must determine whether the requested change would alter or impact the established custodial environment of the child. The proper burden of proof is determined on that outcome. If the proposed change alters the established custodial environment, the party seeking the change must demonstrate by clear and convincing evidence that such a change is in the child's best interests. If the change does not alter the established custodial environment, the proponent of the change need only demonstrate by a preponderance of the evidence that the requested change is in the child's best interests. *Marik,* 325 Mich App at 362 (citing *Pierron v Pierron*, 486 Mich 81, 89–90, 782 NW2d 480 (2010)). To modify a child's established custodial environment, there must be clear and convincing evidence that it is in the child's best interests compared to the status quo and not compared to the suggested modification. *Griffin v Griffin*, 323 Mich App 110, 916 NW2d 292 (2018). Note that a finding of equality or near equality on the best interests factors will not necessarily prevent a party from satisfying the burden of proof by clear and convincing evidence on a motion to change custody when an established custodial environment exists. *Heid v Aaasulewski*, 209 Mich App 587, 532 NW2d 205 (1995). However, in *Baker v Baker*, 411 Mich 567, 576–577, 309 NW2d 532 (1981), the supreme court defined the extent of the burden facing a party challenging an established custodial environment: "In adopting § 7[1](c) of the act, the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment', except in the most compelling cases."

In *Parent v Parent*, 282 Mich App 152, 762 NW2d 553 (2009), the Michigan Court of Appeals addressed an issue regarding a custody order modification that changed a child's educational environment, but did not impact the child's custodial environment. In *Parent,* the court found that "not all modifications to previous judgments or orders require the heightened 'clear and convincing evidence' standard of proof; rather, the burden of proof is heightened for only those modifications that change the child's established custodial environment." *Id.* at 155. The court concluded that because a father sought to change his child's school status (from homeschooling to enrollment in a public school), which did not constitute a change of custodial environment, the father need only prove a preponderance of the evidence that the change was in the child's best interests. *Id.*

3. **Is the modification in the best interests of the child?**

This is the same standard applied in setting custody initially. Orders modifying custody arrangements must contain specific findings and conclusions on the best interests factors. *Meyer v Meyer*, 153 Mich App 419, 395 NW2d 65 (1986) (modified order not remanded for further findings where it essentially supplemented very recent opinion that discussed all factors); *see also Phillips v Jordan*, 241 Mich App 17, 614 NW2d 183 (2000) (court must make independent determination of child's best interests before entering stipulated order to change custody).

In *Parent,* the Michigan Court of Appeals found that a trial court need not make an exhaustive conclusion as to each best interests factor, but must at least make an explicit factual finding as to the applicability of each factor. *Parent,* 282 Mich App at 156–157.

In *Pierron,* the Michigan Supreme Court held that if a proposed custody change will modify a child's established custodial environment, the trial court must consider all of the best interest factors. If a proposed custody change will not modify a child's established custodial environment, the trial court must determine and state on the record whether each of the best interest factors applies; however, if a particular factor is irrelevant, the trial court need not further address the factor. Note that the Michigan Court of Appeals has declined to extend the ruling in *Pierron* to cases involving a change of residence analysis under MCL 722.31. *Gagnon v Glowacki*, 295 Mich App 557, 815 NW2d 141 (2012) (plaintiff established by preponderance of evidence that moving her child to Windsor, Ontario, from Plymouth, Michigan, was warranted and that move would not result in change to established custodial environment).

IX. Change of Legal Residence

A. Background

§3.26 Before the 2001 enactment of MCL 722.31, a custodial parent could move a child anywhere within Michigan without court permission, even if that move were from Monroe to Marquette. Contrarily, pursuant to MCR

3.211(C)(1), a custodial parent seeking to move a child out of state was obligated to seek court approval, even if that move were from Monroe to Toledo.

The disparity in treatment of interstate and intrastate moves was a driving factor in the 2001 enactment of MCL 722.31, more commonly known as the "100-mile rule." The statute provides that, unless sole legal custody is granted to one of the parents, a child has a legal residence with both parents and that legal residence cannot be moved to a location more than 100 miles from the child's original legal residence, except with consent of the other parent or by permission of the court, or unless the move would cause the child's two legal residences to be closer to each other. *See Eickelberg v Eickelberg*, 309 Mich App 694, 871 NW2d 561 (2015). In *Eickelberg,* the trial court misapplied the 100-mile rule by looking at whether defendant had moved more than 100 miles from his last residence in Perry, Michigan, instead of considering whether he moved more than 100 miles from Clinton Township, Michigan, which was the children's legal residence when the parties' divorce action commenced. Because defendant's move to Marshall, Michigan, was more than 100 miles from Clinton Township, he was required to obtain court approval or plaintiff's consent before moving.

The proper method for calculating the distance between the current legal residence and the proposed residence is to measure radial miles, i.e., the distance on a straight line, rather than road miles. *Bowers v Vandermeulen-Bowers*, 278 Mich App 287, 750 NW2d 597 (2008).

The statute does not differentiate between interstate and intrastate moves, *Brown v Loveman*, 260 Mich App 576, 680 NW2d 432 (2004), and applies to relocation petitions arising out of custody orders that predate the statute. *Grew v Knox*, 265 Mich App 333, 694 NW2d 772 (2005). Moreover, if a court order prohibits moving the child to another state regardless of the distance involved, the factors under MCL 722.31(4) are the proper criteria for the court to consider. *Gagnon v Glowacki*, 295 Mich App 557, 815 NW2d 141 (2012) (plaintiff established by preponderance of evidence that moving her child to Windsor, Ontario, from Plymouth, Michigan, was warranted). See §3.27 for a discussion of the factors.

Before the codification of MCL 722.31, Michigan appellate courts adopted similar factors in considering a parent's request to move a child out of Michigan. The four factors had been laid out in *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206–207, 365 A2d 27, *aff'd,* 144 NJ Super 352, 265 A2d 716 (1976), and considered

- the prospective advantages of the move by improving the general quality of life for both the custodial parent and the children;
- the integrity of the custodial parent's motives for seeking the move (i.e., was the request inspired by the desire to defeat or frustrate visitation by the noncustodial parent, or would the custodial parent comply with substitute visitation orders if they were no longer subject to the jurisdiction of the court?);
- the integrity of the noncustodial parent's motives in resisting the move;

- if the move were allowed, whether there was a realistic opportunity for visitation in lieu of the existing schedule that would adequately preserve and foster the parental relationship with the noncustodial parent.

While the legislature apparently based MCL 722.31 on the *D'Onofrio* test, the two tests are not identical. First, the statutory test contains five factors instead of the four *D'Onofrio* factors. In addition, the statute uses the term *relocating parent* rather than *custodial parent.* Further, under the first prong of the *D'Onofrio* test, the trial court was to focus on the custodial family unit, but the statute specifically requires the court to consider the factors "with the child as the primary focus in the court's deliberations." MCL 722.31(4). Decisions applying the *D'Onofrio* factors may still be relevant, depending on the facts of the case.

In *Brown,* the major question was whether the trial court should have decided the issues using the factors in MCL 722.31 (sometimes referred to in the opinion as the "*D'Onofrio* factors") or, because the established custodial environment was with both parents, the best interests factors. The court ruled that MCL 722.27 (regarding the established custodial environment) and MCL 722.31 must be read together, because they have the same purpose and thus are *in pari materia.* The trial court erred because it only considered the statute/*D'Onofrio* factors, without also considering that relocation would be tantamount to a change of custody or change in the established custodial environment. *See also Moote v Moote*, 329 Mich App 474, 942 NW2d 660 (2019) (trial court's failure to address best interests factors in its analysis was not erroneous because move would not alter established custodial environment with plaintiff mother).

Therefore, when a move of over 100 miles would effectively change custody or destroy the established custodial environment, both the factors of MCL 722.31 and the best interests test must be considered. Under the latter test, the court must find that there is clear and convincing evidence that the change is in the child's best interests. *See Sehlke v VanDerMaas*, 268 Mich App 262, 707 NW2d 603 (2005), *rev'd on other grounds,* 474 Mich 1053, 708 NW2d 439 (2006) (change in legal residence in excess of one hundred miles constitutes a change of circumstances).

B. Standard for Change of Legal Residence Motions

§3.27 Where the court is called on to approve a change of legal residence over the other parent's objection, MCL 722.31(4) lists five factors to be considered, with the directive that the court's primary focus is on the child:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that

> can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

MCL 722.31(4) only requires that a court *consider* each listed factor and does not require a statement of its factual findings and conclusions with each factor as long as they were considered adequately enough to facilitate appellate review under MCR 3.210(D)(1). *Yachcik v Yachcik*, 319 Mich App 24, 900 NW2d 113 (2017). A court deciding a change of legal residence motion should first decide whether the movant has shown by a preponderance of the evidence that the change is warranted based on MCL 722.31(4). *Rains v Rains*, 301 Mich App 313, 326–327, 836 NW2d 709 (2013), *criticized on other grounds by Grange Ins Co v Lawrence*, 494 Mich 475, 835 NW2d 363 (2013). If the movant meets this burden, the court must decide if an established custodial environment exists. 301 Mich App at 327. If the court finds that there is an established custodial environment, it must next decide whether the change of residence would alter that environment. *Id.* at 328. If the residence change *will not* alter the established custodial environment, the court may issue the order without further analysis. *Id.* at 325. If the residence change *will* alter the established custodial environment, the movant must show by clear and convincing evidence that the move "is in the child's best interest." *Id.* Caselaw supports that all of these issues may be dealt with in one evidentiary hearing. *See Rains; Iwanska v Nielsen*, No 251396 (Mich Ct App Mar 23, 2004) (unpublished). *But see Grew v Knox*, 265 Mich App 333, 694 NW2d 772 (2005).

Although the trial court in *Rains* failed to consider whether plaintiff had shown by a preponderance of the evidence that the factors in MCL 722.31(4) favored a residence change, the court of appeals held that remand was unnecessary because the evidence supported the trial court's ruling when analyzed under the proper framework. Even if the factors in MCL 722.31(4) favored a change, plaintiff's motion failed because the evidence showed that there was an established custodial environment and plaintiff did not prove by clear and convincing evidence that changing the established custodial environment was in the child's best interests.

Defendant in *Gagnon v Glowacki*, 295 Mich App 557, 815 NW2d 141 (2012), in appealing the trial court's decision to grant a change of residence motion, argued that even though there was no change to the established custodial environment, the court was still required to consider whether the move was in the best interests of the child but at the lower preponderance of the evidence standard, citing *Pierron v Pierron*, 486 Mich 81, 782 NW2d 480 (2010). The court of appeals rejected defendant's argument and distinguished *Pierron,* in which parents who had joint legal custody could not agree regarding an important decision affecting the child's welfare and so must look to the child's best interests, from a

change of residence case under MCL 722.31 where there is no change in the established custodial environment.

The evidentiary hearing held to determine if a change in a child's residence is warranted under MCL 722.31(4) is not sufficient to also determine a change of custody request under MCL 722.23. The trial court is obligated to hold a separate hearing on a change of custody request. *Grew.*

Note that when analyzing MCL 722.31(4)(c), the relevant inquiry is not whether the proposed parenting time schedule is better than the current visitation plan but whether "the proposed parenting-time schedule provides 'a realistic opportunity to preserve and foster the parental relationship previously enjoyed' by the nonrelocating parent." *McKimmy v Melling*, 291 Mich App 577, 584, 805 NW2d 615 (2011), *criticized on other grounds by Grange Ins Co* (quoting *Mogle v Scriver*, 241 Mich App 192, 204, 614 NW2d 696 (2000)).

C. Exceptions

§3.28 MCL 722.31 **does not apply** in the following scenarios:

- One parent has been awarded *sole* legal custody of the child. MCL 722.31(2); *Spires v Bergman*, 276 Mich App 432, 741 NW2d 523 (2007). (If a parent with sole legal custody of a child subject to court order wants to move to another state, MCL 722.31 does not apply, but MCR 3.211(C)(1) still requires the custodial parent to seek the court's permission. *Brecht v Hendry*, 297 Mich App 732, 743, 825 NW2d 110 (2012). Moreover, if the parties share joint physical custody, the court should consider whether the proposed move will change an established custodial environment. *Sulaica v Rometty*, 308 Mich App 568, 583, 566 NW2d 838 (2014).)
- Both parents consent to the move. *Id.* (However, consent to the move does not abrogate the requirements of MCR 3.211(C)(1), which mandates that a judgment or order awarding custody of a minor provide that the domicile or residence of the minor may not be moved from Michigan without the approval of the court.)
- The child's two residences are already more than 100 miles apart or the proposed move would result in their being closer together. MCL 722.31(3).
- The custody order contains the parents' own agreement about how a change in either of the child's legal residences will be handled and the proposed move complies with that agreement. MCL 722.31(5).
- The parent seeking to change the legal residence needs a safe location from the threat of domestic violence. The parent may move to such a location with the child until the court makes a determination under the statute. MCL 722.31(6).
- The trial court did not determine whether there was an established custodial environment with either or both parents before making its initial custody determination. Factors only apply to petitions for a change of residence where there is already a custody order governing the parties. *Kessler v Kessler*, 295 Mich App 54, 811 NW2d 39 (2011).

Practice Tip

- *Under Lombardo v Lombardo, 202 Mich App 151, 507 NW2d 788 (1993), when parents have joint legal custody of a child, the "parents shall share decision-making authority as to the important decisions affecting the welfare of the child." When parents with joint legal custody cannot agree on essential matters, the court decides the issue based on the child's best interests and must make specific findings of fact on the record. See also Bowers v Vandermeulen-Bowers, 278 Mich App 287, 750 NW2d 597 (2008) (change of residence case also requiring Lombardo hearing). In light of Spires, judges should advise litigants that if they can't agree on important medical, legal, and educational issues regarding their child, one of them may get sole legal custody, Fisher v Fisher, 118 Mich App 227, 324 NW2d 582 (1982), and have the right to move away from Michigan without a hearing or notice.*

The parties may reach an agreement about how a change in the child's legal residence will be handled. However, in *Delamielleure v Belote*, 267 Mich App 337, 704 NW2d 746 (2005), the court of appeals found that a blanket consent to a change in residence included in the parties' divorce settlement agreement did not comply with MCL 722.31. The court held that the statutory restrictions are not met under such circumstances because the statute requires parental consent for a specific change in residence and does not authorize a general consent to be granted for any future move.

While a parent with sole legal custody does not have to seek court approval to move under MCL 722.31(1), the parent must seek court approval to move out of state under MCR 3.211(C) and the parties may not agree to waive this approval requirement. *Brausch v Brausch*, 283 Mich App 339, 770 NW2d 77 (2009); *see also Spires* (stipulated agreements do not apply in child custody matters; by entering into stipulated agreement that related primarily to plaintiff's change-of-residence request, defendant in no way abandoned or waived right to judicial determination on his change-of-custody motion). The *Brecht* court stated that *Spires* and *Brausch* "appear to have rendered MCR 3.211(C)(1) nugatory" because "if MCL 722.31 does not apply, the trial court … must approve the [custodial parent's] request [to move out of Michigan] without further ado, which seems to contradict the notion that trial courts have the discretion [under MCR 3.211(C)(1)] to grant or deny requests to move a child" out of state. 297 Mich App at 743.

Perhaps one instance where MCR 3.211(C)(1) still has teeth is when the parties share joint physical custody. In *Sulaica,* the mother had sole legal custody of the child but shared physical custody with the child's father. The court of appeals held that the trial court erroneously granted the mother's change of legal residence motion without considering whether the proposed move constituted a change to an established custodial environment. 308 Mich App at 583. The court distinguished *Brecht, Brausch,* and *Spires,* noting that none of these cases involved joint physical custody. On remand, the trial court was instructed to evaluate the child's custodial environment using the last three steps of the four-step process outlined in *Rains v Rains*, 301 Mich App 313, 836 NW2d 709 (2013).

D. *Domicile* Distinguished

§3.29 Caselaw deciding motions to change a child's legal residence "interchangeably describe these motions as motions for a change of domicile." *Grange Ins Co v Lawrence*, 494 Mich 475, 507 n65, 835 NW2d 363 (2013). The supreme court criticized this practice in *Grange Ins Co,* noting that the terms have distinct meanings and that MCL 722.31 expressly uses the term *residence. See Grange Ins Co,* 494 Mich at 493–512 (although child may have multiple residences, child may only have one domicile, which in case of divorced parents is with parent who has sole or primary physical custody under custody order (unless otherwise stated in domicile provision in order), regardless of whether parties have joint legal custody). In cases where parents enjoy "an equal 50/50 division of physical custody," "the child's domicile would alternate between the parents so as to be the same as that of the parent with whom he is living at the time." 494 Mich at 382 n78.

X. Third-Person Custody

A. Third Persons Initiating Custody Actions

§3.30 A *third person* is any person other than a child's biological or adoptive parents. MCL 722.22(k).

A third person does not have standing to create a custody dispute not incidental to a divorce or separate maintenance proceeding in the absence of legislation granting standing. *Bowie v Arder*, 441 Mich 23, 490 NW2d 568 (1992). A nonparent cannot create a child custody dispute by simply filing a complaint in the circuit court alleging that giving custody to the third person is in the "best interests of the child." *Ruppel v Lesner*, 421 Mich 559, 565–566, 364 NW2d 665 (1984). Further, although a third person may be awarded custody in a divorce proceeding, that does not confer standing on such third persons to bring original actions for custody. *Sirovey v Campbell*, 223 Mich App 59, 565 NW2d 857 (1997).

A third person does not obtain substantive rights by virtue of the child's having resided with the third person. *In re Clausen*, 442 Mich 648, 502 NW2d 649 (1993) (Michigan residents, who were temporary legal guardians and had physical custody of child, lacked standing to bring action challenging Iowa custody and guardianship orders); *see also McGuffin v Overton*, 214 Mich App 95, 542 NW2d 288 (1995) (third person had no standing although children were living with her, even if she were viewed as party against whom custody action was brought).

In *Kane v Anjoski (In re Anjoski)*, 283 Mich App 41, 770 NW2d 1 (2009), the Michigan Court of Appeals upheld the trial court's decision to permit a child to remain residing with the decedent-father's wife while an evidentiary hearing to determine custody was pending. Specifically, the court concluded that "[t]he meaning of MCL 722.27(1)(a) is clear and unambiguous. If a child custody dispute is pending, the trial court may award custody of the child to others if it is in the child's best interests. There is no limiting language in the statute that conditions an award 'to others' to only those 'others having standing,' as [the mother] argues." *Kane,* 283 Mich App at 62–63.

B. The Parental Presumption

§3.31 If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. MCL 722.25(1); *see Falconer v Stamps*, 313 Mich App 598, 886 NW2d 23 (2015). This statutory parental presumption must be given priority over the established custodial environment presumption, MCL 722.27(1)(c), and the third person must prove by clear and convincing evidence that all relevant factors, taken together, demonstrate that the child's best interests require placement with the third person. *Howard v Howard*, 310 Mich App 488, 871 NW2d 739 (2015); *Frowner v Smith*, 296 Mich App 374, 820 NW2d 235 (2012); *Heltzel v Heltzel*, 248 Mich App 1, 638 NW2d 123 (2001). The parental presumption prevails and applies to the natural parent regardless of whether that parent is a fit parent. *Hunter v Hunter*, 484 Mich 247, 771 NW2d 694 (2009), *overturning Mason v Simmons*, 267 Mich App 188, 704 NW2d 104 (2005). The term *natural parent* under the Child Custody Act includes a parent who gestated and birthed a child, while having no genetic connection to the child. *LeFever v Matthews*, 336 Mich App 651, 971 NW2d 672 (2021). The court in *Hunter* stated that the natural parent's fitness is an intrinsic component of the trial court's evaluation of the best interests factors and does not require a preliminary finding of parental fitness before deciding whether the presumption applies. This statement directly contradicts the holding in *Kane v Anjoski (In re Anjoski)*, 283 Mich App 41, 770 NW2d 1 (2009), which stated that an additional step of determining parental fitness is necessary when there is a custody dispute between a natural parent and a third party and when there are compelling indicia that raise concerns about the parent's current ability to care for the safety and welfare of the child before a court may proceed to determine the proper burden of proof.

C. Standing

1. Prospective Adoptive Parents; Unmarried Parents and Related Third Persons

§3.32 Under MCL 722.26c, there are two ways by which a third person may file an original action seeking custody of a child: (1) the third person must be a prospective adoptive parent or (2) the child's biological parents must never have been married (see below for required findings). An affidavit setting forth facts showing the existence of the prerequisite must be filed with the petition. MCL 722.26c(2)(a). In both instances, the action is filed with the circuit court having continuing jurisdiction over the child. If there is no continuing jurisdiction, it is filed in the county where the child has resided for the previous six months or, lacking that residency requirement, then "in the county having the most significant connection with the child." MCL 722.26d(b).

The person seeking third-person custody must send notice to each party having legal custody of the child and to each parent whose parental rights have not

been terminated. MCL 722.26e. The court may appoint an attorney for a parent. *Id.*

Prospective adoptive parents. Under MCL 722.26c(1)(a), a third person may file an original action seeking custody if both of the following conditions are met: (1) the child was placed for adoption with a third person under the adoption laws of Michigan or another state, and the placement order is still in effect when the action is filed, and (2) since placement, the child has resided with the third person for at least six months.

This provision covers prospective adoptive parents if, for any reason, the adoption cannot be finalized.

Unmarried parents and third persons. Under MCL 722.26c(1)(b), third persons have standing if all three of the following conditions are met:

1. The child's biological parents have never been married to one another.
2. The child's parent who has custody of the child dies or is missing, and the other parent has not been granted legal custody under court order.
3. The third person is related to the child within the fifth degree by marriage, blood, or adoption.

In *In re Ramon*, 208 Mich App 610, 528 NW2d 831 (1995), the maternal grandparents of a child born out of wedlock had standing to bring a custody action under this statute. That the grandparents had been appointed temporary guardians did not make them limited guardians and destroy their standing to seek custody. Similar cases, such as *Gray v Pann*, 203 Mich App 461, 513 NW2d 154 (1994), where a grandmother was denied standing, were determined under prior legislation.

A custodial parent in a coma is neither "missing" nor dead for the purposes of the third-party custody provisions of the Child Custody Act, MCL 722.26c. *Lee v Robinson*, 261 Mich App 406, 681 NW2d 676 (2004). In this case, the never-married Lee and Robinson had a child and Lee was awarded custody. Thereafter, Lee became comatose and the child resided with Lee's sister, who moved for custody under MCL 722.26c, claiming that Lee's comatose state rendered her "missing" under the act. The court of appeals disagreed, ruling that, under the plain language, Lee was neither "missing," since she was not absent or unable to be found, nor was she dead. Lee's sister was therefore without standing to bring a third-party custody action.

A third person (in this case, the maternal aunts) could not seek parenting time under this statute because it refers only to *custody. Terry v Affum*, 233 Mich App 498, 592 NW2d 791, *aff'd in part and vacated in part and remanded,* 460 Mich 855, 599 NW2d 100, *on remand, remanded,* 237 Mich App 522, 603 NW2d 788 (1999). The supreme court affirmed the standing issue under MCL 722.26c, but vacated and remanded the case back to the court of appeals to consider whether it was an "appropriate case" for an award of parenting time based on the child's best interests under MCL 722.27(1)(b). On remand, the court of appeals held that, while defendants, as third parties, did not have standing to initiate custody litigation, by virtue of plaintiffs' various actions, defendants were appropriate parties to

a child custody dispute properly before the circuit court. Thus, in modifying a custody order, the trial court must conduct a hearing to determine the best interests of the child pursuant to the guidelines of MCL 722.23. As the trial court failed to provide such a hearing, the matter was remanded.

2. Guardians

§3.33 Under MCL 722.26b, full and limited guardians have standing to bring an action for custody of the child (the ward), except that limited guardians have no standing if the child's parents have substantially complied with the limited guardianship placement plan. *See Newsome v Labby*, 206 Mich App 434, 522 NW2d 872 (1994). Temporary guardians have the same authority as ordinary guardians to bring actions for custody. *Kater v Brausen*, 241 Mich App 606, 617 NW2d 40 (2000). Guardians have standing even if the guardianship was created before the 1990 enactment of MCL 722.26b. *Walterhouse v Ackley*, 459 Mich 924, 589 NW2d 780 (1998), *rev'g* 226 Mich App 67, 572 NW2d 243 (1997), and remanding to the court of appeals for consideration of constitutional issues.

A custody action under MCL 722.26b brought by a guardian who is also the child's grandparent is separate and distinct from an action for grandparenting time under MCL 722.27b. A guardian-grandparent's request for custody does not automatically include a request for grandparenting time. *Falconer v Stamps*, 313 Mich App 598, 886 NW2d 23 (2015) (trial court improperly awarded grandparenting time sua sponte in custody action between child's mother and guardian-grandmother). See §§4.19–4.20.

3. Domestic Partners

§3.34 Domestic partners of a custodial parent do not have standing to seek custody. *McGuffin v Overton*, 214 Mich App 95, 542 NW2d 288 (1995) (domestic partner lacked standing to challenge biological father's custody petitions). There is no provision in the Child Custody Act that can be read to give a third person, who is not a guardian or limited guardian, a right to legal custody of a child on the basis that the child either resides with or has resided with that party. *Id.* at 100. But see the discussion of *Pueblo v Haas*, 511 Mich 345, 999 NW2d 433 (2023) in §3.38 regarding standing under the equitable parent doctrine for partners in same-sex couples where the children were born during Michigan's unconstitutional same-sex marriage ban.

4. Foster Parents

§3.35 A foster parent under contract to the state has no standing to seek custody of the foster child when the biological parent's rights have not been terminated. *Tallman v Milton*, 192 Mich App 606, 482 NW2d 187 (1992).

5. The Putative Father

§3.36 The term *putative father* is not defined in the Adoption Code, MCL 710.22, or the Paternity Act, MCL 722.711. *In re MGR*, 323 Mich App 279, Note 2, 916 NW2d 662 (2018), *rev'd on other grounds,* 504 Mich 852, 928

NW2d 184 (2019) (court applied definition for *putative father* as "a man reputed, supposed, or alleged to be the biological father of a child" from *Girard v Wagenmaker*, 173 Mich App 735, 740, 434 NW2d 227 (1988), *rev'd on other grounds,* 437 Mich 231, 470 NW2d 372 (1991)). A putative father must have established his paternity to seek custody. An acknowledgment of paternity executed in accord with statutory requirements provides a basis for court-ordered child custody. MCL 722.1004; *Hoshowski v Genaw*, 230 Mich App 498, 584 NW2d 368 (1998). A putative father could also first seek a determination of paternity or an order of filiation under the Paternity Act. *Afshar v Zamarron*, 209 Mich App 86, 530 NW2d 490 (1995).

Even though a mother admitted that plaintiff, a man with whom she had an extramarital relationship, was her child's father, plaintiff had no standing to seek custody of and visitation rights with the child. *Kaiser v Schreiber*, 469 Mich 944, 670 NW2d 671 (2003); *see also Aichele v Hodge*, 259 Mich App 146, 673 NW2d 452 (2003).

6. Interstate Disputes

§3.37 The UCCJEA, as adopted in Michigan, is a procedural statute for resolving jurisdictional disputes. The former Uniform Child Custody Jurisdiction Act (UCCJA), MCL 600.651 et seq., was repealed and replaced by the UCCJEA, MCL 722.1101 et seq.; *see also In re Clausen*, 442 Mich 648, 502 NW2d 649 (1993). It does not provide an independent basis for conferring standing on a third person.

In *Clausen,* when an Iowa court in adoption proceedings rescinded its temporary custody order awarding custody to a Michigan couple, the would-be adoptive parents no longer had a basis to claim custody. That the child lived in Michigan was not sufficient to confer standing on the Michigan couple. Both the UCCJA and the federal PKPA required enforcement of the Iowa court's orders. See §§3.41–3.48.

In *Foster v Wolkowitz*, 486 Mich 356, 785 NW2d 59 (2010), the Michigan Supreme Court held that the initial grant of custody to the mother, given when an acknowledgment of parentage is executed under the Acknowledgment of Parentage Act, MCL 722.1001 et seq., is not an "initial child-custody determination" under the UCCJEA. The court reasoned that while, with the filing of this acknowledgment, the parents consent to the general personal jurisdiction of Michigan courts, jurisdiction over a person is not synonymous with jurisdiction over a case and does not provide a basis for finding that Michigan has home-state jurisdiction under the UCCJEA.

D. The Equitable Parent Doctrine

§3.38 In *Atkinson v Atkinson*, 160 Mich App 601, 608–609, 408 NW2d 516 (1987), the court of appeals adopted the equitable parent doctrine and held that

> a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the

> husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

In *Stankevich v Milliron*, 313 Mich App 233, 882 NW2d 194 (2015), the court of appeals held that the nonbiological parent in a same-sex relationship had standing to seek the status of an equitable parent because the parties were married in Canada before their child was born; they entered into an agreement to conceive and raise the child together; and plaintiff assisted in the artificial insemination process, was present at the child's birth, fully participated in the care and rearing of the child, and enjoyed parenting time after the parties separated. The case was remanded to the trial court for an evidentiary hearing to determine whether she was entitled to be deemed an equitable parent, per *Van v Zahorik*, 460 Mich 320, 597 NW2d 15 (1999).

The doctrine does not apply when the parties were unmarried and the child was born out of wedlock. *Lake v Putnam*, 316 Mich App 247, 894 NW2d 62 (2016); *Stankevich*; *Killingbeck v Killingbeck*, 269 Mich App 132, 711 NW2d 759 (2005); *see also Sheardown v Guastella*, 324 Mich App 251, 260, 920 NW2d 172 (2018) (failure of as-applied constitutional challenge raised by unmarried same-sex nonbiological parent as statute, MCL 722.22(i), could be applied to someone in opposite-sex relationship). But see *Ramey v Sutton*, 362 P3d 217, 219 (OK 2015), an Oklahoma case that held that a nonbiological parent in a same-sex relationship acts *in loco parentis* when

> the couple, prior to *Bishop,* or *Obergefell* … , (1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner's parental role following the birth of the child.

However, in *Pueblo v Haas*, 511 Mich 345, 999 NW2d 433 (2023), the Michigan Supreme Court ruled that a former partner of a same-sex couple who is seeking custody of a child to whom they did not give birth and with whom they do not share a genetic connection is entitled to make a case for equitable parenthood and has standing to bring an action under the Child Custody Act, MCL 722.21 et seq. The moving party must establish by a preponderance of the evidence that the parties would have been married before the child's conception or birth but for Michigan's unconstitutional marriage ban. Courts should consider the factors in *In re Madrone*, 350 P3d 495 (Or App 2015), to determine whether a plaintiff has met the burden of proof.

XI. The Role of the Friend of the Court

§3.39 Except in limited circumstances, the parties may opt out of receiving Friend of the Court services. See §7.3. If child custody is disputed in a domestic relations matter and the parties have not opted out of receiving Friend of the Court services, the Friend of the Court must conduct an investigation and make a written report and recommendation on custody to the parties and the

court when ordered by the court. The recommendation must be based on the best interests of the child standard. See §7.11. Alternative dispute resolution must be provided by the Friend of the Court on a voluntary and confidential basis for custody disputes. MCL 552.513. See §§7.7–7.10 for a discussion of Friend of the Court alternative dispute resolution.

In addition, the court must find proper cause or change of circumstance before referring to the Friend of the Court for a postjudgment investigation and recommendation. *Bowling v McCarrick*, 318 Mich App 568, 899 NW2d 808 (2016). However, the court may refer the matter to the referee for a threshold determination by the referee without first finding proper cause or change of circumstance. *Brown v Brown*, No 352767 (Mich Ct App Dec 22, 2020) (unpublished).

Alternative Dispute Resolution. The Friend of the Court must provide alternative dispute resolution services, including domestic relations mediation, for custody disputes. MCL 552.513(1); *see also* MCR 3.224. Alternative dispute resolution is voluntary and the proceedings are confidential. The only report that may issue from alternative dispute resolution is a consent order. MCL 552.513(2). If the parties do not reach an agreement, the domestic relations mediation provider may not make any recommendation involving the parties, nor may the provider perform any enforcement or referee functions in the case. MCL 552.515. If the parties reach an agreement, a consent order is entered by the court. By statute, it appears that the court must enter consent orders reached through alternative dispute resolution. *See* MCL 552.513(2).

Practice Tip

- *While the duties of the Friend of the Court include providing domestic relations alternative dispute resolution in child custody disputes, before scheduling or ordering alternative dispute resolution, indicators of hostility or domestic violence should be considered. See MCL 552.513(1) (Friend of the Court alternative dispute resolution services must include screening process for domestic violence, personal protection order between parties, child abuse or neglect, and other safety concerns). See SCAO form FOC 124 (domestic violence screening form). Indicators can range from information obtained from interviewing the parties to an arrest record for domestic abuse or a personal protection order. These indicators can signal possible problems with being able to use conciliation procedures, as well as safety or security problems. The Michigan Judicial Institute's Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings §7.6 (4th ed 2024) has a wealth of information and suggested steps to ensure safety and fairness.*

Admissibility of reports. The circuit court is not bound by Friend of the Court findings and recommendations. *See Marshall v Beal*, 158 Mich App 582, 405 NW2d 101 (1986). A Friend of the Court report may be considered by the court, but is generally inadmissible as evidence unless all parties stipulate to its admission. *Krachun v Krachun*, 355 Mich 167, 93 NW2d 885 (1959); *McCarthy v McCarthy*, 74 Mich App 105, 253 NW2d 672 (1977). It is error for the court to decide custody solely on the pleadings and the Friend of the Court report. *Stringer v Vincent*, 161 Mich App 429, 411 NW2d 474 (1987). The Michigan Rules of

Evidence do not apply to a court's consideration of a Friend of the Court's report or recommendation submitted under MCL 552.505(1)(g) or (h). MRE 1101(b)(9).

See Chapter 7 for a more complete discussion of the role of the Friend of the Court.

XII. The Role of Domestic Relations Referees

§3.40 Under MCL 552.507, the domestic relations referee has authority to hear motions regarding custody. Within a particular circuit, the chief judge and/or the judge to whom an action is assigned also has a role in determining which motions are referred. MCR 3.215.

The chief judge may direct that specified types of domestic relations motions all initially be heard by a referee. MCR 3.215(B)(1). This may include scheduling and settlement conferences. MCR 3.215(B)(3).

See §1.28 and exhibit 1.1 for more detailed discussion of domestic relations referees' authority.

XIII. Interstate Custody Disputes

A. In General

§3.41 In 2002, the Michigan legislature repealed the UCCJA, MCL 600.651 et seq., and adopted the UCCJEA, MCL 722.1101 et seq. The UCCJEA governs the procedures for resolving child custody disputes when one or both parents reside outside Michigan. It also governs enforcement of out-of-state custody decrees in Michigan and sets forth the circumstances when modification of a foreign court order is permitted. The most important changes the UCCJEA makes to the UCCJA are the giving of jurisdictional priority and exclusive continuing jurisdiction to the home state. The UCCJEA also clarifies ambiguities in the UCCJA that resulted in different states interpreting and applying the UCCJA inconsistently. Important provisions of the UCCJEA include the following:

- **Home State Priority.** The UCCJEA gives priority to home state jurisdiction. The old UCCJA included an alternative ground to home state jurisdiction based on the best interests of the child if the child and one parent (or person acting as a parent) had significant connections with another state.
- **Continuing Exclusive Jurisdiction.** The UCCJEA provides for continuing exclusive jurisdiction, i.e., once a state exercises jurisdiction over a custody dispute, it retains jurisdiction as long as that state maintains a significant connection with the parties or until all parties have moved away from that state.
- **Temporary Emergency Jurisdiction.** The UCCJEA allows a state to obtain jurisdiction temporarily when the child is present in the state and is abandoned or needs protection because the child, or a sibling or parent of the child, is subjected to abuse. The act also permits a court to issue a warrant for physical custody of a child if it is likely that the child will suffer serious imminent physical harm or be imminently removed from the state.

- **Interstate Communication.** If a court of one state has been asked to make a child custody determination and is informed that a custody proceeding has been commenced in another state having jurisdiction substantially in accordance with the UCCJEA, the court in the first state must immediately communicate with the court in the other state to determine the more appropriate forum.

Unlike the UCCJA, the UCCJEA harmonizes with the federal PKPA, 28 USC 1738A, with the effect that custody orders will more consistently be given full faith and credit in sister states. For UCCJEA flowcharts, see the UCCJEA's website.

B. General Principles Under the Uniform Child-Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act

1. Notice and Hearing Requirements

§3.42 Both the PKPA and the UCCJEA have notice and hearing requirements. 28 USC 1738A(e); MCL 722.1108, .1205. All parties, including those living out of state, must be notified and a hearing must be held before any determination is made. This includes notification to the parties, any parent whose rights have not been terminated, and any person with physical custody of the child. *Id.* The PKPA expressly recognizes grandparents as "contestants" entitled to notice in parenting time determinations. 28 USC 1738A(b)(2). The UCCJEA also requires an affidavit from the petitioner with specific information including where the child has resided for the preceding five years and information concerning any pending custody litigation in a court of this or any other state. MCL 722.1209. *See* SCAO form MC 416.

2. Enforcement

§3.43 If another state's custody decree, judgment, or modification substantially conforms with the UCCJEA (and assuming it conforms to the PKPA), Michigan courts must recognize and enforce it. MCL 722.1303; *Loyd v Loyd*, 182 Mich App 769, 452 NW2d 910 (1990) (hearing on established custodial environment or best interests of child was not required when court was only being asked to enforce Tennessee order); *see also Nock v Miranda-Bermudez*, No 363362, ___ Mich App ___, ___ NW3d ___ (July 20, 2023) (children had lived in Michigan with plaintiff for seven months before defendant filed custody action in California; therefore, California court erred when it determined that California was children's home state for purposes of UCCJEA and exercised jurisdiction over custody case); *Nadimpali v Byrraju*, 326 Mich App 73, 931 NW2d 38 (2018) (2014 Californian child custody determination was modified and could no longer be enforceable in Michigan, and circuit court did not abuse its discretion by vacating its earlier order registering 2014 Californian child custody determination).

It is not a prerequisite that the other state has adopted the UCCJEA. However, the other state must have exercised its jurisdiction substantially in conformity with the principles of the UCCJEA, including the notice and hearing provisions. MCL 722.1303; *see Fisher v Belcher*, 269 Mich App 247, 713 NW2d 6 (2005)

(Michigan deferred to Missouri action); *Dean v Dean*, 133 Mich App 220, 348 NW2d 725 (1984) (Michigan did not defer to Texas action).

Unlike the UCCJA, the UCCJEA treats Indian tribes as "states." MCL 722.1104(2). Therefore, a tribal court's custody order is enforceable in a state court if the tribal court's determination was consistent with the act's jurisdictional standards and notice requirements. Furthermore, under MCR 2.615, an order of a tribal court is accorded full faith and credit, meaning it is presumed valid and enforceable, to the extent the tribe or tribal court has agreed to reciprocal enforcement of state court orders in the tribal court.

3. Modification

§3.44 Under the UCCJEA, a Michigan court will not modify another state's (or foreign country's) custody decree unless the Michigan court has jurisdiction to make an initial custody determination under MCL 722.1201(1)(a) or (b) and either (1) the court of the other state determines that it no longer has exclusive, continuing jurisdiction or that a Michigan court would be more convenient, MCL 722.1203(a), or (2) neither the child, the child's parent, nor a person acting as a parent resides in the other state, MCL 722.1203(b). *See Smith v Schafer*, No 366473, ___ Mich App ___, ___ NW3d ___ (Nov 21, 2023) (Michigan circuit court had jurisdiction under UCCJEA to modify Georgia state custody order by removing "tie-breaker" legal custody provision when that tie-breaking provision violated Michigan law and Michigan was home state of parties and child at time of petition to register foreign judgment); *Nadimpali v Byrraju*, 326 Mich App 73, 931 NW2d 38 (2018) (circuit court in Michigan lacked authority to modify Californian child custody order because it did not have jurisdiction to make initial child custody determination under UCCJEA as Michigan has never been child's home state); *Atchison v Atchison*, 256 Mich App 531, 664 NW2d 249 (2003) (criteria to modify Canadian child-custody determination were not established); *see also* 28 USC 1738A(f). A *person acting as a parent,* referred to under MCL 722.1201(1)(a), is defined in the UCCJEA to mean a person, other than a parent, who meets both the following criteria:

> (i) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding.
>
> (ii) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

MCL 722.1102(m). In *Guardalupe Hernandez v Mayoral-Martinez*, 329 Mich App 206, 942 NW2d 80 (2019), the child's maternal grandmother did not qualify as a "person acting as a parent" under MCL 722.1102(m) because she had not been awarded legal custody of the child in Mexico where she and the child lived at the time the child's father initiated the custody action. Although the grandmother may have been seeking custody of the child in Mexico, that did not amount to the grandmother claiming "a right to legal custody under the law of this state."

The following factors were found to affect the court's decision to modify under the UCCJA:

- The child's residence with the petitioner-grandparent in Michigan provided a basis for jurisdiction to modify a California court's custody decree. *In re Danke*, 169 Mich App 453, 426 NW2d 740 (1988).
- Michigan declined to modify a Washington custody decree, deferring to that state's continuing jurisdiction. *Thompson v Hair*, 146 Mich App 561, 381 NW2d 765 (1985).
- Where the petitioner showed significant connection with Michigan and that substantial evidence concerning present and future care was available here, the court modified a California custody order, even though California was the child's home for seven years. *Lustig v Lustig*, 99 Mich App 716, 299 NW2d 375 (1980).
- "[E]ven a proceeding for enforcement in another state does not necessarily terminate the jurisdiction of a court in the child's home state to modify a child-custody determination." *Nadimpali* (despite family court in India failing to follow MCL 722.1206 exactly, "it was located in the child's home state of India and had jurisdiction to modify the child-custody determination").

C. Determining Whether Michigan Has Jurisdiction Under the UCCJEA

§3.45 Under the UCCJEA, a Michigan court has jurisdiction over a custody dispute if one of four jurisdictional bases is met. Note that the child's physical presence in Michigan is not a prerequisite in all the bases (although it is for emergency jurisdiction), nor does mere physical presence guarantee jurisdiction. *See Thompson v Hair*, 146 Mich App 561, 381 NW2d 765 (1985). The four bases are

1. "home state" jurisdiction, which has priority;
2. "significant connection" jurisdiction if no other state has home state jurisdiction;
3. "temporary emergency" jurisdiction; and
4. "last resort" jurisdiction.

Home state jurisdiction. *Home state* is defined as

> the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period.

MCL 722.1102(g).

The focus of the UCCJEA concerns a child's actual presence, not an intent to reside. *Ramamoorthi v Ramamoorthi*, 323 Mich App 324, 918 NW2d 191 (2018).

There are two ways of being a home state under the UCCJEA:

1. At the commencement of the proceeding, the child and at least one parent must have resided in Michigan for at least six consecutive months (or since the child's birth if the child is less than six months old). In *Veneskey v Sulier*, 338 Mich App 539, 980 NW2d 551 (2021), the grandparents' filing of a guardianship petition only several days after removing the child from North Carolina where the child had lived for over six months did not render Michigan as the child's home state.
2. At the commencement of the proceeding, the child is absent from Michigan, but Michigan was the child's home state within six months before the commencement of the proceeding; and a parent or person acting as a parent continues to live in Michigan.

Significant connection jurisdiction. If no other state has home state jurisdiction, a state with "significant connection" may exercise jurisdiction. Significant connection jurisdiction is established where

1. the child and the parents, or the child and at least one parent, have a significant connection with Michigan other than mere physical presence and
2. there is substantial evidence available in Michigan concerning the child's care, protection, training, and personal relationships.

MCL 722.1201(1)(b). If a court exerts jurisdiction under this basis without deferring to the child's home state, its order will not be accorded full faith and credit.

Temporary emergency jurisdiction. For this basis, there must be an emergency requiring a Michigan court to act. The child must be present in Michigan, but there is no residency requirement as in home state jurisdiction. In addition, either the child must have been abandoned or "it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." MCL 722.1204(1).

If a custody proceeding has been commenced or a custody determination made in another state's court, the Michigan court must immediately communicate with the other court to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. MCL 722.1204(4). MCL 722.1110 (communication between courts) must be complied with, including whether parties must be allowed to participate and whether a record of the communication must be made by the court. If a Michigan court finds that a child is likely to suffer serious imminent physical harm or be imminently removed from this state, it may issue a warrant to take physical custody of the child. MCL 722.1310. In situations where domestic violence is at issue, the temporary emergency jurisdiction and warrant provision can be significant. This issue is discussed in the Michigan Judicial Institute's *Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings* §8.6 (4th ed 2024).

Last resort jurisdiction. This basis is used when no other state appears to have jurisdiction. To assert last resort jurisdiction, a court must make the following determinations:

1. no other court has home state, significant connection, or temporary emergency jurisdiction; or

2. another state with home state, significant connection, or temporary emergency jurisdiction has declined to exercise jurisdiction on the ground that Michigan is the more appropriate forum to determine custody.

MCL 722.1201(1)(c), (d).

Exclusive continuing jurisdiction. A Michigan court that has made a child custody determination consistent with the UCCJEA has exclusive continuing jurisdiction over the determination until either of the following occurs: (1) a Michigan court determines that neither the child, nor the child and one parent, have a significant connection with Michigan and that evidence is no longer available in Michigan concerning the child's care, protection, training, and personal relationships; or (2) a Michigan court or a court of another state determines that neither the child, nor a parent of the child, presently resides in Michigan. MCL 722.1202. *Significant connection* to this state is defined as "an important or meaningful relationship." *White v Harrison-White*, 280 Mich App 383, 390, 760 NW2d 691 (2008). A significant connection with Michigan exists where one parent resides in the state, maintains a meaningful relationship with the child, and exercises parenting time in the state. *Id.* at 394.

D. Determining When to Defer Jurisdiction to Another State Under the UCCJEA

§3.46 A Michigan court may not exercise its jurisdiction if, when the petition is filed, a proceeding concerning the custody of the child "has been commenced in a court of another state having jurisdiction substantially in conformity" with the UCCJEA. MCL 722.1206(1); *see Jamil v Jahan*, 280 Mich App 92, 760 NW2d 266 (2008); *Nash v Salter*, 280 Mich App 104, 760 NW2d 612 (2008); *Bigelow v Bigelow*, 119 Mich App 784, 327 NW2d 361 (1982). Adoption proceedings are not included. MCL 722.1103.

Filing a custody petition in another state does not, in itself, constitute an exercise of jurisdiction. There must be some order of the court indicating it has assumed jurisdiction following the filing of the pleading. *Moore v Moore*, 186 Mich App 220, 463 NW2d 230 (1990); *see also Braden v Braden*, 217 Mich App 331, 551 NW2d 467 (1996).

A complaint for child support alone does not constitute a child custody proceeding for purposes of determining jurisdiction under the UCCJEA. *Fisher v Belcher*, 269 Mich App 247, 713 NW2d 6 (2005).

Communication between courts is required when it is determined that a proceeding has been commenced in another state. Before hearing a child custody proceeding, a Michigan court must determine whether a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the UCCJEA. If such a proceeding has been commenced, the Michigan court must stay its proceeding and communicate with the court of the other state. If the other court does not determine that the Michigan court is a more appropriate forum, the Michigan court must dismiss the child custody proceeding. MCL 722.1206(2).

If the other state stays proceedings because Michigan is a more appropriate forum or for other reasons, or if temporary action is necessary to protect a child who has been threatened with mistreatment or abuse or is otherwise neglected or dependent, Michigan may exercise jurisdiction. MCL 722.1206(2); *see Thompson v Hair*, 146 Mich App 561, 381 NW2d 765 (1985) (Washington more appropriate forum).

A custody order entered in the wrong forum must be set aside. In *Fisher,* a Michigan trial court inadvertently entered a custody order before the two states had adequately examined the issue of jurisdiction. After the two trial courts conferred and agreed that Missouri was the proper state of jurisdiction, the Michigan trial court was required to set aside its own custody order; the order was void for lack of jurisdiction. MCR 2.612(C)(1)(d).

E. Declining Jurisdiction Under the UCCJEA

§3.47 Even after determining that it has jurisdiction, a court may decline to exercise it.

A more convenient or appropriate forum. A court may decline to exercise jurisdiction if it finds that another state is a more convenient or appropriate forum. MCL 722.1207(1). The issue may be raised on the court's own motion or the motion of a party. *Id.*; *see Veneskey v Sulier*, 338 Mich App 539, 980 NW2d 551 (2021).

Before declining or retaining jurisdiction, the court may communicate with the other state's court regarding the appropriateness and availability of that forum. MCL 722.1110.

The following considerations are listed in MCL 722.1207(2):

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.

(b) The length of time the child has resided outside this state.

(c) The distance between the court in this state and the court in the state that would assume jurisdiction.

(d) The parties' relative financial circumstances.

(e) An agreement by the parties as to which state should assume jurisdiction.

(f) The nature and location of the evidence required to resolve the pending litigation, including the child's testimony.

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.

(h) The familiarity of the court of each state with the facts and issues of the pending litigation.

The trial court must explicitly consider each of the statutory factors. *Cheesman v Williams*, 311 Mich App 147, 874 NW2d 385 (2015).

Unjustifiable conduct. If a Michigan court has jurisdiction because a person invoking the court's jurisdiction has engaged in unjustifiable conduct, the court

shall decline to exercise its jurisdiction unless the court finds that (a) the parents have acquiesced in the exercise of jurisdiction; (b) a court of the state otherwise having jurisdiction determines that Michigan is a more appropriate forum; or (c) no other state's court would have jurisdiction under the act. MCL 722.1208(1). If a Michigan court declines to exercise its jurisdiction under this provision, the court may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction. MCL 722.1208(2).

F. Child Support Orders

§3.48 Neither the UCCJEA nor the PKPA covers child support. However, in *Scott v Scott*, 182 Mich App 363, 451 NW2d 876 (1990), a UCCJA action, the court did find that once jurisdiction was established over the parent, the court could exercise its equitable interest in the parties and the issue of child support to make an award.

G. Uniform Child Abduction Prevention Act

§3.49 The UCAPA, MCL 722.1521 et seq., allows courts to take measures to prevent child abduction. Under the UCAPA, a court may order abduction prevention measures in a custody proceeding sua sponte if the evidence establishes "a credible risk" of child abduction. MCL 722.1524(1). However, a trial court is not required to sua sponte invoke the UCAPA at a hearing to modify the custody provisions of a consent judgment of divorce. *Kostreva v Kostreva*, 337 Mich App 648, 976 NW2d 889 (2021). A party or other individual entitled to seek a custody determination for the child may also file a verified petition seeking prevention measures. MCL 722.1524(2), .1526 (petition requirements). However, a petition may only be filed in a court that has jurisdiction under the UCCJEA. MCL 722.1525(1). If the court finds a credible risk of abduction, it has temporary emergency jurisdiction under the UCCJEA. MCL 722.1525(2).

The court must evaluate whether there is a credible risk of child abduction using the lengthy list of considerations in MCL 722.1527(1). Acts carried out to avoid domestic violence or imminent harm to the child or the respondent cannot be the basis for an abduction prevention order. MCL 722.1527(2).

If the court finds a credible risk of child abduction under MCL 722.1527, it must enter an abduction prevention order with provisions that are "reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties and the safety of the parties and the child." MCL 722.1528(2); *see also* MCL 722.1528(1) (required provisions), (3)–(5) (optional provisions). In deciding which prevention measures to order, the court must consider the child's age, the risk of harm to the child if abducted, the difficulties of returning the child if abducted, and the reasons for the potential abduction. MCL 722.1528(2). Some of the prevention measures the court may order include

- travel restrictions and documentation requirements,

- restrictions on the child's passport,
- prerequisites to exercising custody or visitation,
- a requirement that the respondent obtain a custody order with identical terms from the relevant foreign jurisdiction,
- limited or supervised visitation,
- a requirement that the respondent post a bond or give security as a financial deterrent to abduction,
- education on the potential harm to the child from abduction, and
- other measures designed to prevent the child's imminent abduction.

MCL 722.1528(3)–(5). If the court finds a credible risk that the child is "imminently likely to be wrongfully removed," it may issue an ex parte warrant to take custody of the child. MCL 722.1529(1); *see* MCL 722.1529(2) (ex parte warrant procedures). An order under the act remains effective until the earlier of (1) "the time stated in the order"; (2) the child's emancipation; (3) the child becoming 18 years old; or (4) "[t]he time the order is modified, revoked, vacated, or superseded by a court with jurisdiction." MCL 722.1530.

XIV. International Custody Disputes

A. Enforcing or Modifying Foreign Orders

§3.50 The UCCJEA applies to international decrees as long as they conform with UCCJEA jurisdictional standards and there was reasonable notice and opportunity to be heard. MCL 722.1105(2). Recognition and enforcement of custody decrees or judgments rendered by legal institutions and appropriate authorities are determined under the same policies applied to other states. The UCCJEA jurisdictional requirements of reasonable notice and an opportunity to be heard must be given to all affected persons. MCL 722.1108. It is not a prerequisite that the foreign jurisdiction has adopted the UCCJEA. *See Klont v Klont*, 130 Mich App 138, 342 NW2d 549 (1983) (German law substantially conformed to UCCJA; Michigan declined jurisdiction); *cf. Farrell v Farrell*, 133 Mich App 502, 351 NW2d 219 (1984) (Michigan jurisdiction not barred where Michigan petition was pending when petition was filed in Ireland and where proceedings in Ireland did not provide notice and hearing).

B. The Hague Convention

§3.51 The Hague Convention on the Civil Aspects of International Child Abduction was ratified by the United States in 1986. To be applicable, both the United States and the other country must be signatories to the Hague Convention. See the Michigan Judicial Institute's *Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings* §8.6 (4th ed 2024) for a list of signatory nations. See the Hague Conference on Private International Law for comprehensive information about the Hague Convention and a country's status. If a country has acceded to the Hague Convention and the United States has yet to accept it, the acceding country is not considered a party. Therefore, the acceding country is not bound to the legal obligations of the Hague Convention. *But see Safdar v Aziz*,

342 Mich App 165, 992 NW2d 913 (2022) (finding that trial court properly determined Pakistan's status as contracting party to Hague Convention). See other connected parties to the Hague Convention. The enabling federal legislation is the International Child Abduction Remedies Act, 22 USC 9001 et seq. Federal and state courts have concurrent jurisdiction over Hague Convention cases. 22 USC 9003(a). The remedies available under the Hague Convention are not exclusive. 22 USC 9003(h).

The Hague Convention establishes legal rights and procedures governing both the prompt return of children wrongfully removed or retained and securing the exercise of "visitation rights" or access rights. 22 USC 9001.

When a child has been wrongfully removed from another country, or is being wrongfully retained in this country, the provisions of the Hague Convention may be invoked. *See Harkness v Harkness*, 227 Mich App 581, 577 NW2d 116 (1998). A Michigan court would not address the merits of any custody dispute until it had first been determined that the Hague Convention did not apply. *Id.* at 588.

This section sets out basic principles concerning application of the Hague Convention. See the Michigan Judicial Institute's *Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings* §8.6 (4th ed 2024) and Fred Morganroth, *The Hague Convention: Understanding and Handling Child Abduction and Retention Cases,* 78 Mich BJ 28 (Jan 1999) for further discussion. See other connected parties to the Hague Convention.

Initiating the action. A petitioner commences this civil action by filing a petition in a court authorized to exercise jurisdiction, which is the place where the child is located at the time the petition is filed. 22 USC 9003(b).

The petitioner's burden. A petitioner seeking the return of a child has the burden of establishing by a preponderance of the evidence that the child was wrongfully removed or retained. 22 USC 9003(e)(1); *Harkness,* 227 Mich App at 589. The petitioner seeking access to the child must show it has visitation rights that are being wrongfully denied. 22 USC 9003(e).

Defining *wrongfully retained.* To show that the child was wrongfully retained, the petitioner must prove three elements:

1. the child was a habitual resident of the other country immediately before the removal or retention;
2. the petitioner had either sole or joint rights of child custody under the other country's law; and
3. at the time the child was retained in the United States, the petitioner was exercising those custodial rights.

Hague Convention, Article 3; *Harkness,* 227 Mich App at 587.

Defining *habitual residence.* The term *habitual residence* is not defined in the Hague Convention and its determination depends largely on the facts of the particular case. *Id.* at 591. The facts of *Harkness* are somewhat complicated. The father was in the U.S. Army and had met and married his wife, a German citizen, while he was stationed in Germany. Their two children had dual citizenship. One

had been born in the United States and one had been born in Germany. The parties lived in a number of places, sometimes separated because of the husband's assignments. The children were in Michigan because they had been left here with their grandparents when the mother returned to Germany after a visit. *Id.* at 583–584.

In deciding that Germany was the habitual residence of the children, the *Harkness* court relied largely on federal precedent, considering the children's "past experiences" or "permanent residences," whether the children had been physically present in a country for an amount of time "sufficient for acclimatization," and where the parties had resided together as a family unit. *Id.* at 596.

Rights of custody. A parent's right to decide the child's country of residence, otherwise known as a *ne exeat* right, is a right of custody under the Hague Convention. *Abbott v Abbott*, 560 US 1 (2010). Accordingly, if a child is taken out of a contracting state to the Convention in violation of a parent's *ne exeat* right, the parent is entitled to the immediate return of the child unless an exception to the Convention applies. *Id.*

Mandatory return of the child. If the court finds a wrongful retention, it must order the return of the child to the other country. The issue of custody is then decided by the appropriate tribunal in the child's place of habitual residence. Hague Convention, Article 12; *Tyszka v Tyszka*, 200 Mich App 231, 235, 503 NW2d 726 (1993). However, the child's return to a foreign country pursuant to a return order under the Hague Convention does not render an appeal of that order moot where "there is a live dispute between the parties over where the[] child will be raised, and there is a possibility of effectual relief for the prevailing parent." *Chafin v Chafin*, 568 US 165, 180 (2013). In *Ajami v Solano*, 29 F4th 763 (6th Cir 2022), the Sixth Circuit held that defendant-mother failed to present clear and convincing evidence that an Article 13(b) exception under the Hague Convention applied because defendant-mother failed to show that returning the children to Venezuela would expose "them to a grave risk of physical or psychological harm" or otherwise subject them to "an intolerable situation."

Exceptions to mandatory return. There are several exceptions to the mandatory return of the child:

- More than one year has elapsed from the date of the wrongful removal or retention, and the child is settled in the new environment. Hague Convention, Article 12. *See Lozano v Montoya*, 572 US 1 (2014) (one-year period not subject to equitable tolling even when abducting parent concealed child's location).
- Whoever had care of the child at the time of removal or retention was not actually exercising custody rights or had consented to or subsequently acquiesced in the removal or retention. Hague Convention, Article 13(a).
- There is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Hague Convention, Article 13(b).

- The child objects to the return and is of an age and degree of maturity where the child's views should be taken into account. *Id.*
- The return is not permitted by American human rights principles. Hague Convention, Article 20.

The respondent establishing the Article 13(b) grave risk exception or the Article 20 human rights exception must show the exception by clear and convincing evidence. 22 USC 9003(e)(2)(A). The other exceptions must be shown by a preponderance of the evidence. 22 USC 9003(e)(2)(B); *see Golan v Saada*, 596 US 666 (2022).

Access rights. *Rights of access* include visitation rights and "the right to take a child for a limited period of time to a place other than the child's habitual residence." 22 USC 9002(7); Hague Convention, Article 5b. The remedy to protect a party's access rights is not as well-defined as the remedy to secure a child's return. Article 21 of the Hague Convention provides that signatory nations are "bound … to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject." Because it contains more detail than the Hague Convention, the UCCJEA may provide a better remedy for parties seeking to enforce their rights of access to children in the Michigan courts.

Practice Tip

- *Most judges are used to applying the best interests factors in custody cases. However, the best interests concept is not applicable to Hague Convention cases because these cases do not involve custody. See Hon. Stephen J. Schaeffer, A View from the Bench, distributed by the National Center for Missing and Exploited Children.*

Form 3.1
Decision Tree for Determining Custody

Best Interests of the Minor Child

Trial courts are required to make best interests findings of fact in each of the following circumstances:

- when a parent seeks to terminate a full minor guardianship;
- when a parent or the sole parent with right to custody seeks to terminate a limited minor guardianship and the parent has not substantially complied with the limited guardianship placement plan;
- when the court, following a review if it is in the best interests of the minor child, decides to terminate the guardianship;
- parenting time requests in guardianship matters;
- requests for removal of a guardian; and
- custody and parenting time decisions.

The probate court has jurisdiction and the family division of the circuit court has ancillary jurisdiction over the first five circumstances; the family division has jurisdiction over the sixth.[1]

Best interests of the child are defined in the Child Custody Act of 1970, MCL 722.23. This decision tree may be of help to you in making the required determinations, keeping in mind, as was stated in *Lustig v Lustig*, 99 Mich App 716, 731, 299 NW2d 375 (1980): "[this] determination is much more difficult than merely tallying runs, hits, and errors in box score fashion following a baseball game."[2] Also, the weight to be given each factor is ultimately left to the court's discretion. *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998). The first two preliminary questions and the subparts of the second question are dealt with only when custody, not guardianship, decisions are at issue.

_____Y _____N Is there a custody order now in place?

If the order is short term or temporary, proceed to "Established Custodial Environment." If the order is long term or permanent, determine whether either a proper cause or a change in circumstances has been shown.[3]

_____ _____ Has a proper cause or a change of circumstances been shown? (See endnote 3.) If Yes, proceed to the next question. If No, stop.
Y N

_____Y _____N Is there an "Established Custodial Environment"?

Note: If the answer is Yes, the standard of proof for changing custody is clear and convincing evidence. If the answer is No, the standard of proof in determining the best interests of the minor child is a preponderance of the evidence.[4]

The following factors have been identified by the appellate courts as relevant to this determination:

Y	N	
_____	_____	Is there a previous custody order?
_____	_____	Has the child been with the present custodian for a significant duration during which the child is given

Y	N	
_____	_____	parental care
_____	_____	comfort
_____	_____	discipline
_____	_____	love
_____	_____	guidance
_____	_____	security
_____	_____	stability
_____	_____	the necessities of life
_____	_____	permanence

Then consider the following best interests factors. The court must consider each factor and make specific findings on the record.

Parent 1 Parent 2

_____ _____

(a) The love, affection, and other emotional ties existing between the parties involved and the child.[5]

Parent 1	Parent 2	
_____	_____	Bonding with and relationship to competing parties—to whom is the child bonded? About whom has the child made statements indicative of bonding?
_____	_____	When the child has a problem, to whom does the child speak?
_____	_____	When the child has a triumph, to whom does the child speak?
_____	_____	Who spends more hours per day with the child?
_____	_____	Who prepares the child's meals?

_____ _____ Who has the ability to separate the child's needs from one's own and to empathize with the child?

_____ _____ To whom does the child openly show signs of affection?

Parent 1 Parent 2

_____ _____

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.[6]

Parent 1 Parent 2

_____ _____ Who bathes and dresses the child?

_____ _____ Who stays home from work when the child is sick?

_____ _____ Who takes responsibility for involvement in academic affairs?

_____ _____ Who takes responsibility for involvement in extracurricular activities?

_____ _____ Who disciplines the child?

_____ _____ Who uses preferable discipline techniques?

_____ _____ Who has preference because of the other's verbal abuse, substance abuse, or arrest record?

_____ _____ Who has preference because of the ability to provide the child access to an extended family?

Parent 1 Parent 2

_____ _____

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.[7]

Parent 1 Parent 2

_____ _____ Who makes purchases for the child?

_____ _____ Who attends to special needs of the child?

_____ _____ Who has greater earning capacity?

_____ _____ Who adjusts working hours based on the needs of the child?
_____ _____ Who has certainty of future income?
_____ _____ Who has the ability to provide insurance for the child?
_____ _____ Who attends classes for professional involvement?
_____ _____ Who has requisite knowledge to meet the needs of the child?
_____ _____ Who schedules and takes the child to medical appointments?
_____ _____ Who schedules and takes the child to dental appointments?
_____ _____ Who arranges for and supervises childcare?

Note: Seasoned observers point out that rarely is this factor decisive at the time the case comes before the court because the court can adjust economic differences with its support orders. The cases in endnote 7 should be read to get a flavor of how the court of appeals views this factor.

Parent 1 Parent 2

_____ _____

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.[8]

Parent 1 Parent 2

_____ _____ Who can provide a safe environment?
_____ _____ Who can provide continuity?

Parent 1 Parent 2

_____ _____

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.[9]

Parent 1 Parent 2

_____ _____ In whose custody will the family unit not be split? The issue is not an "acceptability of the custodial home" standard. *See Ireland v Smith*, 451 Mich 457, 547 NW2d 686 (1996); *Fletcher v Fletcher*, 200 Mich App 505, 517, 504 NW2d 684 (1993), *rev'd on other grounds,* 447 Mich 871, 526 NW2d 889 (1994).

Parent 1 Parent 2

_____ _____

(f) The moral fitness of the parties involved.[10]

Parent 1 Parent 2

_____ _____ Who has priority as a result of the other party having an extramarital affair known by the children? Caution: See *Fletcher* discussion in endnote 10.

Has either party engaged in any of the following conduct:

_____ _____ Verbal abuse.

_____ _____ Drinking problem.

_____ _____ Poor driving record.

_____ _____ Physical or sexual abuse of the child.

_____ _____ Other illegal or offensive behaviors.

Note: The elements set forth under this factor illustrate the dangers of the use of checklists in making best interests determinations. Caution: The thrust of all inquiries about the behavior of the contestants should be directed toward the effect of such behaviors on the child, or as the supreme court stated in *Fletcher,* "questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent.*"

Parent 1 Parent 2

_____ _____

(g) The mental and physical health of the parties involved.[11]

Parent 1 Parent 2

_____ _____ Does either party have a physical or mental health problem that significantly interferes with the ability to safeguard the child's health and well-being?

_____ _____ Age of contestant compared to age of the child—would energies of the child overwhelm the contestant?

Parent 1 Parent 2

_____ _____

(h) The home, school, and community record of the child.[12]

Parent 1 Parent 2

_____ _____ Who can provide leadership to attend school?

_____ _____ Who can provide leadership in extracurricular activity participation?

_____ _____ Who is actively involved in school conferences, transportation, and attendance at school events?

_____ _____ Who can more adequately assist reducing the necessity for other agency involvement (the juvenile court, the Department of Health and Human Services), or if another agency is involved, who can cooperate more fully?

_____ _____ Who can more adequately ensure the child's access to friends and peers useful for the child's development?

_____ _____ Who can more adequately plan and supervise the child's undertaking of home responsibilities that are appropriate to the child's age and circumstances?

_____ _____ Who takes responsibility for completion of school assignments?

Parent 1 Parent 2

_____ _____

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.[13]

Parent 1 Parent 2

_____ _____ Whom does the child favor?

Parent 1 Parent 2

_____ _____

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.[14]

Parent 1 Parent 2

_____ _____ Who can best cooperate with an appropriate parenting time schedule by the other party?

_____ _____ Who is least likely to disparage the other parent in the presence of the child based on past performance?

Parent 1 Parent 2

_____ _____

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.[15]

Parent 1 Parent 2

_____ _____ Have there been incidents of violence in the home by any party against any other party? If so, has there been a police report, arrest, or conviction? Has there been a pattern of violence whether reported or not reported?

Parent 1 Parent 2

_____ _____

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

Parent 1 Parent 2

_____ _____ Who can most likely address the special needs of the child?

_____ _____ Has either parent threatened to kidnap the child?

_____ _____ Does either parent spend excessive time traveling for the child?

_____ _____ Does either parent have a record of failure to exercise parenting time, failure to notify, or failure to return the child?

_____ _____ Who has responsibility for the actual and proposed childcare arrangements?

Yes No

_____ _____ Are there other children, whether a part of this litigation or not, whose custody is relevant to this child's best interests?

_____ _____ Are there significant others or new spouses whose relationship with the child affects the child's best interests?

Endnotes

1. MCL 600.841, .1021. Changes of legal residence are subject to unique tests, not the best interests standards. For a detailed discussion of changes of legal residence, see *Brown v Loveman*, 260 Mich App 576, 680 NW2d 432 (2004).

2. *Lustig* and *Baker v Baker*, 411 Mich 567, 309 NW2d 532 (1981), are cases affirmed on appeal where a less than full fact-finding was undertaken by the trial court. Despite the requirement that the court articulate its findings of fact and conclusions of law on the best interests factors when entering a custody order, neither the Child Custody Act of 1970 nor MCR 2.517, which governs findings of fact by the trial court, requires that the court comment on every matter in evidence or declare acceptance or rejection of every proposition argued in cases involving child custody decisions. *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994).

3. The Child Custody Act of 1970 authorizes a trial court to modify child custody orders "for proper cause shown or because of change of circumstances" and if it is in the child's best interests. MCL 722.27(1)(c).

In *Vodvarka v Grasmeyer*, 259 Mich App 499, 675 NW2d 847 (2003), the court of appeals held that to establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. "The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Id.* at 512. To establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, "which have or could have a *significant* effect on the child's well-being," have materially changed. *Id.* at 513. The *Vodvarka* court also held that the movant cannot rely on facts that existed before entry of the custody order to establish a "change" of circumstances.

An intrastate change in legal residence in excess of 100 miles constitutes a change in circumstances sufficient to reopen a custody matter. *Sehlke v VanDer-Maas*, 268 Mich App 262, 707 NW2d 603 (2005), *rev'd in part on other grounds,* 474 Mich 1053, 708 NW2d 439 (2006).

4. There are two separate levels of sufficiency of evidence for best interests findings of fact. When there is an established custodial environment, clear and convincing evidence is the standard. *McMillan v McMillan*, 97 Mich App 600, 296 NW2d 118 (1980). If there is no established custodial environment, the standard is a preponderance of the evidence. *Lewis v Lewis*, 138 Mich App 191, 360 NW2d 170 (1984).

Established custodial environment—in general. The question whether an established custodial environment exists is preliminary and essential, and it is entirely a factual determination. The trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Ireland.* In *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492, 417 NW2d 542 (1987), the court defined an *established custodial environment* as one where time is an important factor. It should be of significant duration during which the child is given parental care, discipline, love, and guidance that are age- and needs-appropriate and when the relationship is marked by qualities of security, stability, and permanence. The judge should look to the situation in the years immediately preceding the action. *Schwiesow v Schwiesow*, 159 Mich App 548, 406 NW2d 878 (1987). In *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993), the court stated that an expectation of permanence is a factor in determining whether a custodial environment has been established. It further stated that if, over an appreciable period of time, the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort, that should be considered. The court further points out that the age of the child, the physical environment, and the inclination of the custodian and the child regarding the permanency of the relationship must be considered.

With both parents. Often, an established custodial environment exists with both parents, even if only one has primary physical or legal custody. *Foskett v Foskett*, 247 Mich App 1, 634 NW2d 363 (2001); *Jack v Jack*, 239 Mich App 668, 610 NW2d 231 (2000).

Effect of temporary orders. The mere existence of a temporary custody order does not create an established custodial environment. Instead, the court must look to the underlying facts and apply them to the statutory definition. *Baker v Baker*, 411 Mich 567, 309 NW2d 532 (1981); *Bowers v Bowers*, 190 Mich App 51, 475 NW2d 394 (1991) (custody orders alone do not establish a custodial environment).

Voluntary relinquishment. Even if a custodial parent temporarily relinquishes custody, all the circumstances must be reviewed in determining whether a new custodial relationship has been established. Public policy in Michigan encourages parents who are experiencing difficulties to transfer custody of their children to others temporarily until they have resolved their problems. *See Straub v Straub*,

209 Mich App 77, 530 NW2d 125 (1995); *Hall v Hall*, 156 Mich App 286, 401 NW2d 353 (1986); *Theroux v Doerr*, 137 Mich App 147, 357 NW2d 327 (1984).

Custodian interference. In *Curless v Curless*, 137 Mich App 673, 357 NW2d 921 (1984), the court observed that in cases where the custodian discourages the children from seeing the noncustodial party and fails to cooperate with parenting time, this works against the finding of an established custodial environment.

Stipulation of parties. In *Overall v Overall*, 203 Mich App 450, 512 NW2d 851 (1994), the court stated that the parties may stipulate that there is no established custodial environment where there is a shared custodial arrangement.

Dispute between natural parent and third person. In enacting the Child Custody Act of 1970, the legislature incorporated a presumption in favor of the natural parent as well as a presumption in favor of an established custodial environment. In a custody dispute between a natural parent and a third party with whom the child has an established custodial environment, these presumptions are clearly at odds. In *Heltzel v Heltzel*, 248 Mich App 1, 23–24, 27–28, 638 NW2d 123 (2001), the court of appeals held that in a child custody dispute between a natural parent of a child and a third-party custodian, the statutory parental presumption, MCL 722.25(1), must be given priority over the established custodial environment presumption, MCL 722.23, and, therefore, the third person must prove by clear and convincing evidence "that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns," taken together, demonstrate that the child's best interests require placement with the third person. *Heltzel,* 248 Mich App at 27. In *Hunter v Hunter*, 484 Mich 247, 711 NW2d 694 (2009), the supreme court concluded that, in a custody dispute between the child's mother and the paternal aunt and uncle who had an established custodial environment, the parental presumption under MCL 722.25(1) applied to the mother, regardless of whether she was a fit parent. The court reasoned that the natural parent's fitness was an intrinsic component of the trial court's evaluation of the best interests factors.

5. It should probably come as no surprise that trial courts often find the parties equal on this factor. Both parties are struggling to receive custody of the child and therefore have strong emotional ties to the child.

In *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 705 NW2d 144 (2005), plaintiff's negative results on an objective psychological exam, Minnesota Multiphasic Personality Inventory, did not tip this factor in defendant's favor because the examiner testified that plaintiff presented himself quite differently during interviews, defendant's expert testified that the examiner acted within professional standards, and the record evidence revealed that the child loved and was bonded with both parents.

6. In *Harper v Harper*, 199 Mich App 409, 502 NW2d 731 (1993), the court stated that the judge may consider disciplinary techniques of the parties toward the minor child. Here, when the father used his hand in discipline and the mother

used a paddle, this could be used against the party using the paddle. There was also testimony by an expert that the mother was unable to guide the children in a joint task during a session being observed, while the father was able to provide the leadership and direction to assist the children to accomplish the goal.

In *MacIntyre,* factor (b) slightly favored plaintiff when, although each party equally assisted the child with his schoolwork, hobbies, and religious education, plaintiff was the "rule giver" and was better able to provide guidance, and defendant often placed her need for the child's affection above his need for discipline.

7. *See Harper* (income, employment history, certainty of future income, and financial position are factors to be weighed). In *Mazurkiewicz,* the court weighed the husband's income in his favor over the wife's objection that because she was a homemaker, she could never prevail on this factor. The court agreed but stated the trial court did not unduly stress this factor. In *Hilliard v Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998), the trial court properly relied on facts regarding defendant's stable employment history rather than on plaintiff's speculation that her income would soon rise when she obtained her degree. Factor (c) may include the disposition to provide for the child's material needs, as shown by the parent's lack of inclination to pursue a job with a minimal income. *McCain.* In *Dempsey v Dempsey*, 409 Mich 495, 296 NW2d 813 (1980), the supreme court agreed that the trial court placed undue emphasis on economic factors in awarding custody. The cases suggest that while this factor must be weighed, courts must use care not to place a good deal of reliance on economic factors in making a custody decision. In *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993), the court stated that eligibility for health insurance, taking managerial classes, and informing the other party of insurance benefits for the children are all relevant facts to consider. (The court here also referred to a tug of war by the parties over the child's clothing.)

In *MacIntyre,* the evidence showed that both parties were willing and able to provide for the child. However, the trial court weighed this factor in plaintiff's favor, based on defendant's evasive testimony regarding her reasons for discontinuing the child's therapy sessions.

8. In *Bahr v Bahr*, 60 Mich App 354, 230 NW2d 430 (1975), children ages 13, 12, and 8 were with the nonparent custodians for six years. The father sought to change custody. The judge spent an hour with the children in chambers and learned that they wished to stay where they were. The judge pointed out that the children seemed well adjusted and desirous of remaining in the present custodial arrangement with the third parties, but wanted parenting time with their father as well. The court concluded that stability would be provided for by leaving the children where they were. In addition, the court found that it could engage in a comparison between the custodial home and the proposed alternative because the law before the Child Custody Act of 1970, as reflected in *Ernst v Flynn*, 373 Mich 337, 129 NW2d 430 (1964), and *Rincon v Rincon*, 29 Mich App 150, 185 NW2d 195 (1970), had been changed by the Child Custody Act of 1970. In *Hilliard,* the

mother's indefinite plan to marry her boyfriend did not demonstrate a permanent relationship.

9. The focus of this factor is the child's prospects for a stable family life. It focuses on the permanence of the family unit, not the acceptability of the homes or childcare arrangements. *Ireland; Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994). In *Fletcher,* the supreme court recited extramarital conduct of which the children were unaware and also supported the court of appeals' treatment of permanence: "In this case, there was no danger of the family unit splitting up, regardless of which party was awarded custody. Because the evidence favors neither party, we find the parties to be equally positioned to provide permanence as single-parent family units." *Fletcher v Fletcher*, 200 Mich App 505, 518, 504 NW2d 684 (1993). The court of appeals specifically rejected "acceptability" of the proposed homes as being relevant because it is addressed under factors (b) and (c). In a pre-*Fletcher* case, *Mazurkiewicz,* this factor was weighted in the father's favor where the mother had an "inclination" towards "inappropriate relations with other persons during her marriage."

10. Adultery by itself does not necessarily preclude a party from being awarded custody of the children. *Williamson v Williamson*, 122 Mich App 667, 333 NW2d 6 (1982); *Gulyas v Gulyas*, 75 Mich App 138, 254 NW2d 818 (1977) (Hon. Dorothy Riley, in her dissent, stated that this factor should not be used by trial judge to impose work ethic notions).

In *Fletcher v Fletcher*, 200 Mich App 505, 504 NW2d 684 (1993), the court stated that marital affairs of which the child has no knowledge cannot be used against that parent regarding morality. The trial judge used the morality test wrongfully and, in addition, let it influence the court in balancing the other factors. On appeal, the supreme court did not disturb this ruling, but added the following:

> Factor f (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent.* To evaluate parental fitness, courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is *not* "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent.*

Fletcher v Fletcher, 447 Mich 871, 886–887, 526 NW2d 889 (1994) (emphasis supplied by the court).

Cohabitation is an insufficient ground for a finding of immorality. *Hilliard,* 231 Mich App at 323–324; *Snyder v Snyder*, 170 Mich App 801, 429 NW2d 234 (1988).

In *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993), the court showed that a variety of subjects can be used under this category. Specifically, the court may consider a drinking problem, arrest record, living with the child's babysitter, allowing the son to drink from the parent's beer, verbal abuse, and lying about a past alcohol record. In *Helms v Helms*, 185 Mich App 680, 462 NW2d 812 (1990), the court allowed consideration of a circumstance where plaintiff was pregnant, unmarried, and living with her boyfriend because the case was not one of unmarried cohabitation "standing alone"; plaintiff's pregnancy was an aggravating factor. Since moral fitness was not the sole basis for the decision, it was proper to make a custody award taking this factor into account as one of the relevant factors.

11. Deafness, while a physical disability, should not be used against a person in a custody case where to do so would defeat public policy favoring integration of individuals with disabilities into the responsibilities and satisfactions of family life. *Bednarski v Bednarski*, 141 Mich App 15, 366 NW2d 69 (1985). When mental health interferes significantly with the ability of a party to safeguard the children's health and well-being, it will weigh in favor of the other party. *Harper.* In *Straub,* the trial court gave too much weight to the fact that the grandparents had an established home for many years in contrast to the mother's shorter period, since the grandparents were far older.

Factor (g) favored plaintiff in *MacIntyre,* when the record was replete with evidence of defendant's uncontrollable and inappropriate displays of anger in the child's presence.

12. In cases where the courts have found the children too young to express a preference, the court may also determine that the children are too young to have established a home, community, and school record. Therefore, in very young children, this may turn out not to be a relevant factor.

Factor (h) favored plaintiff in *MacIntyre,* when the child's grades and behavior at school declined following an incident in which defendant rearranged his room and damaged his belongings after he and plaintiff worked together to clean the room.

13. In *Bowers v Bowers*, 190 Mich App 51, 475 NW2d 394 (1991), the court stated that children ages six and nine are not too young to express their preferences as a matter of law. In *Wilkins v Wilkins*, 149 Mich App 779, 386 NW2d 677 (1986), the trial court said since the children were 10 years of age and younger, they were not of sufficient age to express a preference. (This point is apparently not important to the court where all factors were considered and no prejudice results.) In *Curless,* the court did not consider the preferences of the children, saying they were too young. In affirming the trial court, the court of appeals explained that this is discretionary with the trial court. In *DeGrow v DeGrow*, 112 Mich App 260, 315 NW2d 915 (1982), the court emphasized that the child's

preference does not outweigh all other factors, but is just one factor to take into account. In *Siwik v Siwik*, 89 Mich App 603, 280 NW2d 610 (1979), the trial court was not reversed where it interviewed a six-year-old child and determined, based on the interview, that the child was not of sufficient age to express a preference. This is left to the sound discretion of the court. The failure of a trial court to speak with the child in a custody dispute generally requires remand. *In re Stevens*, 86 Mich App 258, 273 NW2d 490 (1978).

In *Burghdoff v Burghdoff*, 66 Mich App 608, 239 NW2d 679 (1976), the court stated that an in camera conference is generally the best way for the judge to determine the preference of the child. The test in determining whether the child is of sufficient age is not the test for a witness in a courtroom—e.g., the "child has the intelligence and sense of obligation to tell the truth"—and the trial court does not have to make such a finding.

Courts should not cover matters other than the child's preference in their in camera interviews. In *Molloy v Molloy*, 247 Mich App 348, 637 NW2d 803 (2001), a special panel resolved the conflict between the prior opinion of *Molloy v Molloy*, 243 Mich App 595, 628 NW2d 587 (2000), and *Hilliard* by deciding that the purpose and questioning of an in camera interview is limited to determining the child's preference. The panel also mandated that all in camera interviews with children in custody cases be recorded and sealed for appellate review. In *Molloy v Molloy*, 466 Mich 852, 643 NW2d 574 (2002), the supreme court affirmed the special panel's decision, with the exception of the requirement that all future in camera interviews with children in custody cases be recorded.

Pursuant to an amendment to MCR 3.210(C)(5), such in camera interviews are limited to a child's custodial preference. There is no requirement that the interviews be recorded.

14. In *McCain,* the trial court's belief that defendant would attempt to destroy the relationship between plaintiff and her children did not outweigh other best interests findings under which defendant prevailed over plaintiff or was found to be equal. Failure to consider this, or presumably any factor under the Child Custody Act of 1970, is grounds for remand. *Blaskowski v Blaskowski*, 115 Mich App 1, 320 NW2d 268 (1982) (trial court failed to consider this factor because it did not know of amendment and also failed to find whether established custodial environment existed to determine standard of proof).

Factor (j) favored plaintiff in *MacIntyre,* when there was ample evidence to support the finding that defendant was unwilling to facilitate and encourage a close relationship between plaintiff and the child. She denigrated plaintiff in front of the child and interfered with plaintiff's parenting time. Conversely, the child reported that plaintiff did not verbally attack defendant, and plaintiff allowed the child to stay with defendant when he had to go out of town during his scheduled parenting time.

15. Factor (k) favored plaintiff in *MacIntyre.* Both parties admitted spanking the child. However, the child witnessed defendant physically attack plaintiff and defendant did not deny these allegations of domestic violence.

Race. Interracial factors in determining custody are irrelevant. *Edel v Edel*, 97 Mich App 266, 293 NW2d 792 (1980).

Keeping siblings together. In most cases, it is in the best interests of each child to keep brothers and sisters together. However, this does not outweigh the best interests of an individual child. *Wiechmann v Wiechmann*, 212 Mich App 436, 538 NW2d 57 (1995).

Biological preference. The court may not determine a biological preference exists without reference to its relevance or whether it is substantiated by the evidence. In *Freeman v Freeman*, 163 Mich App 493, 414 NW2d 914 (1987), the court awarded a daughter to her mother and articulated that a natural biological preference dictated the result.

Childcare arrangements. Although childcare arrangements are properly considered under the best interests standard, the supreme court in *Ireland* declined to establish any broad rules regarding whether in-home childcare or day care is more acceptable.

Emotional pressure on child. In *Hilliard,* the court properly considered the emotional pressure endured by the child caught between the two parties and noted that plaintiff did not take responsibility. There was evidence that plaintiff's anger toward her ex-husband interfered with her ability to consider the needs of her children and that she tended to blame others, including her children, for her problems.

Exhibit 3.1
Guidelines for Interviewing Children About Custody Preference

Legal Background

In *Molloy v Molloy*, 247 Mich App 348, 637 NW2d 803 (2001), *aff'd in part, vacated in part on other grounds,* 466 Mich 852, 643 NW2d 574 (2002), a special conflicts panel decided that the purpose and questioning of an in camera interview is limited to determining the child's preference. MCR 3.210(C) was subsequently amended to reflect this holding:

> The court may interview the child privately to determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. The court shall focus the interview on these determinations, and the information received shall be applied only to the reasonable preference factor.

MCR 3.210(C)(5).

It may be reversible error to use the interview to investigate the other best interests factors. In *Thompson v Thompson*, 261 Mich App 353, 364–365, 683 NW2d 250 (2004), the court of appeals held that the trial judge's questions to a child during a preference interview about which parent took him to the doctor, cooked meals, cleaned, or helped with homework and about whether the parents fought did not represent an improper fact-seeking expedition by the court. Instead, these questions were the court's effort to engage the child and encourage him to speak freely. However, the court's language indicates that reversible error might have been found if the trial judge had used the examination information when determining the best interests of the child and the parties had not fully litigated the topics on which the child was questioned.

The judge may wish to find out, before the interview is scheduled, whether the parents or their attorneys will agree to waive the *Molloy* restrictions. Many parents/attorneys are happy to waive them. If there is no waiver, the interview is limited to the child's preference and the basis for that preference.

Making a Record

There is no requirement that the interviews be recorded, but many judges recommend recording. A judge should never conduct a child interview behind closed doors without a third party present. And generally, the third person should be a court reporter. Recording the interview, either in writing or by video, is essential to preserving the record for appeal.

Conducting the Interview

The judge and court staff should make every effort to set the child at ease. The child should not be left waiting in chambers. Judges differ on whether to wear judicial robes during the interview. Some judges never do, for fear it will intimidate the child; others always do to set a dignified tone; others make the

decision on a case-by-case basis depending on the age and demeanor of the child. It is a matter of personal preference.

Start the interview with questions about things (school, activities, toys, chores) that are less anxiety producing; move into the custody preference questions; and then wind down the interview by a return to "safer" topics and reassurances. Here is a suggested outline for the interview:

- Introduce yourself with a smile.
- Introduce the court reporter and briefly explain what the reporter does. Assure the child that the court reporter won't tell anyone what is discussed, but is there in case your bosses at the court of appeals need to determine whether you made a mistake.
- Tell the child a little bit about yourself, especially if you have children or other relatives close to the child's age.
- Tell the child what to expect and how long the interview will last.
- Explain confidentiality. Tell the child that the law says the conversation is private, and that if anyone asks what was discussed, it's ok to say, "The judge said it was between me and him."
- Spend a few minutes building rapport with the child. Know his/her name and age. Use your own experiences, be age appropriate, and don't lead: When is your birthday? What grade are you in? Who's your favorite teacher? What do you like about him/her? What's your favorite class? What do you like about it? Do you buy hot lunch or bring your own? What's your favorite? Who makes it for you? What's your favorite dinner? Who makes it for you?
- Move into the topic of preference: What do you like/dislike about mom's house? Why? What do you like/dislike about dad's house? Why? Follow up and try to get a free narrative going. If the child is old enough, ask: How would you set it up if you were in charge? Why?
- Conclude the interview by asking the child if the child has any questions and reassuring the child that it is the judge who will make the custody decision.

Recommended Reading

Anne Graffam Walker, Ph.D., *Handbook on Questioning Children: A Linguistic Perspective* (2d ed 1999). It is published by the ABA Center on Children and the Law.

Exhibit 3.2
Commonly Used Instruments

Test	Frequency of use*
Parents:	
MMPI-2	94/92
MCMI-II/III	52/34
WAIS-R/III	47/33
Rorschach	44/48
Parent-Child Relationship Inventory	44/11
Parenting Stress Index	41/9
Sentence Completion	26/22
TAT	24/29
Parenting Awareness Skills Survey	21/8
Child Abuse Potential Inventory	21/6
Projective drawings	14/9
Children:	
Intelligence tests (various)	48/58
Family drawings	45/?
MMPI-A (adolescents)	43/20
TAT/CAT	35/37
Child Behavior Checklist (parents)	31/4
Sentence Completion	30/29
Bricklin Perceptual Scales (BPS)	28/35
PORT	23/16
MACI (adolescents)	21/11

* Percentages found by Bow, J. N. & F. A. Quinnell (2001), Psychologists' current practices and procedures in child custody evaluations: Five years after the American Psychological Association guidelines, *Professional Psychology: Research and Practice, 30,* 261–268 (the first number), and Ackerman, M. J. & M. C. Ackerman (1997), Custody evaluation practices: A survey of experienced professionals (revisited), *Professional Psychology: Research and Practice, 28,* 137–145 (the second number).

Exhibit 3.3
Additional Resources Regarding Psychological Assessment and Expertise

Formal Ethical Principles, Rules, Standards, Guidelines, and Regulations

- American Academy of Child and Adolescent Psychiatry (1982). Principles of practice of child and adolescent psychiatry. Washington, DC: Author. (202) 966-7300.
- American Academy of Psychiatry and the Law (1995). Ethical guidelines for the practice of forensic psychiatry. Washington, DC: Author.
- American Educational Research Association, American Psychological Association, & National Council on Measurement in Education (1999). Standards for educational and psychological testing. Washington, DC: Author.
- American Medical Association (2001). Principles of medical ethics (with annotations especially applicable to psychiatry). Chicago, IL: Author.
- American Psychological Association (1981). Specialty guidelines for the delivery of psychological services by clinical psychologists. *American Psychologist,* 36(6), 640–681.
- American Psychological Association (2010). Ethical principals of psychologists and code of conduct.
- American Psychological Association (2003). Guidelines on multicultural education, training, research, practice, and organizational change for psychologists. *American Psychologist,* 58(5), 377–402.
- American Psychological Association Committee on Professional Practice and Standards (2007). Record Keeping Guidelines. *American Psychologist,* 62, 993–1004.
- American Psychological Association Committee on Professional Practice and Standards (2010). "Guidelines for Child Custody Evaluations in Family Law Proceedings." *American Psychologist,* 65, 863–867.
- American Psychological Association Committee on Professional Practice and Standards (2012). Guidelines for Psychological Evaluations in Child Protection Matters. *American Psychologist,* 68, 20–31.
- American Psychological Association Committee on Psychological Tests and Assessment (1996). Statement on the Disclosure of Test Data. *American Psychologist,* 51, 644–648.
- American Psychological Association Division 41 Committee on Specialty Guidelines (1991). Specialty guidelines for forensic psychologists. *Law and Human Behavior,* 15, 655–665.
- American Psychological Association Office of Ethnic Minority Affairs (1991). Guidelines for providers of psychological services to ethnic, linguistic, and culturally diverse populations. *American Psychologist,* 48, 45–48.

- Assessment of Individuals with Disabilities Working Group of the Joint Committee on Testing Practices (1999). Assessment of individuals with disabilities sourcebook. Washington, DC: American Psychological Association.
- Association of Family and Conciliation Courts (2006). "Model Standards of Practice for Child Custody Evaluation." Madison, WI: Author.
- National Association of Social Workers (Rev ed 2017). NASW Code of Ethics. Washington, DC: Author. 202-408-8600.
- Law & mental health professionals series. (Volumes available for many particular states). Washington, DC: American Psychological Association.
- Test Taker Rights and Responsibilities Working Group of the Joint Committee on Testing Practices (1998). Rights and responsibilities of test takers: guidelines and expectations. Washington, DC: American Psychological Association.
- Turner, S. M., S. T. DeMers, H. R. Fox, & G. M. Reed (2001). APA's guidelines for test user qualifications: An executive summary. *American Psychologist,* 56, 1099–1113.
- U.S. Department of Health and Human Services, Office for Civil Rights (May 2003). Standards for Privacy of Individually Identifiable Health Information. [45 CFR Parts 160 and 164].

Exhibit 3.4
A Judge's Suggestions for Settling Custody and Parenting Time Disputes

Each time a judge resolves an issue of custody or parenting time through litigation, the authority of the parents is undercut and the prospects that their children can mature into healthy adults grow dimmer. It is my firm belief that, in the vast majority of cases, any decision parents make jointly is better than any decision I can make. Consequently, in administering my docket, I spend a substantial amount of my time counseling pairs of parents in the presence of their lawyers about the dangers that their litigation poses for the long-term health of their children. With the permission of both counsel, I invite both the parties to join us in chambers. I sit the two parents side by side in front of me with the attorneys off to the side. I often intersperse the more general remarks with examples from my docket or from personal stories as seems appropriate. The more earnest and personal the approach, the better.

My experience thus far has been that this approach virtually eliminates the need to try custody and parenting time cases. The parties often embrace each other or their children once an agreement has been reached. The cases tend not to come back for relitigation or modification. My fervent hope is that the children will be the true long-term beneficiaries.

I recommend no particular method for bringing the parties together. Do what is comfortable for you. Below, I have reproduced an example of my talk only as an example of what has proven successful for me.

> Mr. and Mrs. Smith, I've asked to see you today, along with your counsel, to talk to you informally about the impact of this divorce on your children. I am not here to take testimony or adjudicate the case back here. If I am called upon to decide this matter, we will do it on the basis of testimony, under oath, out in the courtroom. Counsel tells me that you are fairly far along in settling your property dispute, and we will resolve those issues one way or another shortly, either by agreement or by trial. Once that's done, my sole concern will be the welfare of your children. As I understand it, you have two children: Michael, 6, and Amanda, 3. And that means I may have jurisdiction over your family for something like the next fifteen years. I want to give you a warning about the impact this divorce will have on your children.
>
> You both obviously love your children and that is why you are here disagreeing. But I have bad news about them. There are a number of good, long-term studies of the impact of divorce on children. They have studied the children of divorced parents for decades, well into their adult years. These studies tell a terrible story. The vast majority of children of divorce turn out to be less well-educated than their parents, they earn less money than their parents, and they have, if anything, more unstable home lives than their parents did.
>
> My most important task on the Family Court is to try to keep the children within my jurisdiction in that small percentage of cases in which the children achieve what we all hope for our kids—that they are better educated than their parents were; that they earn more money than their parents, or are more success-

ful, however you measure success; and lastly, that they have more stable personal relationships than you two have had.

Some of the ill effects on the children of divorce can be accounted for by the fact that, as you probably already discovered, it is more expensive to raise a family in two households than in one. But in my opinion, there is a far more significant cause of this failure of the children of divorce to thrive. If your kids are like all of the other kids in the world, they have come into this world wanting to love you both. They now see the two of you gnawing at each other. You're litigating, you're fighting, you're consulting lawyers, and you're coming to court. You may be saying nasty things about each other in the presence of the children. If you tear down the other parent in front of these kids, these kids, who want to love you both, will ultimately come to resent the parent who is doing the speaking as much as they will the parent whom you are bad mouthing. Since the kids of divorce very often carry feelings of guilt growing out of the feeling that somehow they caused the divorce (invariably just a fantasy), the battles between the parents add to that sense of guilt.

More importantly, by litigating about custody or parenting time, you risk losing your authority as parents. You've been parents long enough to realize that the last time you had complete physical control over your kids was just before they learned to climb out of the crib. During those few months, if you wanted to control your child for whatever reason, you could stick them in the crib. Once each of your children learned to climb out of that crib, you started to lose physical control. And let me tell you as a parent of older children, that the loss of physical control runs from that point straight through a point when they get their driver's license and then rises exponentially from there. By the time your children get to their teens and you have to tell them to study and not to smoke, drink at their age, use drugs, or drop out of school, the only control you will have is your moral authority as a parent. If you leave to some stranger like me the important decisions affecting your children, your authority as parents will be diminished. I will become Super Dad, but I won't be around to tell them not to drop out of school. The children will look at you and, whether they verbalize it or not, will be thinking, "You two parents, who have legal custody over me, abandoned to some stranger crucial decisions about our upbringing. Why should I listen to you now?" I can, if you wish, decide the question of custody and parenting time that you are currently discussing, and I will do so, if you can't. But if you want to preserve your moral authority over your children, you two must make the important decisions in the lives of your children.

Even the litigation winner loses because your authority as a parent has been undercut if I make the decision.

The very best thing you can do for your children, both now and in to the future, is to go to them, hopefully together, and tell them, "We have decided that … ." And I will guarantee you, whatever they hear after that won't matter. The important thing is that *you* decided something. Often I have worked with parents back here in chambers and when they go out into the courtroom and announce to their waiting child that they have agreed "that …" (whatever they had agreed to), there is a sigh of relief from the child strong enough that you can feel the relief back here. My very strong feeling is that any agreement the two of you can reach is better than any decision that I can make.

Also, let me remind you that if we litigate, there will be a permanent record in the form of a transcript that one or the other or both of you can use to display to the children what an evil parent the other one was.

Let me give you a recent horror story. On Thursday afternoons, I often hear appeals from referee decisions regarding child support. Incredibly, in 1999, I had two cases back to back that looked identical. Each of these cases was filed in 1983 and the divorce was granted in 1984. The file in each case was terribly thick. In each case, the parties came back to litigate every few months over something regarding parenting time or support or change of custody or medical bills. This time they came to me to determine whether their 19-year olds could be the subject of child support. As you may know, children beyond 18 can be the subject of support for the next year and a half only if they are in high school full time. In each case, I asked from the bench, very innocently, why the child was in high school at age 19. In each case, the warring parents responded very matter-of-factly, "Because my child was in jail for a time and had to drop out of high school." I was shocked. One parent had brought a lawyer from halfway across the state to argue about $400 in support. When it came time for them to offer guidance to their kids, these parents had no parental authority left.

The other day, I saw parties who had been warring over every conceivable issue for the four years since their divorce. Each parent seized every opportunity that parent could to bad mouth the other one, often in the presence of the children. They had four daughters ages 13, 11, 9, and 7, all in the custody of their mother. I suggested to the parent that the 13-year old was getting old enough so that if this awful situation were to continue, she might be tempted to leave the home. Suddenly Mom began to shake and she disclosed that she had recently found a suitcase packed with the 11-year old's favorite things in a secret hiding place in the house. She was about to leave the home given the ugly environment that existed between the parents.

What I am trying to get through to you is that your child may thrive or not, depending on how the two of you handle yourself through the divorcing process and beyond. You will be setting the examples of adult behavior. Your children will look to you more than anybody else to determine how adults should act. How they respond to other authority figures, teachers, police officers, and others will depend on the kind of example of adult behavior that you set. If you respect each other, if you establish a loving relationship with your children, they will learn to respect their teachers as well. If, on the other hand, you gnaw at each other, litigate frequently, leave the important decisions in your children's lives to some stranger, then they will come to disrespect authority figures. This will determine in part how well your children will achieve.

I can't imagine that you would set out to inflict upon either Michael or Amanda the same kind of pain that you have been going through for the last few years in your lives, but that is what your fighting will produce.

Let me also ask you to view this from a very selfish perspective. You can spend the next few decades going to honors convocations, graduations, and hopefully one wedding per child if you do this right. On the other hand, if you do it wrong, you will spend your time with school counselors, psychologists, and, if the worst happens, with probation officers, in jail visits, and accompanying the kids to divorce court. So it is in your own interests to do this right.

Let me repeat, in my view, any decision the two of you can reach is better than any decision that I can make. I am not suggesting that either of you yield merely for the sake of reaching agreement, but I am suggesting to you that you have enough facts at your command to reach the right results. You know your own schedules and your children's schedules. You know who has time to tend to the kids at any particular hour of the day. You know where the better school systems are and where the children have friends. You know who will want to help the kids do high school homework when your two kids reach that level.

You obviously both love your children and you both want to maximize your time with them. What I am suggesting to you is that you start with the premise that you want to come up with a scheme that will maximize the time the children have with each of you, and work from there. You both have experienced attorneys who can help you with this. I urge you to give it a try before you ask me to adjudicate the issue.

I also want to share with you my very strong view that the details don't matter. When Michael and Amanda are in their mid-twenties and you consider whether they've turned into healthy, happy, functioning, successful, loving adults—as my wife likes to say, adults you would like to have as friends—it will not matter with whom they spent the third weekend of October 2005. What matters is that you take them out of the middle of your dispute. They need to be kids. They should not be made to be a tug-of-war rope between you. Don't use them to work out your differences with each other.

When I was growing up, there was a toy called Stretch Armstrong. You may know it. It's a flexible figure that you can pull by the arms and stretch it and stretch it and when you let go, it slowly comes back to its original shape. If you tug at your kids this way, they will not return to their original shape. One way or another, they will be scarred by the experience. It will show up in their psychological well-being and their ability to have friends and their ability to love. It will reflect in their willingness to abide by the law. It will reflect in their studies. You cannot expect that they can emerge unscarred by your battles.

And let me tell you, they know when you are fighting. Even if you take steps to shield them from your disputes, they overhear telephone conversations. They know when you are going to court. They see you dressing differently. They see you nervous. I have interviewed seven- and eight-year olds in chambers and, when I ask them, as I often do, if they know why they're here, I get better descriptions of the case and its history than I've had from the lawyers. They are far more aware than you think. You need to let them be kids while they are kids and not the objects of litigation. If you are not careful, they will be going through this same agony when they are young adults.

If you have the time, I am going to ask you and your counsel to go to my jury room for a few minutes and see if you can start to discuss these issues. Remember, your goal is to try to maximize the time your children spend with you. You also need to keep in mind that nothing we do here in Family Court with regard to custody or parenting time is permanent because these matters can always be the subject of modification. You also ought to keep in mind the fact that no schedule can last long where kids are involved. As they grow, they are going to have more and more homework. They are going to have after-school sports and activities and develop friendships, and your finely crafted parenting time schedule will have to be modified every day. Your schedules will change as

you develop other relationships and as your job demands change. I am urging you to try to work it out for the present. Once you begin talking, it will be easier in the future as these modifications become necessary.

Let me know how you are doing. I will be here if you need any further help.

4
Parenting Time

D. Relation to Existing Custody, Parenting Time, or Other Orders Affecting Minors §4.25

Summary of Parenting Time

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

General principles. §4.1.

- Any terms must be in the best interests of the child.
- Presumption that it is in the best interests of the child to have a strong relationship with both parents.
- The frequency, type, and duration of parenting time must be reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.
- The child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that parenting time would endanger the child's physical, mental, or emotional health.

If the parents agree on parenting time. §4.1, §4.4.

The court must order the parenting time terms unless it finds on the record by clear and convincing evidence that the terms are not in the child's best interests.

When parenting time may not be ordered. §4.2.

- Parenting time of a child conceived as a result of criminal sexual conduct or assault with intent to commit criminal sexual conduct may not be awarded to the convicted biological parent (except if the criminal sexual conduct was based solely on the victim's being between 13 and 16 years old), unless, after conviction, the biological parents cohabit and establish a mutual custodial environment for the child.
- A biological parent convicted of criminal sexual conduct or assault with intent to commit criminal sexual conduct or found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual penetration with their own child may not be granted parenting time with that child or a sibling unless the other parent and the child or sibling consent. The child or sibling must be found to be of sufficient age to express parenting time desires to the court.

Best interests factors. §§4.5–4.6.

There is a split of opinion whether the court must make findings on all best interests factors or only contested factors.

The *best interests of the child* means the sum total of the following factors:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

Parenting time factors. §4.7.

The court may consider the following factors in deciding the frequency, duration, and type of parenting time:

(a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

Enforcement.

Friend of the Court. §4.12.

In a Friend of the Court case, the office must do one or more of the following in response to an alleged custody or parenting time order violation:

- apply a makeup parenting time policy;
- commence civil contempt proceedings;
- file a motion for a modification of existing parenting time provisions to ensure parenting time, unless contrary to the best interests of the child;
- schedule mediation; or
- schedule a joint meeting.

Court Rule Mediation and Binding Arbitration. §4.13.

Child custody and parenting time issues may be submitted to mediation pursuant to court rule or, if the parties agree, to binding arbitration.

Support payments and parenting time enforcement. §§4.15–4.16.

A parent cannot unilaterally decide to stop paying child support as a way of enforcing parenting time rights. The court may suspend support payments if parenting time is being denied, but the suspension cannot adversely affect the child.

In interstate cases, the Uniform Interstate Family Support Act would not allow a Michigan court to condition payment of another state's support order on a party's compliance with the parenting time order.

Modification. §§4.17–4.18.

Modification may be requested by the parties or by the Friend of the Court if there is a postjudgment dispute over parenting time.

Same best interests and parenting time factors apply as in initial parenting time decisions.

In a pure parenting time dispute, the court need make findings only on contested factors.

If a modification of parenting time is actually a request to change the established custodial environment, there must be clear and convincing evidence that the change is in the best interests of the child.

Grandparenting time. §§4.19–4.21.

Grandparents may bring an action for visitation, but courts must presume that a "fit" parent's decision to deny visitation does not create a substantial risk of harm to the child's mental, physical, or emotional health. To gain visitation, grandparents must overcome this presumption by a preponderance of the evidence and show that the visitation is in the best interests of the grandchild.

I. General Principles

A. Statutory Basis

§4.1 The Child Custody Act of 1970, MCL 722.21 et seq., establishes rights and duties regarding parenting time (visitation) in disputed actions. The family division of the circuit court has exclusive jurisdiction over cases of child custody, including questions regarding parenting time. *See* MCL 600.1021(1)(g).

MCL 722.27a sets forth general principles controlling parenting time decisions.

- It is presumed that it is in the best interests of a child to have a strong relationship with both parents.
- The frequency, duration, and type of parenting time granted should be reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. *See also Booth v Booth*, 194 Mich App 284, 486 NW2d 116 (1992).
- The child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that parenting time would endanger the child's physical, mental, or emotional health. *See also Rozek v Rozek*, 203 Mich App 193, 511 NW2d 693 (1993).
- If the parents reach an agreement regarding parenting time, the court must order the parenting time terms unless it finds on the record by clear and convincing evidence that the terms are not in the child's best interests. MCL 722.27a(2).
- The parent exercising parenting time may decide all routine matters concerning the child while the child is with that parent. MCL 722.27a(11).

B. When Parenting Time May Not Be Granted

§4.2 There are two instances when parenting time may not be granted.

1. A biological parent who is convicted of a criminal sexual conduct crime of any degree or assault with intent to commit criminal sexual conduct or is found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual penetration may not be granted parenting time with a child conceived as a result of that crime. MCL 722.27a(4). This prohibition does not apply if, after conviction, the biological parents cohabit and establish a mutual custodial environment for the child, or if the criminal sexual conduct conviction was based solely on the victim being between 13 and 16 years old.
2. An individual convicted of criminal sexual conduct or assault with intent to commit criminal sexual conduct may not be granted parenting time with that child or a sibling of the child unless the other parent and the child or sibling (if either is of sufficient age to express their feelings) consent to the parenting time. MCL 722.27a(6). The limitation in this provision applies

solely to a biological parent convicted of criminal sexual conduct. All other persons, including stepparents, are subject to the best interests of the child test, MCL 722.27a(1). *DeVormer v DeVormer*, 240 Mich App 601, 618 NW2d 39 (2000).

C. Friend of the Court Recommendations

§4.3 The Friend of the Court is authorized "[t]o investigate all relevant facts, and to make a written report and recommendation to the parties and to the court" in disputed parenting time cases. MCL 552.505(1)(g). Its recommendation is required if the matter is not resolved through domestic relations mediation or if the court orders. *Id.*

The Friend of the Court's report and recommendation must be based on the standards set forth in the Child Custody Act. *Id.*

If parenting time is disputed and the parties have not opted out of receiving Friend of the Court services (see §7.3), the Friend of the Court must investigate and make a written report and recommendation on parenting time to the parties and the court. The recommendation must be based on the best interests of the child standard. See §7.11. Alternative dispute resolution must be provided by the Friend of the Court on a voluntary and confidential basis for parenting time disputes. MCL 552.513. See §§7.7–7.10 for a discussion of Friend of the Court mediation.

Practice Tip

- *The SCAO has developed the Custody and Parenting Time Investigation Manual (2018) for use in the state's Friend of the Court offices. The guidelines are available in PDF format on the SCAO website.*

II. Factors to Be Considered in Determining Parenting Time

A. In General

§4.4 If the parents can agree on parenting time terms, those terms must be ordered by the court unless the court determines on the record by clear and convincing evidence that the agreed-on terms are not in the best interests of the child. MCL 722.27a(2). The Michigan Supreme Court issued an Order in *Herschfus v Herschfus*, 481 Mich 887, 749 NW2d 714 (2008), remanding the matter back to the trial court for entry of a parenting time order that sets a parenting time schedule incorporating the father's religious observances "in accordance with the parties' agreement regarding the child's upbringing."

In general, the guiding principle for establishing parenting time is that any terms be "in accordance with the best interests of the child." MCL 722.27a(1); *see Thames v Thames*, 191 Mich App 299, 477 NW2d 496 (1991). It is presumed that it is in the best interests of a child to have a strong relationship with both parents. MCL 722.27a(1). MCL 722.23 defines the phrase *best interests of the child*; see §4.6. This is the same definition used in determining custody. *See Daniels v Daniels*, 165 Mich App 726, 418 NW2d 924 (1988).

MCL 722.27a(7) also provides specific factors that the court may consider when determining the frequency, duration, and type of parenting time to be granted; see §4.7.

Note that a court's award of joint legal and physical custody does not require a parenting time schedule where the children spend 50 percent of their time with each parent. *Diez v Davey*, 307 Mich App 366, 861 NW2d 323 (2014).

B. The Best Interests Factors

1. Findings Required

§4.5 The court must make adequate findings and conclusions in support of the parenting time decision. *Arndt v Kasem*, 156 Mich App 706, 710, 402 NW2d 77 (1986) (court failed to address issues in dispute or best interests factors). See also MCR 2.517(A)(1), which generally requires definite findings of fact and conclusions of law. However, there is a split of opinion as to whether the trial court must evaluate each of the best interests factors and make findings of fact and conclusions of law in parenting time disputes. Cases finding that the trial court must make specific findings of fact in parenting time cases include *Daniels v Daniels*, 165 Mich App 726, 418 NW2d 924 (1988), and *Dowd v Dowd*, 97 Mich App 276, 293 NW2d 797 (1980). However, in *Hoffman v Hoffman*, 119 Mich App 79, 326 NW2d 136 (1982), findings of fact and conclusions of law were required only on those issues that were contested.

Where the court accepts the parties' agreement regarding parenting time, there is no contested case and the trial court does not need to expressly articulate each of the best interests factors. "Implicit in the court's acceptance of the parties' agreement is its determination that the arrangement is in the child's best interest." *Koron v Melendy*, 207 Mich App 188, 192–193, 523 NW2d 870 (1994); *see also* MCL 722.27a(2).

2. The Factors

§4.6 The Child Custody Act defines the phrase *best interests of the child* as follows:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

MCL 722.23.

Practice Tip

- *The child's opinion (factor "i") generally should not be accorded overwhelming weight when it would cut off parenting time. Casbergue v Casbergue, 124 Mich App 491, 335 NW2d 16 (1983). Here are some suggestions for what to do when the child says "I won't go!":*
  - *Have the Friend of the Court interview the parents and the child and make a recommendation.*
  - *Ascertain whether the child is at risk for emotional, mental, or physical abuse.*
  - *Look for creative alternatives. An evening at the mall may be more enjoyable for both the parent and the child than a forced weekend afternoon visit.*
  - *If the custodial parent is creating the problem situation, remind the parent of a duty to ensure that parenting time takes place.*
  - *Remind the custodial parent that the child needs both parents. There may be long-term emotional, psychological, or delinquency problems that can be avoided by encouraging the child to interact with the other parent.*
  - *Tell parents that the child's obligation to visit the other parent is the same as the obligation to attend school. Parents should implement whatever measures they use to enforce brushing teeth, doing household chores, or going to school to enforce parenting time.*
  - *Initiate a counseling program to help parents with parenting time problems. Some funding may be available for courts from state grants.*
  - *Initiate contempt proceedings against the custodial parent.*

C. Parenting Time Factors

§4.7 In addition to the best interests factors, MCL 722.27a(7) sets forth nine factors that more specifically relate to the frequency, duration, and type of parenting time to be granted. While the court may consider these factors, it is not mandated to do so.

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
>
> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
>
> (i) Any other relevant factors.

See Maier v Maier, 311 Mich App 218, 874 NW2d 725 (2015) (trial court considered best interests of child even though it did not explicitly go through all factors in MCL 722.27a(6) (now subsection (7)).

D. Examples of Parenting Time Provisions

§4.8 The parenting time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time and are appropriate to the particular case. For example, the order may require the following:

- The responsibility and cost of transporting the child are to be divided between the parents.
- The presence of third persons during parenting time be restricted, or a third person or agency must be present during parenting time.
- The child must be ready for parenting time at a specific time.
- The parent must arrive for parenting time and return the child from parenting time at specific times.
- A bond to ensure compliance with a parenting time order be posted.
- Reasonable notice must be given when parenting time will not occur.

MCL 722.27a(9).

A parenting time order must prohibit parenting time from being exercised "in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction," unless "both parents provide the court with written consent to allow a parent to exercise parenting time [in such a country]." MCL 722.27a(10); *see also Elahham v Al-Jabban*, 319 Mich App 112, 899 NW2d 768 (2017). To be a party to the Hague Convention, a ratifying state (the United States, for example) must accept the other country's accession to the convention. If a country's accession is not accepted by a ratifying state, that other country "is not bound to all the benefits and obligations imposed by the Convention." *Safdar v Aziz*, 327 Mich App 252, 933 NW2d 708 (2019) (although Pakistan acceded to Hague Convention, United States never recognized accession and, therefore, Pakistan was not party to the convention bound by MCL 722.27a(10)).

Parenting time must be granted in specific terms if requested by either party at any time. MCL 722.27a(8). In *Pickering v Pickering*, 268 Mich App 1, 706 NW2d 835 (2005), the trial court erred by awarding "reasonable and liberal parenting time" to defendant, *id.* at 4, and refusing to consider awarding specific parenting time, on defendant's oral motion, made during a hearing to resolve objections to the proposed judgment.

In *Van Koevering v Van Koevering*, 144 Mich App 404, 375 NW2d 759 (1985), a parenting time schedule based on the best interests of the child was valid where the court balanced the father's religious preferences and lifestyle and the mother's parental rights.

In *Deal v Deal*, 197 Mich App 739, 496 NW2d 403 (1993), weekend parenting time was scheduled over the mother's argument that it interfered with observance of the Sabbath. The mother had moved to Ohio after the divorce, but the father still resided in Michigan. The court considered both a psychologist's evaluation that the schedule would not harm the children and the practicalities of trying to find a workable schedule not unduly burdensome on the children or the father.

In *Farrell v Farrell*, 133 Mich App 502, 351 NW2d 219 (1984), the best interests standard justified setting quite limited parenting time for defendant father who lived in Ireland. Because an Irish court had granted the father custody, the Michigan court conditioned the father's exercise of his parenting time rights on his surrendering his passport and plane tickets.

In *Sturgis v Sturgis*, 302 Mich App 706, 840 NW2d 408 (2013), the trial court erred in reinstating defendant's parenting time because the court's finding that there was not a reasonable likelihood of abuse or neglect (MCL 722.27a(7)(c); formerly MCL 722.27a(6)(c) when *Sturgis* was decided) was against the great weight of the evidence. Defendant had two criminal sexual conduct convictions and his abuse of his children had been documented in other cases before the court, resulting in his parental rights being terminated for two of his children.

Practice Tip

- *Parenting time terms can address the specific problems between the parties. This may be particularly important where the case indicates a reasonable likelihood of abuse of the child or of a spouse. A number of practical suggestions appear in the Michigan Judicial Institute's Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings §8.4 (4th ed 2024), which can be helpful in any parenting time order. Here are a few suggestions:*
  - *Avoid ambiguous provisions like "reasonable parenting time" or "as agreed to by the parties." Clear, specific terms are easier to follow and more readily enforceable.*
  - *If providing for supervised parenting time, clearly identify the supervisor, where the parenting time is to occur, and any related particulars. Be sure the supervisor has agreed to serve in this capacity and specify in the order how much compensation, if any, will be paid to the supervisor.*
  - *Place limits on initial parenting time; terms can be eased if things go well.*
  - *Establish time limits on waiting for the noncustodial parent to arrive or on the custodial parent's ability to cancel parenting time.*
  - *Specify the consequences of violating the parenting time order and what the aggrieved party should do in the event of a violation.*
  - *In high-conflict cases, consider appointing a guardian ad litem (in some counties, local psychologists are used).*

The court may also appoint a parenting coordinator to assist the parties in settling their parenting issues. See §4.11.

III. Orders for Parenting Time

A. In General

§4.9 An order or judgment awarding custody of a minor must include the following:

- a prohibition against moving the child's residence outside Michigan, MCR 3.211(C)(1)
- a requirement that the custodial parent promptly notify the Friend of the Court in writing of any change of the child's address, MCR 3.211(C)(2)
- a statement by the court declaring the child's inherent rights and establishing the rights and duties as to the child's custody, support, and parenting time, MCL 722.24(1)
- in joint custody arrangements, the parents' agreement regarding relocation of the child's legal residence or, if the parents do not agree on a relocation provision, the following statement: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the 'Child Custody Act of 1970,' 1970 PA 91, MCL 722.31.", MCR 3.211(C)(3)

The party submitting the first temporary order or a final judgment awarding child custody, parenting time, or support must serve the Friend of the Court and the parties with a Judgment Information Form (SCAO form FOC 100) and proof of service. This form, which contains personal identifying information, is separate from the court order and not a public document. MCR 3.211(F)(2).

Special procedures must be followed in cases where one of the parties is incarcerated or on active military duty. See §3.1.

B. Ex Parte Orders

§4.10 MCL 722.27a(12)–(15) provide that a parent may seek an ex parte interim order concerning parenting time before the entry of a temporary order. The party receiving an ex parte order must serve a true copy of the order on both the Friend of the Court and the opposing party. MCL 722.27a(12).

The order must give notice of the procedure for objecting and of the Friend of the Court's role. Written objections or a motion to modify or rescind must be filed within 14 days after receiving notice of the order. A true copy of the objections or motion must be served on the Friend of the Court and the party who obtained the order. MCL 722.27a(13).

The Friend of the Court must attempt to resolve the dispute set forth in the written objection within 14 days of receiving it. If the matter is not resolved, the Friend of the Court must provide the opposing party with a form motion and order with written instructions on how to modify or rescind the order without the assistance of counsel. If the opposing party proceeds without counsel, the Friend of the Court must schedule a hearing with the court to be held within 21 days after the filing of the motion. MCL 722.27a(14).

If a motion to modify or rescind is filed and a hearing requested, the court must resolve the dispute within 28 days after the hearing is requested. *Id.*

The ex parte interim parenting time order must include the following notice:

"NOTICE:

"1. You may file a written objection to the order or a motion to modify or rescind the order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve a true copy of the objection or motion on the friend of the court and the party who obtained the order.

"2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.

"3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte

> order and a request for a hearing. Even if an objection is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."

MCL 722.27a(15); MCR 3.207(B)(5).

See §4.24 for discussion of ex parte personal protection orders.

C. Orders for Parenting Coordinators

§4.11 The court may appoint a parenting coordinator with the parties' consent to help implement parenting time orders and resolve parenting disputes. MCL 722.27c(1)–(2). Before appointing a coordinator, the court must consider any past coercion or violence between the parties and ensure that the order provides adequate protection to the victim. MCL 722.27c(2); *see also* MCL 722.27c(7)–(8) (coordinator's responsibilities to screen for and handle coercion or violence between parties). The order appointing the parenting coordinator must

- acknowledge that each party had the chance to consult with an attorney and a domestic violence counselor;
- acknowledge that the coordinator is neutral and may make recommendations regarding disputes;
- acknowledge that the coordinator may have ex parte communications with the parties, their attorneys, and others and that the communications are not privileged or confidential, except that the coordinator may decline to disclose information that would endanger a party or a child;
- define the duration of the appointment;
- explain the coordinator's costs and allow the coordinator to resign for nonpayment;
- define the scope of the coordinator's duties, which may include any of those set forth in the statute;
- authorize the coordinator to have access to certain persons and records, along with notice of all proceedings; and
- explain the coordinator's dispute resolution process, how the coordinator will make recommendations, and the effect of those recommendations.

MCL 722.27c(3), (9); *see also* MCL 722.27c(10)–(11) (requirements for coordinator's recommendations).

Coordinators acting within the scope of their authority are immune from personal injury or property damage actions. MCL 722.27c(6). The court may allow the coordinator to testify if it will help resolve a pending dispute, but the coordinator must not testify regarding a child's statements if the coordinator believes that doing so would be damaging to the child. MCL 722.27c(12).

The court may terminate the appointment if it is no longer helpful, and the coordinator may resign at any time with notice to the parties and the court. MCL 722.27c(4)–(5).

IV. Parenting Time Enforcement

A. Through the Friend of the Court

§4.12 If there is an open Friend of the Court case (see §7.3 for a discussion of opting out of Friend of the Court services), the Friend of the Court must initiate enforcement if it receives a written complaint that states specific facts constituting a parenting time order violation. A parenting time violation means that an individual's act or failure to act interferes with a parent's right to interact with the child in the time, place, and manner established in the parenting time order if the individual accused of interfering is subject to the order. MCL 552.602(e). Within 14 days, the Friend of the Court must send a copy of the complaint to each party to the parenting time order. MCL 552.511b(2). On request, the Friend of the Court must assist the parent in preparing the written complaint. MCL 552.511b(1). See §§7.27–7.30 for a fuller discussion.

According to MCL 552.641(1), if the Friend of the Court determines that enforcement is merited, it must do one or more of the following: (1) apply a makeup parenting time policy adopted under MCL 552.642, (2) commence civil contempt proceedings, (3) file a motion for modification of the parenting time order, (4) schedule Friend of the Court alternative dispute resolution with the consent of the parties pursuant to MCL 552.513, or (5) schedule a joint meeting under MCL 552.642a. See §§7.27–7.30 for more discussion.

The Friend of the Court is responsible for initiating proceedings to enforce orders, parenting time, custody, or child support. The Friend of the Court can schedule a hearing before a judge or a referee for the noncompliant party to show cause why the party should not be held in contempt of court. The court must hold a show-cause hearing with the Friend of the Court if a party presents evidence that requires more information from the Friend of the Court's records before making a decision. MCR 3.208(B)(5).

B. Court Rule Mediation and Binding Arbitration

§4.13 A custody or parenting time dispute may be referred to mediation through the parties' written stipulation, on a party's written motion, or on the judge's own order. MCR 3.216(C)(1). Parties who are subject to personal protection orders or are involved in child neglect or abuse proceedings may not be referred to mediation without a hearing to determine whether mediation is appropriate. MCR 3.216(C)(3). See §§1.38–1.42 for a detailed discussion of court rule mediation.

The parties may also agree to binding arbitration to resolve parenting time disputes. MCL 600.5071; *Dick v Dick*, 210 Mich App 576, 534 NW2d 185 (1995). Matters of child abuse and neglect are specifically excluded from arbitration. MCL 600.5072(4).

See §§1.44–1.45 for a detailed discussion of domestic relations arbitration.

V. Parenting Time Enforcement Under the Uniform Child-Custody Jurisdiction and Enforcement Act

§4.14 Interstate parenting time disputes are covered by the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 et seq., and the Parental Kidnapping Prevention Act (PKPA), 28 USC 1738A(b)(9). Under these statutes, a court may not modify another state's parenting time determination unless the other state no longer has jurisdiction to modify it or has declined to exercise jurisdiction. The UCCJEA is more fully discussed in §§3.41–3.50.

VI. Parenting Time and Support Payments

A. In General

§4.15 Prior Michigan caselaw applied the spirit of the clean hands doctrine by holding that support payments could be suspended where noncustodial parents were wrongly denied visitation rights, unless suspension of those payments would adversely affect the children for whose benefit the payments are made. However, those cases predate the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 et seq., which does not contemplate the suspension of child support as a remedy when the custodial parent has frustrated visitation. *See Rzadkowolski v Pefley*, 237 Mich App 405, 603 NW2d 646 (1999).

Practice Tip

- *Parental time offsets are built into the support amounts and parenting time abatements have been eliminated. See 2021 MCSF 3.03. An offset for parental time generally applies to every support determination, whether in an initial determination or subsequent modification and whether or not previously given. 2021 MCSF 3.03(B).*

B. Interstate Enforcement and Support Payments

§4.16 A Michigan court may not issue an order or a judgment pertaining to child custody or parenting time in a proceeding under the Uniform Interstate Family Support Act, MCL 552.2101 et seq. MCL 552.2104(2)(b).

VII. Parenting Time Modification

A. General Rules

§4.17 Modifications of parenting time are decided under the Child Custody Act. *See* MCL 722.27. The Friend of the Court must make forms and instructions available for a party to request a modification of parenting time without benefit of counsel. See §7.31. If there is a postjudgment parenting time dispute in an open Friend of the Court case, after conducting an evaluation commensurate with the dispute, the Friend of the Court may file a motion for modification of the parenting time order to ensure parenting time, unless contrary to the best interests of the child. MCL 552.641(1)(c) and .517d(1). The motion must be accompanied by a written Friend of the Court report and recommendation. If neither party objects within 21 days after receiving notice from the Friend of the Court of the recommended modification, the Friend of the Court may sub-

mit a modified order for adoption by the court. See §7.31 for a fuller discussion of the notice requirements. If objections are filed, the motion for modification of parenting time must be noticed for hearing before a judge or referee.

At the hearing, the judge or referee may admit a statement of fact in the office's report or recommendation as evidence to prove a fact relevant to the proceeding, but only if all parties stipulate to or no party objects to the admission of the statement of fact and no other evidence is presented concerning the fact to be proved. MCL 552.517d(4).

MCL 722.27a(16)–(18) governs parenting time modifications filed while a parent is deployed, as defined in MCL 722.22(e). The court must generally presume that it is in the child's best interests to refrain from changing the parenting time that existed on the date of deployment. However, the court may enter a temporary parenting time order if there is clear and convincing evidence that it is in the child's best interests. The temporary order may be for a limited period of time. If a motion for change of parenting time is filed during the time a parent is on deployment, a parent may file and the court must consider an application for stay. The parent can request a stay or an extension of the stay at any time before the final judgment by filing a signed, written statement certified to be true under penalty of perjury. Neither the parent nor the child needs to be present for the court to consider the stay application. MCL 722.27a(16). The parent must notify the court of the parent's deployment end date before or within 30 days after that deployment ends. Once the court receives this notification, it must reinstate the parenting time order in effect immediately preceding that deployment period. MCL 722.27a(17). If a motion for change of parenting time is filed after a parent returns from deployment, the court must not consider the parent's absence due to that deployment or future deployments in making its decision. *Id.* When two parents share custody, "the deploying parent must notify the other parent of an upcoming deployment within a reasonable period of time." MCL 722.27a(18).

For a discussion of change of legal residence, see §3.26.

B. Considerations in Modifying Parenting Time Orders

§4.18 The trial court may amend a previous judgment or order pertaining to a custody dispute if it is in the child's best interests and if the movant shows "proper cause" or "a change of circumstances." MCL 722.27(1)(c); *see Vodvarka v Grasmeyer*, 259 Mich App 499, 675 NW2d 847 (2003) (defining *proper cause* and *change of circumstances* in custody cases). However, parenting time modifications "are not necessarily changes in custody." *Rains v Rains*, 301 Mich App 313, 340, 836 NW2d 709 (2013), *criticized on other grounds by Grange Ins Co v Lawrence*, 494 Mich 475, 835 NW2d 363 (2013). Under MCL 552.505(1)(g), a trial court must find that proper cause has been shown or there has been a change of circumstance before ordering a referral to the Friend of the Court for a parenting time (or custody) investigation. *Bowling v McCarrick*, 318 Mich App 568, 899 NW2d 808 (2017). However, if the modification of a custody order has no direct bearing on the custodial environment or parenting time, the trial court may modify the order without determining proper cause or changed circumstances. *Kost-*

reva v Kostreva, 337 Mich App 648, 976 NW2d 889 (2021) (custody of child's passport has no direct bearing on custodial environment or parenting time). The framework for evaluating "proper cause" or "change in circumstances" when a party requests to modify a parenting time order depends on whether an established custodial environment is affected and the type of modification requested.

- If the proposed parenting time modification changes the child's established custodial environment, the court should "apply the 'proper cause and change of circumstances' framework [from *Vodvarka*]." *Rains,* 301 Mich App at 340 (citing *Shade v Wright*, 291 Mich App 17, 27, 805 NW2d 1 (2010)); *see, e.g., Lieberman v Orr*, 319 Mich App 68, 900 NW2d 130 (2017) (additional 85 days of parenting time for plaintiff would significantly alter children's established custodial environment with defendant); *Eickelberg v Eickelberg*, 309 Mich App 694, 871 NW2d 561 (2015) (on remand, trial court to consider whether proposed parenting time modification due to father's move from Clinton Township to Marshall constitutes change in established custodial environment); *Powery v Wells*, 278 Mich App 526, 752 NW2d 47 (2008) (modification of parenting time based on mother's move from Ludington to Traverse City amounted to change in established custodial environment because either she or father would be relegated to role of "weekend" parent).
- If the modification would not change the established custodial environment and amounts to "a change in the duration or frequency of parenting time," the standard in *Shade* applies. *Kaeb v Kaeb*, 309 Mich App 556, 570, 873 NW2d 319 (2015). *Shade,* discussed below, applied "a more expansive definition of 'proper cause' or 'change in circumstances'" than what was articulated in *Vodvarka. Shade,* 291 Mich App at 28.
- If the request is "to modify or amend a condition on parenting time" that does "not affect an established custodial environment or alter the frequency or duration of parenting time, … a lesser, more flexible understanding of 'proper cause' or 'change in circumstances' [than articulated in *Vodvarka* or *Shade*] should apply." *Kaeb,* 309 Mich App at 570–571 (discussed below).

Unless MCR 3.207(B) applies, if a trial court's modification of parenting time will alter a child's custody, even temporarily, the trial court must conduct a hearing on the child's best interests. *Barretta v Zhitkov*, Nos 364921, 365078, ___ Mich App ___, ___ NW3d ___ (Oct 12, 2023).

To determine whether a parenting time modification is in the child's best interests, courts look at the same best interests factors and parenting time factors discussed in §§4.6–4.7. In a pure parenting time dispute, the trial court need not make specific findings on each best interests factor but may focus solely on the contested issues. *Olepa v Olepa*, 151 Mich App 690, 702, 391 NW2d 446 (1986) (dispute over grandparenting time). The standard of proof for evaluating best interests depends on whether the proposed modification changes an established custodial environment. If it does, the modification "should not be granted unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child." *Brown v Loveman*, 260 Mich App 576, 595, 680 NW2d 432 (2004); *see also Eickelberg.* If the modification does not

change an established custodial environment, the movant must show that it is in the child's best interests by a preponderance of the evidence. *Rains,* 301 Mich App at 340.

Modifications to parenting time orders were considered in the following circumstances:

- Where a minor child is in high school and desires to participate in more social and extracurricular activities, which the geographical distance between her parents' homes in Michigan and Ohio make impossible, proper cause or change of circumstances sufficient to modify parenting time exists as long as these changes do not affect the established custodial environment. *Shade.* The *Shade* court explained that the definitions of *proper cause* and *change of circumstances* in *Vodvarka* did not control in this case, which involved a modification of parenting time that would not result in a change in the established custodial environment. The court opined that the focus of parenting time is to foster a strong relationship between the child and the parent. Therefore, normal life changes, which do not constitute proper cause or a change of circumstance sufficient to justify a change of custody, are precisely the types of considerations a court should review in determining requests for parenting time modifications.
- In *Rains,* plaintiff's proposed commutes between Traverse City and Grand Blanc to see her fiancé "constituted proper cause or a change in circumstances that was sufficient to justify the trial court's modification of parenting time." 301 Mich App at 342. Both plaintiff and defendant testified to the difficulties the child faced shifting between two homes and plaintiff's proposed commute added a third home. Although the trial court did not specify why it modified parenting time, "the trial court's analysis of the best-interest factors" shows that it based its decision "on plaintiff's testimony that (1) she sold her home, (2) she was engaged to a man who was moving to Traverse City, and (3) if her motion to change [legal residence] were denied, she would rent an apartment in Grand Blanc and commute between Traverse City and Grand Blanc." *Id.* at 341–342.
- In *Lieberman,* plaintiff's motion to modify parenting time for an additional 85 days and request to change the children's schools would significantly alter the established custodial environment with defendant. The court opined that the request for such a significant shift in parenting time was in fact a change of physical custody. The court of appeals vacated and remanded the proceedings to apply the legal standards set forth in *Vodvarka* to first determine if there was proper cause or a change of circumstance to reopen the issue. Only after the threshold is met can the trial court determine whether it is in the best interests of the children.
- In *Kaeb,* the father was required to attend counseling and AA meetings as conditions of his parenting time. Two months after a review hearing affirming these conditions, he filed a motion to remove these requirements and presented letters from two professionals who indicated that he no longer needed either treatment. The trial court held that the father's motion was

frivolous under MCR 1.109(E)(7) (formerly MCR 2.114(D)(2)) because he had not shown a change in circumstances since the last order; rather, the father was arguing that the court was incorrect in ordering the conditions. The court of appeals reversed. It explained that the imposition, revocation, or modification of a condition of parenting time generally does not affect an established custodial environment or alter the frequency or duration of parenting time. Therefore, a "lesser, more flexible understanding" of proper cause or change in circumstance should apply. 309 Mich App at 570–571. Specifically, it held that a request to change an existing condition on the exercise of parenting time constitutes proper cause or change in circumstances if the conditions in their current form no longer serve the child's best interests.

- In *Deal v Deal*, 197 Mich App 739, 496 NW2d 403 (1993), it was not an abuse of discretion to modify a parenting time order over the custodial parent's argument that the modification would interfere with weekly religious observances. The trial court appropriately weighed the needs of the children to spend adequate time with their father, school and work schedules, and a psychologist's testimony that the children would not be harmed by the arrangement.
- In *Prettyman v Prettyman*, 348 Mich 206, 82 NW2d 475 (1957), where the mother took the children to Texas after the divorce and denied the father parenting time, the court approved a modification whereby the children were to visit the father from July 15 to September 1 each year, with each party paying transportation one way.
- After the mother controlled her alcoholism, the judgment in *Knowles v Knowles*, 340 Mich 238, 65 NW2d 772 (1954), was modified to allow the mother to have the children for six weeks instead of one month each summer and also for half the Christmas vacation each year.
- In *Kane v Kane*, 314 Mich 529, 22 NW2d 773 (1946), where the father had remarried and moved into his own home and desired more frequent contact with his child, the court increased his parenting time.
- In *Stevenson v Stevenson*, 74 Mich App 656, 254 NW2d 337 (1977), the father was denied specific parenting time where the child had not seen his father in 11 years, considered the stepfather his real father and his half-brothers true brothers, and was stabilized in the home environment.
- A noncustodial parent's parenting time rights may not be canceled solely because the parent is living with someone to whom the parent is not married. *Snyder v Snyder*, 170 Mich App 801, 429 NW2d 234 (1988). However, the court may limit parenting time based on the failure of the parent's boyfriend to submit to a background check as ordered by the court where the court was concerned about the parent's and the boyfriend's behaviors. *Mitchell v Mitchell*, 296 Mich App 513, 823 NW2d 153 (2012).
- When a court suspends a party's parenting time, the court should order periodic review hearings to determine whether parenting time should be rein-

stated in the future. Without any mechanism for further review, the party with suspended parenting time effectively has nonexistent parental rights. *Luna v Regnier*, 326 Mich App 173, 930 NW2d 410 (2018); *see also Barretta* (error for trial court to suspend parenting time without evidentiary hearing when suspension "had the effect of actually modifying the award of joint physical custody" and MCR 3.207 did not apply).

VIII. Grandparenting Time

A. When a Grandparent May Seek an Order

§4.19 For several decades before 2003, a grandparent in Michigan could seek an order for grandparenting time under certain circumstances as long as the court determined that grandparenting time was in the best interests of the child. However, in *DeRose v DeRose*, 469 Mich 320, 666 NW2d 636 (2003), the supreme court found Michigan's then-existing grandparenting time statute unconstitutional. The *DeRose* court based its decision on *Troxel v Granville*, 530 US 57 (2000), where the U.S. Supreme Court invalidated a Washington statute that permitted "any person" to petition for visitation rights at "any time" and authorized state courts to grant such rights whenever visitation served the child's best interests. Michigan's statute, although narrower in scope than Washington's, was found to be flawed because (1) it did not provide a presumption that fit parents act in the best interests of their children; (2) it failed to accord the fit parent's decision concerning visitation any "special weight"; and (3) it failed to clearly place the burden in the proceedings on the petitioners, rather than on the parents. *DeRose,* 469 Mich at 336.

In *Johnson v White*, 261 Mich App 332, 682 NW2d 505 (2004), the court of appeals held that *DeRose* was to be given full retroactive effect.

Under MCL 722.27b, a grandparent may seek grandparenting time if

> (a) an action for divorce, separate maintenance, or annulment involving the child's parents is pending before the court;
>
> (b) the child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled;
>
> (c) the child's parent who is a child of the grandparents is deceased;
>
> (d) the child's parents have never been married, they are not residing in the same household, and paternity has been established;
>
> (e) legal custody of the child has been given to a person other than the child's parent or the child is placed outside of and does not reside in the home of a parent; or
>
> (f) in the year preceding the commencement of the action for grandparenting time, the grandparent provided an established custodial environment for the child, whether or not the grandparent had custody under a court order.

MCL 722.27b(1).

The definition of a *fit parent* set forth in *Troxel* will be read into MCL 722.27b to determine an award of grandparenting time. In *Geering v King*, 320 Mich App 182, 906 NW2d 214 (2017), the trial court improperly found that both

biological parents, who objected to the grandparent's motion, were unfit. The court of appeals reversed the award, holding that the trial court's finding of both parents to be unfit was against the great weight of evidence. The statute creates a presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. Guardians and custodians are not afforded this presumption as the statute specifically uses the term *parent*. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 547, 840 NW2d 743 (2013) ("permitting guardians or custodians to derive the benefit of the fit-parent presumption would require us to rewrite the statute").

To rebut the presumption, a grandparent must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court will dismiss the action. MCL 722.27b(4)(b). The court may also dismiss the action if two fit parents sign an affidavit stating that they both oppose an order for grandparenting time. MCL 722.27b(5). Even if a parent consents to a grandparenting time schedule, the fit-parent presumption must still be applied and rebutted by a preponderance of the evidence. *Zawilanski v Marshall*, 317 Mich App 43, 894 NW2d 141 (2016).

To ensure that the statute is not found unconstitutional, the legislature included an alternative burden of proof. If the current preponderance of the evidence test in MCL 722.27b(4)(b) is successfully challenged in an appellate court, the statute will convert to a clear and convincing evidence test. MCL 722.27b(4)(c). However, the court of appeals has held that the preponderance of the evidence standard is constitutional. *Varran v Granneman*, 312 Mich App 591, 880 NW2d 242 (2015).

The statute survived an as-applied constitutional challenge in *Keenan v Dawson*, 275 Mich App 671, 739 NW2d 681 (2007) (trial court's decision to award grandparenting time, which was based on evidence and in consideration of statutory presumption in favor of defendant's decision, did not improperly interfere with defendant's constitutional right to raise child as he sees fit). The statute also survived substantive due process, procedural due process, and equal protection claims in *Brinkley v Brinkley*, 277 Mich App 23, 742 NW2d 629 (2007) (grandparents have no fundamental constitutional right to relationship with their grandchildren, nor do grandchildren have fundamental right to maintain relationship with their grandparents against their parents' wishes).

If the court finds that a grandparent has met the standard for rebutting the presumption, the court will consider whether it is in the best interests of the child to enter an order for grandparenting time. In determining the best interests of the child, the court will consider the ten factors set forth in MCL 722.27b(6).

The parent of a father who has never been married to the child's mother may not seek an order for grandparenting time unless the father completes an acknowledgment of parentage, a court issues an order of filiation, or the father is determined to be the father by a court. MCL 722.27b(2). *See Varran.* Further, the parent of a putative father may not seek grandparenting time unless the putative father has provided substantial and regular support or care in accordance with his

ability to provide the support or care. But see §2.4 regarding gender neutrality in statutes after *Obergefell v Hodges*, 576 US 644 (2015).

Adoption of a child or placement of a child for adoption terminates the grandparents' right to seek visitation. *Coppess v Atwood (In re Keast)*, 278 Mich App 415, 750 NW2d 643 (2008). However, this prohibition does not apply when the grandchild is adopted by a stepparent. MCL 722.27b(13). In *Jones v Slick*, 242 Mich App 715, 619 NW2d 733 (2000), the Michigan Court of Appeals found that a plain reading of MCL 722.27b(1) in conjunction with MCL 710.60(3) did not terminate the rights of a decedent's parent to seek grandparenting time. Grandparenting time actions in stepparent adoption situations are limited to grandparents whose own child is deceased. MCL 722.27b(13).

In *Porter v Hill*, 301 Mich App 295, 836 NW2d 247 (2013), *reversed,* 495 Mich 987, 844 NW2d 718 (2014), the court of appeals held plaintiffs lacked standing to bring an action for an order under MCL 722.27b(1)(c) to see their son's children with his former spouse. The court explained that plaintiffs were not the children's grandparents under MCL 722.22(f) (previously MCL 722.22(e)) because plaintiffs' son was not a parent under MCL 722.22(i) (previously MCL 722.22(h)) as his parental rights had been involuntarily terminated before his death. The supreme court reversed, holding that "under the circumstances of this case, a biological parent is encompassed by the term 'natural parent' in [MCL 722.22(f) and (i)], regardless of whether the biological parent's parental rights have been terminated." 495 Mich at 987–988.

The PKPA was amended to cover grandparenting time actions. 28 USC 1738A.

A custody action under MCL 722.26b brought by a guardian who is also the child's grandparent is separate and distinct from an action for grandparenting time under MCL 722.27b. A guardian-grandparent's request for custody does not automatically include a request for grandparenting time. *Falconer v Stamps*, 313 Mich App 598, 886 NW2d 23 (2015) (trial court improperly awarded grandparenting time sua sponte in custody action between child's mother and guardian-grandmother).

B. Procedure

§4.20 A request for grandparenting time is initiated either by filing a motion, if the circuit court has continuing jurisdiction over the child, or if the circuit court does not have continuing jurisdiction, by filing a complaint in the circuit court for the county where the child resides. MCL 722.27b(3). The motion or complaint must be accompanied by an affidavit setting forth facts supporting the requested order. MCL 722.27b(4)(a). MCL 722.27b(4)(b) requires grandparents "must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health." However, grandparents may file regardless of whether a parent has denied grandparenting time. *Varran v Granneman*, 312 Mich App 591, 880 NW2d 242 (2015) (holding that MCL 722.27b(1) does not require parental denial and that MCL 722.27b(4)(b) was enacted to fix a constitutional defect, not

to set forth requirements for seeking grandparenting time). *But see Falconer v Stamps*, 313 Mich App 598, 886 NW2d 23 (2015) (improper for trial court to award grandparenting time sua sponte because court presumed mother would unreasonably deny grandparenting time).

The grandparent is obligated to give each person with legal custody of the grandchild notice of the motion or action. Parties with legal custody of the grandchild may file opposing affidavits. MCL 722.27b(4)(a).

A party may request a hearing on the motion or complaint, or the court may order a hearing sua sponte. If a hearing is requested, the court must order it. At the hearing, any party submitting an affidavit or a counter affidavit must be "allowed an opportunity to be heard." *Id.*

The statute directs that a "fit" parent's decision to deny grandparenting time is presumed not to create a "substantial risk of harm to the child's mental, physical, or emotional health." To rebut this presumption, the grandparent seeking visitation must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time does create such a risk. MCL 722.27b(4)(b); *see Varran,* 312 Mich App at 625 (finding risk of substantial harm where grandparents raised child as their own for several years and evidence showed child "saw his Grandparents as parental figures" and that "he would be sad, angry, and depressed" if he could not see them). If the grandparent cannot overcome the presumption, the request for visitation must be denied. MCL 722.27b(4)(b); *see Falconer* (award of grandparenting time against great weight of evidence where trial court failed to give proper weight to evidence concerning MCL 722.27b(6)(b), (d), (e), (f), (g), (h), (i), or (j)).

If the grandparent successfully rebuts the presumption that the parent's denial of visitation does not create such a substantial risk, the court moves to the second step of the two-step process. Specifically, if the court finds that the grandparent has rebutted the presumption, it must then consider whether it is in the best interests of the child to enter an order for grandparenting time. *See Falconer* (improper for trial court to award grandparenting time sua sponte because court deprived mother of chance to address evidentiary burden and statutory best interests factors). If the court finds by a preponderance of the evidence that this is the case, the court must enter an order for "reasonable grandparenting time." MCL 722.27b(6). Reasonable grandparenting time is "determined on a case-by-case basis, keeping the child's best interests in mind." *Falconer,* 313 Mich App at 657. In certain "very unusual circumstances, extensive grandparenting time may be appropriate." *Id.* Note, however, that "an order for grandparenting time cannot alter or change the legal custody or physical custody of a child." *Varran,* 312 Mich App at 605.

Alternatively, if the grandparent overcomes the presumption, the court may refer the request for grandparenting time to domestic relations mediation, governed by MCR 3.216. If the matter is referred to Friend of the Court alternative dispute resolution, but the Friend of the Court is not able to reach a voluntary resolution within a "reasonable time," the court itself must hold a best interests hear-

ing. MCL 722.27b(7). The statute does not suggest any time line that would satisfy the reasonable time standard.

The court must make a record of its analysis and findings, including the reasons for granting or denying the visitation request. MCL 722.27b(12).

C. Modification or Termination of a Grandparenting Time Order

§4.21 MCL 722.27b provides that a court may not modify or terminate a grandparenting time order unless it finds by a preponderance of the evidence, on the basis of facts arising since the entry of the grandparenting time order or facts that were unknown before the order, that there has been a change of circumstances of the child or the child's custodian and that modification or termination of the existing grandparenting time order is needed to avoid a substantial risk of harm to the mental, physical, or emotional health of the child. MCL 722.27b(11). The court must a make a record of its analysis and findings regarding whether an existing grandparent visitation order should be modified or terminated, including the reasons for granting or denying the visitation request. MCL 722.27b(12).

A court may not prevent a parent from changing a child's domicile solely to allow the exercise of grandparenting time. MCL 722.27b(9).

Absent a showing of good cause, a grandparent is barred from filing an action or motion for grandparenting time more than once every two years. However, if the court finds "good cause," it may permit more than one motion or action within this two-year period. MCL 722.27b(8). The court must make a record of its analysis and findings regarding whether good cause to file a premature request for visitation exists, including the reasons for granting or denying the visitation request. MCL 722.27b(12).

IX. Parenting Time and Personal Protection Orders

A. In General

§4.22 Personal protection orders (PPOs) are inappropriate to address domestic relations disputes regarding parenting time; a domestic relations order under MCR 3.207 is more appropriate. *See* MCR 3.201(A). However, because abusers often use the exercise of their parental rights as an opportunity for asserting control over victims, there is a strong link between the victim's safety and the abuser's access to children. In general, domestic relations disputes such as parenting time in cases where domestic violence is present are resolved most safely and effectively if the same judge presides over all the proceedings between the same parties. Unfortunately, this is not always possible, particularly where the victim has fled the county that has jurisdiction over the parenting time dispute. PPO and domestic relations actions in separate courts can result in conflicting orders issued in each court. At the time of publication, there was no Michigan statute, court rule, or appellate decision directly addressing the problem of conflicting orders affecting parenting time or custody issues. However, the rules regarding the issuing of PPOs provide mechanisms for avoiding unnecessary conflicts between a parenting time order and PPO restrictions. The relevant court rules are described

in §§4.23–4.25. See also the Michigan Judicial Institute's *Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings* §5.7 (4th ed 2024), for a helpful discussion of relevant considerations and suggestions for dealing with the potential problem.

B. Jurisdiction

§4.23 The family division of the circuit court has jurisdiction over proceedings under the Child Custody Act, which includes parenting time issues. It also has exclusive jurisdiction over cases involving PPOs sought under MCL 600.2950, the domestic relationship PPO statute, or under MCL 600.2950a, the stalking PPO statute. *See* MCL 600.1021(1)(g), (k). However, the petitioner may file a personal protection action in any county in Michigan regardless of residency. MCR 3.703(E).

The court with jurisdiction in a domestic relations case may issue ex parte and temporary orders with regard to any matter within its jurisdiction, and protective orders against domestic violence as provided in MCR subchapter 3.700 (concerning PPOs available under MCL 600.2950). MCR 3.207(A).

C. Courts' Responsibilities When Personal Protection Order Petitions Are Filed

§4.24 A PPO petition may be filed in any county regardless of residency. MCR 3.703(E). The petition must specify whether there are any other pending actions in the petitioned court or in any other court, including any orders or judgments already entered by any court, that affect the parties in the petition. MCR 3.703(D). If the PPO is filed in the same court as another action between the parties, the PPO petition is to be assigned to the same judge. MCR 3.703(D)(1)(a). For PPOs involving unemancipated respondents younger than age 18, see MCL 712A.2(h); MCR 3.701.

When the PPO petition is filed subsequent to the initiation of a domestic relations action in another court, the petitioned court has a general directive to contact the court with the pending action, if practicable, to determine any relevant information. MCR 3.703(D)(1)(b). Specifically, when the prior court has jurisdiction over a parenting time or custody matter, the petitioned court must contact the other court, where practicable, and consult with the prior court, as contemplated in MCR 3.205(C)(2), about the impact on custody and parenting time rights before issuing the PPO. MCR 3.706(C)(1).

Under MCR 3.205(C)(2), the subsequent or petitioned court must give due consideration to prior continuing orders of other courts, and it may not enter orders contrary to or inconsistent with the prior continuing orders, except as provided by law.

Ex parte orders. If the PPO is requested ex parte, the petition must set forth facts showing that the petitioner will face immediate and irreparable injury, loss, or damage as a result of the delay required to give notice or that notice itself may precipitate adverse action. MCR 3.703(G).

D. Relation to Existing Custody, Parenting Time, or Other Orders Affecting Minors

§4.25 If the respondent's custody or parenting time rights will be adversely affected by the PPO, the issuing court must determine whether conditions should be specified in the PPO to accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and minor children would be compromised by such conditions. MCR 3.706(C)(2).

The resulting PPO takes precedence over any existing custody or parenting time order until the PPO expires, or the court having jurisdiction over the custody or parenting time order modifies the order to accommodate the conditions of the PPO. MCR 3.706(C)(3).

The respondent or petitioner may file a motion to modify the existing custody or parenting time order with the court having jurisdiction of that order and may request a hearing. In such a case, the hearing must be held within 21 days after the motion is filed, and the proceedings to modify the earlier order are subject to MCR subchapter 3.200. MCR 3.706(C)(3).

Although a PPO may adversely affect parenting time, the court of appeals found that the Child Custody Act was inapplicable to custody issues in a son's action seeking a PPO against his father, where the son had reached majority age before seeking the PPO. *Hayford v Hayford*, 279 Mich App 324, 760 NW2d 503 (2008). The court determined that the act was still applicable regarding child support. *Id.*

"'[E]mancipated minor' as it relates to MCL 600.2950(26)(b) applies to a minor child where the parental rights of one or both parents have been terminated." *SP v BEK*, 339 Mich App 171, 981 NW2d 500 (2021). Therefore, MCL 600.2950(26)(b) does not preclude a court from issuing a PPO against a respondent whose parental rights to the minor children involved have been terminated even if the other parent's parental rights were not terminated. *Id.*

Practice Tip

- *If a dispute arises over a PPO issued in the context of a domestic relations case, the court should handle resolution of the dispute with the potential criminal nature of the acts enjoined in the PPO in mind. Typically, domestic relations proceedings of a civil nature (such as parenting time disputes) call for negotiated settlements of private disputes. To the extent that PPO proceedings address criminal conduct, however, they should not be a subject for negotiation or settlement between the victim and the perpetrator.*

5
Child Support

Summary of Child Support

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Who has an obligation to support the child? §§5.1–5.5.

- Both natural (or adoptive) parents, unless the court modifies or terminates the obligation or the child is emancipated.
- The obligation may be enforced by either parent, the child, the child's guardian or foster parents, or a Title IV-D agency.
- A father of an illegitimate child; the mother cannot contract away the child's right to support.
- Generally no obligation to support an unrelated child, unless (1) equitable estoppel applies (usually when there is an express or implied representation that a parental relationship exists) or (2) the person is an "equitable parent." These doctrines do not cover situations where there is no marriage.

Equitable parent doctrine. §5.5.

- Criteria—(1) the nonbiological parent and the child acknowledge a parent relationship or the biological parent cooperates in developing this relationship over a period of time before a divorce complaint is filed, (2) the nonbiological parent desires parental rights, and (3) the nonbiological parent is willing to pay child support.
- Once the criteria are met over a reasonable period of time, equitable parenthood is established and the criteria need not be met perpetually.
- The doctrine does not apply when the parties were never married.

Jurisdiction to order support. §§5.6–5.8.

The court may order child support in (among other things) actions for divorce, annulment, separate maintenance, paternity, child custody, family support (applies when the married parent is living apart from the noncustodial parent who does not contrib-

ute financially although able to do so; also applies when the custodial parent is unmarried if the children are legitimate, legitimated, or adopted).

The court must have in personam jurisdiction over the defendant to order child support.

- Requires personal service and sufficient contacts with Michigan to justify the state assuming jurisdiction.
- Long-arm statute includes living in Michigan while subject to a marital or family relationship that is the basis for a claim for, e.g., child support.
- In interstate cases, the Uniform Interstate Family Support Act lists additional bases for personal jurisdiction.

The court may enter ex parte or temporary orders for child support. See §§5.9–5.10. In ex parte child support orders, a specific notice regarding objecting to the order is required. See §5.9.

Amount of support. §§5.11–5.18.

Support means payment of money for support of a child, including payment of medical, dental, and other health care expenses; child care expenses; and educational expenses. For enforcement purposes, also includes confinement/pregnancy expenses or genetic testing expenses ordered under the Paternity Act and the surcharge on past-due support payments.

Postmajority support. §5.12.

The court may order support for a child between the ages of 18 and $19^1/_2$ if the child is regularly attending high school full time with a reasonable expectation of graduating and is living full time with the support payee or at an institution. When determining whether a child is living full time with the support payee, the court must analyze whether the child is both physically residing and has the intention to reside full time with the parent while attending high school. *Weaver v Giffels*, 317 Mich App 671, 895 NW2d 555 (2016). Such an order must include a provision that the support terminates on the last day of a specified month, regardless of the actual graduation date.

Agreements by the parties for postmajority support on the record or in the divorce judgment are enforceable, even if entered before the 1990 statutory amendments regarding postmajority support.

The Michigan Child Support Formula (MCSF). §§5.13–5.18.

The amount of support is determined by the MCSF. *See* MCL 552.501 et seq..

The 2021 MCSF is available on the SCAO website under the Friend of the Court Bureau link. Please note that the 2021 Michigan Child Support Formula Manual Supplement, with the most current economic data and tables needed to calculate support, is also available on the SCAO website under the Friend of the Court Bureau link.

A court may enter a support order that deviates from the formula if application of the formula would be unjust or inappropriate. MCL 552.605(2).

If the court deviates from the formula, it must set forth in writing or on the record all the following:

- the support amount determined by the child support formula
- how the support order deviates from the child support formula
- the value of property or other support awarded in lieu of the payment of child support, if applicable
- reasons application of the child support formula would be unjust or inappropriate in this case

MCL 552.605(2); 2021 MCSF 1.04(B).

The MCSF contains an extensive list of factors the court may consider in exercising its discretion to order a deviation from the formula. *See* 2021 MCSF 1.04(E).

Role of Friend of the Court (FOC) and the Michigan State Disbursement Unit (MiSDU). §5.19.

The collection of most child support payments and the disbursement of those payments to the recipients are no longer the functions of the FOC. These functions are now conducted by the MiSDU.

Parental agreements regarding child support. §5.20.

The court may consider, but is not bound by the agreement.

The parent may not bargain away the child's right to adequate support.

Domestic relations referees, mediation, arbitration, joint meeting. §5.21.

A child support matter may be referred to a domestic relations referee pursuant to the court's authority to refer motions in any domestic relations matter.

Child support can be also dealt with in mediation, arbitration, or in joint meeting.

Mandatory and optional judgment provisions. §§5.22–5.24.

Any provisions regarding child support must be prepared on a Uniform Support Order (see SCAO forms FOC 10, FOC 10a, and FOC 10d). This order must accompany any judgment or order affecting child support and both documents must be signed by the judge. The Uniform Order governs if the terms of the judgment or order conflict with it. The final judgment must either incorporate the Uniform Order by reference or state that none is required.

See §5.23 for a list of mandatory judgment provisions.

Modification of support orders. §§5.25–5.33.

Procedure.

On a motion by either party or the FOC, the court may modify child support provisions until the child reaches 18 or $19^{1}/_{2}$ under conditions for postmajority support (see above). Modification of support orders is within the court's discretion.

Grounds—as circumstances of the parents and the benefit of the children require.

- The party alleging a change in circumstances has the burden of showing a change justifying modification.
- A change in the child support formula can justify modification of support, but does not require it.

Jurisdiction—if the court had in personam jurisdiction when it granted the divorce, it has the authority to modify support provisions. Note that motions for modification that involve other states' orders or parties who reside outside Michigan are governed by other statutes that may affect a Michigan court's authority to act.

A hearing must be held if the parties do not agree and there are factual issues. There must be a record of the hearing and the judge must state findings.

If the court deviates from the child support formula, the following must be on the record or in writing:

- the support amount determined under the formula
- how the support order deviates from the formula
- if applicable, the value of property or other support awarded in lieu of child support
- the reasons application of the formula would be unjust or inappropriate in the case

Note that income disparity by itself does not warrant deviation from the MCSF.

Retroactive modification. §5.33.

The support amount is generally only modifiable from the date of the notice of a petition to the other party, except the following:

- This provision does not apply to ex parte or temporary support orders.
- The court may approve the parties' agreement to retroactively modify.
- The court may retroactively correct the amount if the party required to report income to the FOC intentionally misrepresents or fails to report.

Generally, MCR 2.612, the relief from judgment court rule, may not be used to set aside accrued child support; however, in rare circumstances, constitutional due process protections may require retroactive modification.

Parental time offsets are built in to the support amounts and parenting time abatements have been eliminated. *See* 2021 MCSF 3.03. An offset for parental time generally applies to every support determination, whether in an initial determination or subsequent modification and whether or not previously given. 2021 MCSF 3.03(B).

A payer is not entitled as a matter of law to use prior voluntary overpayments as a credit against existing and future support obligations.

Cancellation of arrearages is generally not available. However, a payer who has an arrearage under a support order may file a motion for a payment plan to pay the arrearage and discharge or abate arrearages. A payer or the FOC can file a motion for a repayment plan.

Enforcement of support orders. §§5.38–5.52.

Payment is made through the MiSDU unless the support order provides otherwise.

Income withholding. §§5.39–5.41.

All support orders must provide for income withholding, which is immediately effective unless

- the court finds good cause, which requires (1) the court's written and specific finding why immediate income withholding would not be in the child's best interests, (2) proof of timely payment of any previously ordered support, and (3) the payer's agreement to keep the FOC informed of information about the source of income and health insurance coverage, or
- the parties agree otherwise in a written agreement, which is reviewed by the court and entered in the record, and which provides (1) that income withholding will not take effect immediately, (2) an alternative payment arrangement, and (3) that the payer will keep the FOC informed of information about the source of income and health insurance coverage.

Triggered by delinquency—For orders not immediately effective, income withholding will take effect if the payer falls behind in an amount equal to one month of support.

License suspensions. §5.42.

Driver's, occupational, recreational, and/or sporting licenses of delinquent payers may be suspended through an action brought by the FOC or as a sanction in contempt proceedings. See exhibit 5.1 for the procedure.

Contempt proceedings. §5.43.

May be initiated only if the person fails or refuses to obey the support order and income withholding is inapplicable or unsuccessful.

A contempt order may be issued if the court finds that the payer has the capacity to pay some or all of the amount due through the exercise of diligence or out of currently available resources, or that the payer has failed to attend a work program after referral by the FOC.

In assessing currently available resources, the court may presume, in the absence of contrary proofs, that the payer has currently available resources equal to one month of support charges. A determination that the payer has resources of more than that requires proof by the FOC or the recipient.

Factors considered in determining the ability to pay include the following:

- employment history
- education and skills
- work opportunities
- diligence in trying to find work
- the payer's personal history, including present marital status and present means of support
- real and personal assets and any transfer of assets to another

- efforts to modify the decree if it is considered excessive under the circumstances
- health and physical ability to obtain gainful employment
- availability for work
- the payer's location since the judgment and reasons for moving, if applicable

Sanctions for *nonpayment out of currently available resources* may be one of the following:

1. Committing the payer to the county jail or other penal or correctional facility
2. Committing the payer to the county jail with work-release provisions
3. Ordering the payer to participate in a work activity
4. Ordering the payer to participate in a community corrections program
5. Ordering the parent to pay a fine of not more than $100
6. Placing the payer under the supervision of the FOC for a term fixed by the court with reasonable conditions, including (1) participating in a parenting program, (2) participating in drug or alcohol counseling, (3) participating in a work program, (4) seeking employment, (5) participating in other counseling, (6) continuing compliance with a current support or parenting time order, or (7) entering into and compliance with an arrearage payment plan
7. Applying any other remedy authorized by the Support and Parenting Time Enforcement Act (SPTEA) or the FOC Act if the payer's arrearage qualifies

Important: An order of commitment should be used only if other remedies seem unlikely to correct the failure to pay. The first order of commitment cannot exceed 45 days; subsequent orders cannot exceed 90 days. The court must provide in the order of commitment that the payer must be released when the payer complies with the conditions to secure the support payment set forth in the order.

Right to counsel—The Fourteenth Amendment's due process clause does not automatically require the state to provide counsel to an indigent noncustodial parent who is subject to a child support order at civil contempt proceedings. *Turner v Rogers*, 564 US 431 (2011).

Liens and bonds. §5.44.

The amount of an allowance for the support of the children constitutes a lien on the payer's real and personal property, subordinate to any prior perfected lien. The court may require a payer to provide sufficient bond, security, or other guarantee to secure the payment of support that is past due, or due in the future, or both.

Consumer reporting. §5.45.

The FOC Act gives consumer reporting agencies access to information regarding child support arrearages. On request of a consumer reporting agency or the payer, the FOC must provide a payer's current support information to the consumer reporting agency.

Interception of tax refunds. §5.46.

Support arrearages may be offset by state and federal tax refunds; the FOC submits a request and the Office of Child Support (OCS) initiates offset proceedings.

Surcharge on arrearages. §5.47.

The court may order a surcharge, based on a rate tied to the five-year U.S. treasury note rate and added on January 1 and July 1 of each year if it determines that the payer has failed to pay support under a support order and the failure was willful.

Passport restrictions. §5.48.

A parent will be ineligible to receive a passport if the U.S. Department of Health and Human Services certifies that the parent is in arrears on child support payments in an amount in excess of $2,500.

Statute of limitations. §5.49.

An action to enforce a support order must be brought within 10 years from the date that the last support payment is due under the support order, regardless of whether the last payment is made. Payments toward the arrearage can waive a statute of limitations defense.

Enforcement and military personnel. §5.50.

The court may order collection of child support payments from members of any branch of the United States military. However, whenever child support is owed by a servicemember in any branch of the service, the provisions of the Servicemembers Civil Relief Act, 50 USC 3901 et seq., must be considered. *See also* MCL 32.517.

Bankruptcy. §5.51.

Bankruptcy does not discharge domestic support obligations.

Criminal sanctions. §5.52.

An individual who fails to pay child or spousal support is guilty of a felony and may be imprisoned for not more than four years, fined up to $2,000, or both.

An individual arrested on a felony warrant for criminal nonsupport must remain in custody until the arraignment unless the person pays a cash bond of $500 or 25 percent of the arrearage, whichever is greater.

A person of sufficient ability who refuses or neglects to support the family is guilty of a misdemeanor. MCL 750.167.

The Uniform Interstate Family Support Act (UIFSA). §§5.53–5.67.

In general. §5.53.

A Michigan court may act as an initiating court—a support establishment or enforcement proceeding is filed in Michigan and then forwarded to the state where enforcement is sought—or as responding court—a support enforcement proceeding is filed in another state and forwarded to Michigan for enforcement.

Jurisdictional requirements. §§5.54–5.57.

When may a Michigan court issue a support order when an order is also requested in another state? §5.54.

The support request is filed first in another state and then in Michigan—Michigan may exercise jurisdiction if all of the following apply:

- the pleading is filed in Michigan before the time expires for filing a responsive pleading challenging the exercise of jurisdiction in the other state or foreign country,
- the party challenges the other state's or foreign country's exercise of jurisdiction in a timely manner, or
- if relevant, Michigan is the child's *home state.*

The support request is filed first in Michigan and then in another state—Michigan may exercise jurisdiction if all of the following apply:

- the pleading is filed in another state before the time expires in Michigan to challenge Michigan's exercise of jurisdiction,
- the contesting party timely challenges Michigan's exercise of jurisdiction, and
- if relevant, the other state or foreign country is the child's *home state.*

Continuing exclusive jurisdiction (CEJ). §5.55.

Once a court has established a support order, it can only modify that support order if it has CEJ. A court has CEJ to modify the order if it is the controlling order and

- the obligor, the obligee, or the child reside in Michigan when the modification request is filed or
- the parties consent in a record or in open court that the Michigan court has CEJ to modify the order.

If another state's tribunal modifies a Michigan support order under that state's UIFSA (or a substantially similar law), the other state obtains CEJ. Temporary orders issued ex parte or pending resolution of a jurisdictional conflict do not create CEJ.

If the Michigan court loses CEJ, it is limited to enforcing the amounts that accrued before the modification and providing other relief for violations of the original order that occurred before the modification's effective date.

Personal jurisdiction. §5.56.

In a proceeding to enforce a support order or to determine parentage, there is personal jurisdiction over a nonresident if least one of the following applies:

- the individual was personally served with notice in Michigan;
- the individual has submitted to jurisdiction by consent, which is shown in a record, or by the person entering a general appearance or filing a responsive document in effect waiving any objection;
- the individual resided with the child in Michigan;

- the individual resided in Michigan and provided prenatal expenses or support for the child;
- the child resides in Michigan as a result of the individual's acts or directives;
- the individual has engaged in sexual intercourse in Michigan and the child might have been conceived by that act;
- the person has acknowledged parentage in Michigan's parentage registry; or
- any other constitutionally acceptable basis for asserting jurisdiction.

In a proceeding to modify a support order of another state, there is personal jurisdiction over a nonresident if the above requirements are met along with the requirements in MCL 552.2611(1) (if the order was issued in another state) or MCL 552.2615 (if the order was issued in another country).

A petitioner's participation in a UIFSA proceeding does not confer personal jurisdiction over the petitioner for other proceedings or litigation.

If two or more states have issued support orders, which order is recognized as controlling? §5.57.

- Only one state has CEJ—That state's order is controlling.
- Two or more states have CEJ—If one state is the child's current home state, that state's order is controlling. If neither is the child's home state, the most recent order is controlling. Modification is requested in the state that issued the controlling order if that state has CEJ. If no state has CEJ, the order must be registered for modifications in the state in which the nonrequesting party lives.
- No state has CEJ—A Michigan court can issue a new controlling order and obtain CEJ.

Establishing, enforcing, or modifying a child support order; determining parentage. §§5.58–5.63.

Registration and petitions for affirmative relief. §§5.58–5.59.

To enforce an out-of-state support order, a party must register it with a Michigan court or seek administrative enforcement with a Michigan support enforcement agency. Once a support order is registered, the court must notify the nonregistering party who then has the opportunity to contest the validity of the order. A registered out-of-state support order is enforceable in the same manner as other Michigan court orders, except that modification is subject to the UIFSA.

To establish a support order, determine parentage, or register and modify an out-of-state support order, the petitioner must file a petition with an initiating tribunal for forwarding to a responding tribunal or directly in the state or foreign country that can obtain personal jurisdiction over the respondent.

Modification of another state's support orders. §5.62.

A Michigan court may modify the registered support order of another state only if the requirements of MCL 552.2611 or .2613 are met. MCL 552.2613 applies when the child is not a resident of the issuing state and all individual parties reside in Michigan.

If MCL 552.2613 is inapplicable, the court must follow MCL 552.2611, which requires the following for modification:

- the child, the obligee, and the obligor do not live in the issuing state; a nonresident petitioner seeks modification; and the respondent is subject to the Michigan court's personal jurisdiction or
- the child or an individual party is subject to the Michigan court's personal jurisdiction and all individual parties have filed written consent in the issuing court for the Michigan court to modify the order and assume CEJ.

Foreign support orders. §5.63.

Foreign support orders that fall under the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance are governed by separate provisions under the UIFSA.

Income withholding orders. §5.64.

An out-of-state income withholding order may be sent directly to the obligor's employer without filing a petition or registering the order. It may also be registered with a Michigan court or administratively enforced. MCL 552.2507.

Evidence and discovery. §5.65.

Special evidence and discovery rules apply to UIFSA proceedings.

Application of law by a responding court; remedies available. §5.67.

The responding tribunal has the power to

> (a) Establish or enforce a support order, modify a child-support order, determine the controlling child-support order, or determine parentage of a child.
>
> (b) Order an obligor to comply with a support order, specifying the amount and the manner of compliance.
>
> (c) Order income withholding.
>
> (d) Determine the amount of any arrearages and specify a method of payment.
>
> (e) Enforce orders by civil or criminal contempt, or both.
>
> (f) Set aside property for satisfaction of the support order.
>
> (g) Place liens and order execution on the obligor's property.
>
> (h) Order an obligor to keep the tribunal informed of the obligor's current residential address, electronic-mail address, telephone number, employer, address of employment, and telephone number at the place of employment.
>
> (i) Issue a bench warrant for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants.
>
> (j) Order the obligor to seek appropriate employment by specified methods.
>
> (k) Award reasonable attorney's fees and other fees and costs.

(*l*) Grant any other available remedy.

Other interstate enforcement remedies. §§5.68–5.70

- The Interstate Income Withholding Act—see §5.68.
- The Uniform Enforcement of Foreign Judgments Act—see §5.69.

I. Children's Right to Support

§5.1 A child has an inherent right to the support of the natural parents. MCL 722.3(1); *People v Coleman*, 325 Mich 618, 39 NW2d 201 (1949). This right to support includes adopted children. *Hendrick v Hendrick*, 247 Mich 327, 225 NW 483 (1929).

Children of parties to a divorce born after the divorce judgment have the right to support and may be provided for by the modification of a support order. *Weaver v Weaver*, 15 Mich App 15, 166 NW2d 4 (1968).

An illegitimate child has a right to support from the father and the mother may not contract away this right. *Tuer v Niedoliwka*, 92 Mich App 694, 699, 285 NW2d 424 (1979); *see also Crego v Coleman*, 463 Mich 248, 615 NW2d 218 (2000), *cert denied,* 531 US 1074 (2001).

A child is entitled to child support even if the child is conceived as the result of the mother's uncharged act of criminal sexual conduct with an underage boy. *LME v ARS*, 261 Mich App 273, 680 NW2d 902 (2004). An action for child support "against a noncustodial parent" may be brought by "'either a custodial parent or the director of social services (now the [Department of Health and Human Services (DHHS)]) if the child is supported by public assistance.'" *Macomb Cty Dep't of Human Servs v Anderson*, 304 Mich App 750, 849 NW2d 408 (2014) (quoting *LME,* 261 Mich App at 279–280) (trial court erred in dismissing child support complaint brought by Department of Human Services (now DHHS) and child's mother for mother's failure to attend hearing on plaintiffs' motion for default judgment because MCL 552.452(1) does not require custodial parent to attend hearing).

II. Parents' Obligation to Support

A. In General

§5.2 Both parents are obligated to support a minor child unless a court modifies or terminates the obligation or the child is emancipated. MCL 722.3(1); *see also* MCL 722.1498(1). This is true of emancipation by operation of law, such as by marriage, military service, or age. However, if the emancipation is by court order, the parental support obligation may continue past the emancipation because "[t]he parents of a minor emancipated by court order are jointly and severally obligated to support the minor," although "[t]he parents of a minor emancipated by court order are not liable for any debts incurred by the minor during the period of emancipation." MCL 722.4e(2).

Unless there is an adoption or other termination of parental rights, the support obligation remains with the biological parents. *Tanielian v Brooks*, 202 Mich App 304, 508 NW2d 189 (1993). However, the voluntary release or involuntary termination of a parent's parental rights does not automatically terminate that parent's child support obligation. In *Department of Human Servs v Beck (In re Beck)*, 488 Mich 6, 793 NW2d 562 (2010), the Michigan Supreme Court found that the father had a continuing obligation to pay child support after the involuntary termination of his parental rights, holding that a parental obligation continues unless a court of competent jurisdiction modifies or terminates the obligation.

See also Evink v Evink, 214 Mich App 172, 176, 542 NW2d 328 (1995) (father who voluntarily released his parental rights remained obligated to support children where there was no adoption and mother retained custody).

A noncustodial parent has an obligation to assist in the support of a child even if the custodial parent has sufficient income to meet the needs of the child without financial assistance. *Beverly v Beverly*, 112 Mich App 657, 317 NW2d 213 (1981). The remarriage of a noncustodial parent does not nullify or minimize the obligation to support. *Dillon v Dillon*, 318 Mich 686, 29 NW2d 126 (1947).

A noncustodial father is obligated to pay child support even if the child is conceived as the result of the mother's uncharged act of criminal sexual conduct with the father. *LME v ARS*, 261 Mich App 273, 680 NW2d 902 (2004).

The support obligation may be enforced by either parent, the child, the child's guardian or foster parents, or a Title IV-D agency. MCL 722.1498(1); *see* MCL 552.602(*ll*) (defining *Title IV-D agency*); *see also Macomb Cty Dep't of Human Servs v Anderson*, 304 Mich App 750, 849 NW2d 408 (2014) (action for child support "against a noncustodial parent" may be brought by "'*either* a custodial parent or the director of social services (now the director of the [DHHS]) if the child is supported by public assistance'") (quoting *LME,* 261 Mich App at 279–280). In *Anderson,* the Department of Human Services (now DHHS) and the child's mother brought a support complaint against the noncustodial father. The father defaulted and plaintiffs moved to have a default judgment entered against him. Neither parent was present at the hearing on plaintiffs' default motion. Citing MCL 552.452(2), the trial court determined it could not enter a support order because it could not determine if there was a custody dispute. The court of appeals reversed, noting that MCL 552.452(1) does not require the custodial parent to appear at the hearing. Moreover, because the father defaulted, custody was undisputed since all allegations in the support complaint were rendered true.

Under the Summary Support and Paternity Act (SSPA), MCL 722.1491 et seq., a Title IV-D agency may establish support for a child who is being supported by public assistance or for whom an application for Title IV-D has been filed. MCL 722.1499(2); *see* MCL 722.1495–.1497 (procedures for Title IV-D agency to establish paternity if not previously established). The agency must file a statement of support obligation with the court and serve it on the individual from whom support is sought. MCL 722.1499(2) (statement requirements), (4) (delivery requirements). The individual has 21 days to contest the statement. MCL 722.1499(2)(c). During that time, the individual may agree to establish support in accordance with the MCSF. MCL 722.1499(5). If the individual fails to timely respond, the agency must submit a proposed order establishing the support obligation to the court. MCL 722.1499(6). If the court is satisfied that the statutory procedures were followed, the court must enter the order. *Id.* If the individual timely contests the statement and proves the facts are incorrect, the court can dismiss the proceeding, order genetic testing, or take other appropriate action. MCL 722.1499(7).

Any support order under the SSPA is enforceable under the SPTEA. MCL 722.1501(5). Where the SSPA "contains a specific provision regarding the con-

tents or enforcement of a child support order that conflicts with a provision in the [SPTEA], the [SSPA] controls in regard to that provision." *Id.* SSPA support orders should include temporary or permanent custody and parenting time provisions. MCL 722.1499(3), (8).

B. Children Unrelated by Blood or Adoption

1. In General

§5.3 If there is no biological or adoptive relationship with an individual, a child is usually not entitled to support from that individual. *Magarell v Magarell*, 327 Mich 372, 41 NW2d 898 (1950); *Tilley v Tilley*, 195 Mich App 309, 489 NW2d 185 (1992) (nonparent guardians have no legal obligation to support wards).

2. The Equitable Estoppel Doctrine

§5.4 The courts have applied the doctrine of equitable estoppel to estop a husband from denying paternity of a child born during the marriage, but of whom he is not the biological father. *Johnson v Johnson*, 93 Mich App 415, 286 NW2d 886 (1979) (man married pregnant woman knowing that her child was not his). Similarly, in *Nygard v Nygard*, 156 Mich App 94, 401 NW2d 323 (1986), a nonparent was estopped from denying an obligation to support a child who was not his because he had dissuaded the mother from giving up the baby for adoption and agreed to raise the child as his own. However, in setting the amount of support, the trial court could consider the fact that defendant was not the biological father.

However, the doctrine of equitable estoppel has not been extended to cover situations where there is no marriage. *See Van v Zahorik*, 460 Mich 320, 597 NW2d 15 (1999). In *Van,* the supreme court declined to apply the doctrine against a natural parent where the parties were unmarried and the child was born out of wedlock. In the absence of an express or implied representation that a parent-child relationship exists, the courts have not imposed support obligations on a nonparent. *See also Killingbeck v Killingbeck*, 269 Mich App 132, 711 NW2d 759 (2005); *Bergan v Bergan*, 226 Mich App 183, 572 NW2d 272 (1997) (doctrine of equitable estoppel did not apply where ex-husband had been falsely led to believe he was child's natural father).

3. The Equitable Parent Doctrine

§5.5 Unlike equitable estoppel where the nonbiological parent is denying any parental support obligation, under the equitable parent doctrine, the nonbiological parent is seeking parental rights, including paying support. *See Atkinson v Atkinson*, 160 Mich App 601, 610, 408 NW2d 516 (1987) (husband who considered child to be his own and did not know he was not biological father until commencement of divorce was allowed to assert parental rights, including support).

In *Atkinson,* the court held that a husband who is not the biological father of a child born or conceived during a marriage may be considered the equitable parent of the child if

> (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

Id. at 608–609. In *Stankevich v Milliron*, 313 Mich App 233, 882 NW2d 194 (2015), the court held that the nonbiological parent of a child born during a same-sex marriage had standing to bring an equitable parent claim. *See also Pueblo v Haas*, 511 Mich 345, 999 NW2d 433 (2023) (former partner of birth mother involving same-sex couple, together at time of birth, who sought for custody of that child to whom they did not give birth and with whom they do not share genetic connection is entitled to make case for equitable parenthood and has standing to bring action under Child Custody Act, MCL 722.21 et seq.).

Once the criteria have been met over a reasonable period of time, equitable parenthood is established and the party does not need to perpetually meet the criteria to retain that status. *York v Morofsky*, 225 Mich App 333, 571 NW2d 524 (1997) (child born during marriage; equitable parent informed that he was not biological parent when child was five).

In contrast, the doctrine was not applied where the ex-husband refused to voluntarily assume the responsibility of paying child support. *Bergan v Bergan*, 226 Mich App 183, 186, 572 NW2d 272 (1997).

In addition, the court has refused to apply the equitable parent doctrine when the parties are unmarried and the child is born out of wedlock. *Van v Zahorik*, 460 Mich 320, 597 NW2d 15 (1999) (man who cohabited with children's mother and believed himself to be their father, although he was not, could not be equitable parent). *See also Killingbeck v Killingbeck*, 269 Mich App 132, 711 NW2d 759 (2005).

The court of appeals has applied the equitable parent doctrine to a child born before the marriage, where the husband had been determined to be the father in a paternity action, but blood tests later showed he was not. *Hawkins v Murphy*, 222 Mich App 664, 565 NW2d 674 (1997) (res judicata and collateral estoppel also barred relitigation of paternity).

III. Jurisdictional Requirements

A. In General

§5.6 The following Michigan statutes authorize a court to award child support:

- the Divorce Act, *see* MCL 552.15
- the Child Custody Act of 1970, *see* MCL 722.27
- the Family Support Act, *see* MCL 552.451

- the Status and Emancipation of Minors Act, *see* MCL 722.3
- the Paternity Act, *see* MCL 722.712
- the SSPA, *see* MCL 722.1499

These acts are under the exclusive jurisdiction of the family division of the circuit court, MCL 600.1021, and are enforceable under the SPTEA, MCL 552.601 et seq., which is also under the exclusive jurisdiction of the family division. MCL 600.1021; *see also* MCL 552.16, .452(3), 722.27(2), .714.

The court may also order an alleged abusive parent to pay support to maintain a suitable home environment for a juvenile under certain circumstances. MCL 712A.13a(8)(a).

For interstate actions, the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.183 et seq., and the UIFSA, MCL 552.2101 et seq., provide the authority for, and restrictions on, ordering support.

A court may not enter an order of support if it does not have jurisdiction over the action before it. *Smith v Smith*, 218 Mich App 727, 555 NW2d 271 (1996) (temporary support order could not be enforced if trial court lacked subject-matter jurisdiction under residency requirements for that divorce action).

B. Personal Jurisdiction

§5.7 To order child support, the court must have in personam jurisdiction over the defendant. *Hillsdale Cty Dep't of Soc Servs v Lee*, 175 Mich App 95, 437 NW2d 293 (1989). If the parent is not a resident of Michigan, this entails not only personal service under MCR 2.105 but also sufficient contacts between the defendant and the state of Michigan to justify Michigan's assuming jurisdiction over the defendant. *Id.* In *Hillsdale,* payment of child support was sought under the Family Support Act. The father's only contact with Michigan was that his wife and children lived here. This was not the minimum contact needed to satisfy Michigan's long-arm statute or to comport with constitutional due process, as enunciated in *Kulko v Superior Court of California*, 436 US 84 (1978).

C. Long-Arm Jurisdiction

§5.8 The long-arm statute provides a listing of contacts sufficient to justify personal jurisdiction over the nonresident, including living in Michigan while subject to a marital or family relationship that is the basis for a claim for child support, for example. MCL 600.705(7).

In interstate cases, the UIFSA, MCL 552.2101 et seq., which can be used to establish or enforce a support order, extends personal jurisdiction to include any of the following:

- an individual who may have conceived the child by engaging in sexual intercourse in Michigan
- an individual personally served with notice in Michigan
- an individual consenting to jurisdiction via a record, entering a general appearance, or filing a responsive pleading

- an individual who resided with the child in Michigan
- an individual who caused or directed the child to reside in Michigan
- an individual who resided in Michigan and provided either prenatal support or support for the child
- an individual who filed an affidavit of parentage
- "any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction"

MCL 552.2201.

IV. Authority for Ex Parte and Temporary Orders for Child Support

A. Ex Parte Orders

§5.9 The court may issue an ex parte order with regard to any domestic relations matter within its jurisdiction. MCR 3.207.

Required showing. Before the court may issue the order, it must be satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to give notice or that notice itself will precipitate an adverse action. MCR 3.207(B)(1).

Service. The party obtaining the ex parte support order must arrange for the service of true copies on the FOC and the other party. MCR 3.207(B)(2).

Enforceability. An ex parte order is effective on entry and enforceable on proof of service. MCL 552.511(1); MCR 3.207(B)(3). However, an income withholding order in an ex parte order takes effect 21 days after the order has been served on the opposite party unless that party files a written objection during the 21-day period. MCL 552.604(4).

An ex parte order is effective until modified or superseded by a temporary or final order. MCR 3.207(B)(4). The ex parte order automatically becomes a temporary order if written objections or a motion to modify are not filed. MCR 3.207(B)(6).

Required notices. All ex parte support orders must contain notices regarding information that the parties must supply to the FOC and procedures for objecting to the order. The requirement that all support orders include specific language restricting retroactive modification of support, MCL 552.603(6), does not apply to ex parte orders. MCL 552.603(3).

Objections. An ex parte order that provides for child support must contain a specific notice regarding objecting to the order. Specific language of the notice is set out at MCR 3.207(B)(5):

"NOTICE:

"1. You may file a written objection to the order or a motion to modify or rescind the order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve

> a true copy of the objection or motion on the friend of the court and the party who obtained the order.
>
> "2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.
>
> "3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing. Even if an objection is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."

B. Temporary Orders

§5.10 Either party, the FOC, or the court itself may move for entry of a support order during a pending action for divorce, annulment, or separate maintenance. MCL 552.15. A party may request a temporary order at any time during the pendency of a domestic relations case by filing a verified motion that sets forth facts sufficient to support the relief requested. MCR 3.207(C)(1).

A temporary order may not be issued unless there is a hearing, except when the parties agree on its terms or when an ex parte order automatically matures into a temporary order under the provisions of MCR 3.207(B)(5) and (6). MCR 3.207(C)(2).

A temporary order may be modified at any time during the pendency of the case following a hearing and on a showing of good cause. MCR 3.207(C)(3).

A temporary order must state its effective date and whether it may be modified retroactively by a subsequent order. MCR 3.207(C)(4). The order remains in effect until modified or until entry of the final judgment or order. MCR 3.207(C)(5); *see Riemer v Johnson*, 311 Mich App 632, 876 NW2d 279 (2015) (although temporary child support order did not address retroactivity, the court, "[b]y recording its intent regarding retroactivity in [a subsequent] written … opinion, … satisfied, nunc pro tunc, the retroactivity requirement of MCR 3.207(C)(4)").

Pending a de novo hearing, a referee's recommended order on a domestic relations matter may be presented to the court for entry as an interim order or the court may make all these orders effective on an interim bases through a local administrative order. *See* MCL 552.507(7); MCR 3.215(G).

The SPTEA requirement of notice restricting retroactive modification of support does not apply to temporary orders entered under MCR 3.207. MCL 552.603(3).

V. Determining the Amount of Support

A. *Support* Defined

§5.11 Under the SPTEA, *support* means the court-ordered payment of money for a child, including payment of the medical, dental, and other health care expenses; child care expenses; and educational expenses. MCL 552.602(ii)(*i*).

According to 2021 MCSF 3.04, every support order must set a family annual ordinary health care expense amount to cover uninsured costs, premiums, and copays for children. For purposes of setting the support obligation, it is presumed that a specified dollar amount per child per year ($454 per 2021 MCSF-S 2.02) will be spent on ordinary expenses. Amounts may be added to compensate for other known or predictable expenses, such as orthodontia or special medical needs. This annual amount is apportioned according to the parents' incomes, and the payer's share is paid as part of the regular support payment. Uninsured health care expenses that the payee incurs beyond the ordinary health care expense amount and any uninsured expenses that the payer pays are extraordinary expenses, which are apportioned between the parents based on the medical percentages set in the support order.

For enforcement purposes, a payment ordered under the Paternity Act for the necessary expenses incurred by or for the mother in connection with her pregnancy and the birth of the child is included as support. MCL 552.602(ii)(*ii*), 722.717(2). For enforcement purposes, support also includes the surcharge added to past-due support payments in lieu of interest. MCL 552.602(ii)(*iii*), .603a.

B. Postmajority Support

§5.12 By statute. The court may order postmajority support for the benefit of a child between the ages of 18 and $19^1/_2$ if the child

- is regularly attending high school full time,
- has a reasonable expectation of graduating from high school, and
- is living full time with the payee of support or at an institution.

MCL 552.605b(2). Such an order for support must include a provision that the support terminates on the last day of a specified month, regardless of the actual graduation date. A pleading requesting postmajority support may be filed any time before the child reaches the age of $19^1/_2$. *Id.* Note that MCL 552.605b(2) and (5) establish independent bases for postmajority support. *Lee v Smith*, 310 Mich App 507, 871 NW2d 873 (2015). Therefore, MCL 552.605b(5) is not a limitation on MCL 552.605b(2). *Lee.*

The terms "regularly attending" and "with a reasonable expectation of completing sufficient credits to graduate from high school," found in MCL 552.605b, are generally interpreted by reference to school attendance and academic standards. When determining whether a child is living on a "full-time basis" with the support payee, the court must analyze whether the child is both physically residing and has the intention to reside full time with the parent while attending high school. *Weaver v Giffels*, 317 Mich App 671, 684, 895 NW2d 555 (2016) (finding that "trial court erred in concluding that [the child] resided with plaintiff on a 'full-time basis' on the exclusive basis that, after she turned 18, she continued living by the arrangements in the now inapplicable parenting time order").

There is no statutory provision for ordering support after the child reaches $19^1/_2$ years of age if the parent objects.

Postmajority support and the nonstudent. The legislation does not provide for postmajority support for children who are disabled or otherwise unable to support themselves. But see *Parrish v Parrish*, 138 Mich App 546, 361 NW2d 366 (1984), where the court considered the added responsibility in caring for a disabled adult child in determining spousal support for the parent.

Pre-1990 postmajority orders. A nonconsensual provision in a judgment or an order entered *before* the effective date of the postmajority support legislation in 1990 is valid and enforceable if it complies with the three conditions set forth above. MCL 552.605b(4).

By contract. A clear contract between the parties on the record or in the divorce judgment in which one party agrees to pay postmajority support is enforceable. MCL 552.605b(5). *See Smith v Smith*, 433 Mich 606, 624 n28, 447 NW2d 715 (1989); *see also Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990) (husband's promise to pay son's college expenses in exchange for wife's promise not to seek child support increase enforceable); *Gibson v Gibson*, 110 Mich App 666, 313 NW2d 179 (1981) (when parties agree, court may reserve right to determine amount to be paid for educational expenses beyond high school and child's minority). Note that MCL 552.605b(5) "independently sets forth requirements for enforcing agreements for postmajority child support in a judgment or order, regardless of whether the agreement concerns a child who satisfies the requirements for support in [MCL 552.605b(2).]" *Lee,* 310 Mich App at 513.

C. The Michigan Child Support Formula

1. In General

§5.13 All child support calculations, including for interim orders and requests for modification, must begin with application of the MCSF. MCL 552.605(2). The 2021 MCSF is available on the SCAO website under the FOC Bureau link. The 2021 Michigan Child Support Formula Manual Supplement (MCSF-S) with the most current economic data and tables needed to calculate support, is also available on the SCAO website under the FOC Bureau link.

Under the MCSF, a parent's support obligation consists of:

> (1) a base support obligation [that is] adjusted for parenting time;
>
> (2) medical support obligations that include ordinary and additional (extraordinary) medical expenses, health care coverage[,] and division of premiums; and
>
> (3) child care expense obligations.

2021 MCSF 3.01(A) (omitted citations). The amount of child support recommended by the child support formula is presumed to be appropriate. *Calley v Calley*, 197 Mich App 380, 496 NW2d 305 (1992). The court must order support in the amount determined by the formula unless the court finds that application of the formula would be unjust or inappropriate. MCL 552.605(2); *see also Burba v Burba (After Remand)*, 461 Mich 637, 643–645, 610 NW2d 873 (2000) (citing MCL 552.17, which was later replaced by MCL 552.605); *Ewald v Ewald*, 292 Mich App 706, 716–717, 810 NW2d 396 (2011).

According to the FOC Act, the formula is to be based on the needs of the child and the actual resources of each parent. MCL 552.519(3)(a)(vi); *see also Burba,* 461 Mich at 642–643. Numerous factors are considered, such as parental income, family size, child care, dependent health care coverage costs, and other criteria. The formula is intended to apply in divorce cases, paternity cases, family support cases, and other cases involving the support of children. In addition, special provisions are made for low-income families, split custody, shared custody, and third-party custody situations.

In third-party custodian situations, when a nonparent has custody of a child, both parents will be obligated to pay support, and each parent's base support obligation is determined through each parent's individual income. 2021 MCSF 4.01(A). Each parent's support obligation for the child is calculated based only on that parent's income. 2021 MCSF 4.01(D).

Before use of the formula, the gross income of each party must be calculated. The formula addresses the many complexities that may be involved in this calculation, such as perks and in-kind income, capital gains, tips and gratuities, gifts that replace income, imputed income, and obligations to children from other relationships. *See* 2021 MCSF 2.01–.09.

Parental time offsets are built into the support amounts and parenting time abatements have been eliminated. *See* 2021 MCSF 3.03. An offset for parental time generally applies to every support determination, whether in an initial determination or subsequent modification and whether or not previously given. 2021 MCSF 3.03(B).

2. Medical Support and Child Care Expenses

§5.14 A child support obligation includes payment for the general care and needs of a child (base support), medical support, and child care expenses. 2021 MCSF 3.01(A).

According to 2021 MCSF 3.04, every support order must set a family annual ordinary health care expense amount to cover uninsured costs, premiums, and copays for children. For purposes of setting the support obligation, it is presumed that a specified dollar amount per child per year ($454 in the 2021 MCSF-S) will be spent on ordinary medical expenses. *See* 2021 MCSF-S 2.02(A). This annual amount is apportioned according to the parents' income, and the payer's share is paid as part of the regular support payment. Amounts may be added to compensate for other known or predictable expenses, such as orthodontia or special medical needs. An expense of the payee that exceeds the ordinary health care expense amount is apportioned between the parents according to income. Any expense of the payer exceeds the ordinary health care expense and is apportioned between the parents because the payer has paid the ordinary health care expense as part of the payer's support.

Under 2021 MCSF 3.06, a child support order must allocate, based on each parent's percentage share of family income, actual child care expenses that allow a parent to look for employment, retain employment, or attend an educational program to improve employment opportunities. It is presumed that the need for child

care continues until August 31st following the child's 12th birthday, but the obligation may continue beyond that date as a child's health or safety needs require. 2021 MCSF 3.06(D).

3. Relationship to Spousal Support

§5.15 Child support must be calculated before spousal support. Spousal support paid between parties to the case under consideration does not get deducted from the payer's income and does not constitute income for the recipient for purposes of calculating the proper amount of child support. *See* 2021 MCSF 2.01(F), 2.07(A).

4. Deviation from the Formula

§5.16 The court must order support in an amount determined by applying the child support formula or may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate. MCL 552.605(2). In exercising its discretion, the court may consider any or all of the following factors:

(1) The child has special needs.

(2) The child has extraordinary educational expenses.

(3) A parent is a minor.

(4) The child's residence income is below the threshold to qualify for public assistance, and at least one parent has sufficient income to pay additional support that will raise the child's standard of living above the public assistance threshold.

(5) A parent has a reduction in the income available to support a child due to extraordinary levels of jointly accumulated debt.

(6) The court awards property in lieu of support for the benefit of the child.

(7) A parent has incurred, or is likely to incur, extraordinary medical expenses for either that parent or a dependent.

(8) A parent receives bonus income in varying amounts or at irregular intervals.

(9) Someone other than the parent can supply reasonable and appropriate health care coverage.

(10) A parent provides substantially all the support for a stepchild, and the stepchild's parents earn no income and are unable to earn income.

(11) A child earns an extraordinary income.

(12) The court orders a parent to pay taxes, mortgage installments, home insurance premiums, telephone or utility bills, etc., before entry of a final judgment or order.

(13) A parent must pay significant amounts of restitution, fines, fees, or costs associated with that parent's conviction or incarceration for a crime other than those related to failing to support children, or a crime against a child in the current case or that child's sibling, other parent, or custodian.

(14) A parent makes payments to a bankruptcy plan or has debt discharged, when either significantly impacts the monies that parent has available to pay support.

(15) A parent provides a substantial amount of a child's day-time care and directly contributes toward a significantly greater share of the child's costs than those reflected by the overnights used to calculate the offset for parental time.

(16) A child in the custody of a nonparent-recipient spends a significant number of overnights with the payer that causes a significant savings in the nonparent-custodian's expenses.

(17) The court ordered nonmodifiable spousal support paid between the parents before October 2004.

(18) When a parent's share of net child care expenses exceeds 50 percent of that parent's base support obligation calculated under §3.02 before applying the parental time offset.

(19) When the amount calculated does not exceed $20, and the administrative cost to enforce and process payments outweighs the benefit of the minimal amounts.

(20) Any other factor the court deems relevant to the best interests of a child.

2021 MCSF 1.04(E). Note: Incarceration is no longer a deviation factor.

If the court deviates from the formula, it must set forth in writing or on the record all the following:

- the support amount determined by the child support formula
- how the support order deviates from the child support formula
- the value of property or other support awarded in lieu of the payment of child support, if applicable
- reasons application of the child support formula would be unjust or inappropriate in this case

MCL 552.605(2); 2021 MCSF 1.04(B).

The court must follow the same procedure for modification of an existing child support order. MCL 552.605(2); *Burba v Burba (After Remand)*, 461 Mich 637, 610 NW2d 873 (2000) (citing MCL 552.17, which was later replaced by MCL 552.605).

Income disparity by itself is not a sufficient basis for deviating from the formula where modification of a child support order is sought. *Id.* It is also unnecessary to deviate a support award downward because it is more than the child needs. The MCSF incorporates both a child's needs and the parent's resources. *Riemer v Johnson*, 311 Mich App 632, 876 NW2d 279 (2015) (citing *Burba*). Moreover, nothing in the MCSF supports an intent to allow deviations based on geographic variations in the cost of living. *Teran v Rittley*, 313 Mich App 197, 882 NW2d 181 (2015).

Practice Tip

- *The court should require details for any deviation to be placed in the order or on the deviation addendum to allow the court at a later date to determine whether a change in circumstances exists when one of the parties claims that the basis for the deviation no longer applies.*

In *Ewald v Ewald*, 292 Mich App 706, 810 NW2d 396 (2011), one parent's alleged interference with the other parent's parenting time rights is not considered a circumstance that permits a deviation of the child support formula under MCL 552.605(2). The trial court erred in finding that, because a parent's actions caused a child to refuse to visit the other parent, deviation from the child support formula was warranted. The SPTEA does not provide for the enforcement of parenting time rights by adjusting child support obligations. *Ewald.*

A court may review a parent's support obligation when the parent is temporarily or permanently incapacitated. *Incapacitation* means "the inability to pay the ordered support obligation caused by a parent being temporarily or permanently unable to earn an income for a period that will likely last 180 days or longer and that is due to disability, mental incompetency, serious injury, debilitating illness, or incarceration." 2021 MCSF 4.02(A). The court may set an incapacitated payer's child support obligation at zero. 2021 MCSF 4.02(B).

Practice Tip

- *While counsel may find some advantages in designating a lump-sum support payment as "unallocated family support," this practice may cause problems for the court and the parties. One problem is that the court is responsible for setting child support at the support guideline level or explaining why it did not. Some judges have declined to sign orders containing this provision.*

5. Software

§5.17 Printable and downloadable copies of the formula can be obtained from the SCAO website. The OCS within the DHHS has a free and public support calculator called the MiChildSupport Calculator. IV-D funded agencies and employees, including FOC office staff, prosecuting attorney staff, and referees, must use their version of the child support calculator embedded in the Michigan Child Support Enforcement System (MiCSES) to calculate support.

There is a software program for a fee created by a Michigan attorney that calculates child support. Craig Ross, an attorney and former domestic relations referee, has developed child and spousal support software that is endorsed by the Family Law Section of the Michigan Bar. Contact Craig Ross, MarginSoft, 1709 Ferndale, Ann Arbor, MI 48104, 734-663-0998.

All automated child support software should produce a correct result if the formula has been properly programmed. However, the formula calculates support using net income and so the method by which net income is determined could produce different end results. Most often, differences among the calculation software result from different assumptions made by different software when estimat-

ing taxes to determine net income. As a result, if a user relies solely on a tool's automated calculations to determine net income, the multiple tools will sometimes reach different results.

Practice Tip

- *If actual taxes are available, those numbers should be entered and used to calculate support rather than relying on estimated taxes.*

6. *Income* Defined

§5.18 The SPTEA defines *income* to include:

> (i) Commissions, earnings, salaries, wages, and other income due or to be due in the future to an individual from his or her employer or a successor employer.
>
> (ii) A payment due or to be due in the future to an individual from a profit-sharing plan, a pension plan, an insurance contract, an annuity, social security, unemployment compensation, supplemental unemployment benefits, or worker's compensation.
>
> (iii) An amount of money that is due to an individual as a debt of another individual, partnership, association, or private or public corporation, the United States or a federal agency, this state or a political subdivision of this state, another state or a political subdivision of another state, or another legal entity that is indebted to the individual.

MCL 552.602(o). The source of income may be an employer or successor employer, a labor organization, or any other individual or entity that owes or will owe income to the payer. MCL 552.602(ff).

The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent's financial status are open for consideration when support is being determined. *See* 2021 MCSF 2.01(B). The formula manual lists a wide range of possible sources of income. The listed sources may not correspond to the sources of taxable income as set forth by the Internal Revenue Service (IRS). The list includes, among other sources, cost of living allowances; shift premiums; bonuses; trust fund payments; strike pay; sick benefits; perks and in-kind income; capital gains; tips and gratuities; gifts that replace income; rental income; gambling winnings; employer contributions to retirement plans; and insurance or other similar payments received as compensation for lost earnings. 2021 MCSF 2.01(C).

In addition to these sources, if the payer parent is self-employed, a business owner, or a business executive, the parent's income may also be derived from distributed profits; profits sharing; officer's, management, or consulting fees; commissions; certain personal loans from the business; certain payments to friends or relatives from the business; unnecessarily deferred or reduced income; and certain pretax business deductions. 2021 MCSF 2.01(E). *But see Riemer v Johnson*, 311 Mich App 632, 876 NW2d 279 (2015) (court excluded depreciation taken by plaintiff's businesses from plaintiff's income because the depreciation was consis-

tent with nature of businesses); *Diez v Davey*, 307 Mich App 366, 861 NW2d 323 (2014) (trial court erroneously calculated father's income based on expert's business judgment of how father's S corporation should be run rather than corporation's historical practices and whether father used corporation to hide income).

The formula also counts as income spousal support paid by someone who is not the other parent in the case, 2021 MCSF 2.01(F), and "potential income" when a parent is voluntarily unemployed or underemployed, 2021 MCSF 2.01(G) (discussed in detail below). Means-tested sources of income such as such as Temporary Assistance to Needy Families (TANF), food stamps, the federal Earned Income Credit, and Supplemental Security Income (SSI) are not considered income for the purpose of determining child support. 2021 MCSF 2.04(A). In addition, all dependent benefits from government insurance programs that are based on the earnings record of a parent and paid for a child in common are attributed as the earning parent's income, including Social Security benefits, railroad retirement, and Veterans Affairs benefits. 2021 MCSF 2.01(I).

The MCSF uses net income, so allowable deductions from income and additional children adjustments are equally important.

In determining the level of support, the court is not strictly limited to the payer's income, but may also consider the payer's financial condition. *Good v Armstrong*, 218 Mich App 1, 6, 554 NW2d 14 (1996) (while receipt of personal injury settlement did not automatically determine level of support, it was relevant fact in determining what was fair).

Imputed (potential) income. When a party voluntarily reduces or eliminates income and the court concludes that the party has the ability to earn an income and pay child support, the court can order support based on the unexercised ability to earn. *Berger v Berger*, 277 Mich App 700, 747 NW2d 336 (2008); *Olson v Olson*, 189 Mich App 620, 473 NW2d 772 (1991), *aff'd,* 439 Mich 986, 482 NW2d 711 (1992); *see also Rohloff v Rohloff*, 161 Mich App 766, 411 NW2d 484 (1987).

"When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the *potential* income that parent could earn, subject to that parent's actual ability." 2021 MCSF 2.01(G) (emphasis added).

In evaluating whether there is an unexercised ability to earn, the following factors should be considered:

1. Prior employment experience and history, including history of earnings and reasons for changes in employment or termination.
2. Educational level, literacy, and any special skills or training.
3. Physical and mental disabilities that may affect a parent's ability to work or to obtain or maintain gainful employment.
4. Availability for work (excluding periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.).
5. Availability of opportunities to work in the local geographical area.

6. The prevailing wage rates and number of hours of available work in the local geographical area.
7. Diligence exercised in seeking appropriate employment.
8. Evidence that the parent in question is able to earn the imputed income.
9. Personal history, including present marital status, age, health, residence, means of support, criminal record, ability to drive, and access to transportation.
10. The presence of the parties' children in the parent's home and its impact on that parent's earnings.
11. Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification.

2021 MCSF 2.01(G)(2). *See also Ghidotti v Barber*, 459 Mich 189, 586 NW2d 883 (1998).

In *Carlson v Carlson*, 293 Mich App 203, 809 NW2d 612 (2011), the trial court abused its discretion by imputing an income of $95,000 to a parent where there was no assessment of the factors set forth in the MCSF for the imputation of income and where the court failed to assess whether the parent possessed an actual ability and likelihood of earning the $95,000 imputed income.

In *Clarke v Clarke*, 297 Mich App 172, 823 NW2d 318 (2012), the appellate court held that per 2008 MCSF 2.01(G) (now 2021 MCSF 2.01(G)), a parent's election against taking early Social Security retirement benefits was not an unexercised ability to earn, as long as it was financially prudent. However, if the parent's intent was malevolent, like precluding the other parent from receiving a child's dependent benefits, imputation may be proper.

D. The Roles of the FOC and the MiSDU

§5.19 If there is an open FOC case (see §7.3 for a discussion of opting out of FOC services), the FOC must make an investigation and report and recommendation as to child support if ordered by the court. MCL 552.505(1)(h). The report and recommendation are placed in the court file and served on the parties and their attorneys. *Id.* The FOC recommendation is calculated using the MCSF. See §§7.12 and 7.32 for a discussion of the process for the FOC investigation and report and recommendation.

Since October 1, 2003, the collection of most child support payments and the disbursement of those payments to the recipients are no longer the functions of the FOC. These functions are now conducted by the MiSDU. The FOC no longer receives or mails child support payments, except those allowed under MCR 3.208(C)(2) and (3).

Before the centralization of payment processing at the MiSDU, each county FOC received and disbursed all payments in its own cases. Now, except in the limited instances noted in MCR 3.208(C)(2) and (3), the MiSDU is the single location to which a payer or source of income sends a child support or fee pay-

ment. MCL 400.236. The MiSDU in turn disburses these payments within two business days of receipt. The FOC now provides enforcement services to individual child support parties, conducts investigations, makes recommendations for custody and child support, enforces support and medical orders, initiates show-cause hearings, prepares support reviews, enters court orders into the system, and processes parenting time complaints. The FOC also registers Michigan orders in other states and provides alternative dispute resolution through mediation programs.

See §7.16 for further discussion of the MiSDU.

VI. Parental Agreements Regarding Child Support

§5.20 Although a court may consider an agreement between the parties, the court is not bound by it. *Bowman v Coleman*, 356 Mich 390, 97 NW2d 118 (1959); *Lewis v Lewis*, 73 Mich App 563, 252 NW2d 237 (1977).

If the parties stipulate to the amount of support, that fact should be made a matter of record, *Bedford v Bedford*, 49 Mich App 424, 212 NW2d 260 (1973), but the parents may not stipulate themselves out of child support, *Ballard v Ballard*, 40 Mich App 37, 198 NW2d 451 (1972). Parents may not bargain away a child's right to adequate support. *Carlston v Carlston*, 182 Mich App 501, 452 NW2d 866 (1990).

The following agreements have been found to be not enforceable:

- a custodial parent's agreement never to seek modification of child support, *Ballard*
- an agreement to ignore a support order, *Ydrogo v Ydrogo*, 332 Mich 530, 52 NW2d 345 (1952)
- a ceiling on the support available in the future, *Carlston*
- an agreement that child support will terminate if the mother remarries, *Wiersma v Wiersma*, 241 Mich 565, 566, 217 NW 767 (1928)
- an agreement that a custodial parent will not enforce support if the noncustodial parent does not visit the child, *Ydrogo*
- an agreement that triggers alimony payments from one parent in the same amount as child support ordered to be paid by the other parent, *Laffin v Laffin*, 280 Mich App 513, 760 NW2d 738 (2008)

In *Holmes v Holmes*, 281 Mich App 575, 760 NW2d 300 (2008), the father agreed to pay child support in excess of the parent's minimum support obligation (bonus agreement). After approximately 10 years, the father petitioned the court for modification of the child support order. *Id.* at 580. The trial court granted the father's petition, claiming it did not have the authority to enforce the bonus agreement. *Id.* at 585–586. On appeal, the court of appeals reversed the trial court and held that the trial court did have the enforcement authority and, absent a compelling reason, the trial court should have enforced the bonus agreement. *Id.* at 592–593. Specifically, the court held

> that because the child support guidelines set forth a parent's minimum support obligation, a voluntarily assumed obligation to pay an amount in excess of the minimum is not inherently objectionable. Therefore, a contract enhancing a parent's child support obligation should be enforced absent a compelling reason to forbear enforcement. The circuit court refused to enforce the bonus provision of the agreement that the parties, both attorneys, entered into voluntarily, despite the absence of any evidence that its enforcement would create a hardship for [the father] or otherwise qualify as unjust or inappropriate.
>
> …
>
> [The father] agreed to pay a larger percentage of his bonus than he would have had to pay if the SERF [shared economic responsibility formula] were applied. Thus, the agreement negotiated by the parties required [the father] to pay an amount exceeding the guidelines, which served to benefit the Holmes children and caused no demonstrable hardship for [the father] during the 10 years that he paid it. Continued enforcement of the 25 percent bonus provision benefits the Holmes children without violating the court's inherent ability to modify the child support award if circumstances substantially change or the child support amount qualifies as "unjust or inappropriate" under MCL 552.605(2)(d). Accordingly, we conclude that the circuit court erred by finding that it lacked the power to enforce the contractual bonus provision.

Holmes, 281 Mich App at 592–593.

VII. Domestic Relations Referees, Mediation, and Arbitration

§5.21 A child support matter may be referred to a domestic relations referee pursuant to the court's authority to refer motions in any domestic relations matter. *See* MCL 552.507(2); *see also* MCR 3.215(B).

See §1.28 and exhibit 1.1 for discussion of domestic relations referees' authority generally.

Child support can be dealt with in mediation or arbitration. There are two types of mediation available: (1) the procedures directed by the domestic relations mediation court rule, MCR 3.216, and (2) private mediation. FOC mediation provisions generally do not apply to support issues. See §§1.37–1.43 and §§7.7–7.10 for further discussion of mediation. A joint meeting may also be used to settle child support. See §7.29.

Domestic relations arbitration is governed by the Domestic Relations Arbitration Act (DRAA), MCL 600.5070 et seq. The DRAA does not relieve the court of its duty to review an arbitration award of child support. *Harvey v Harvey*, 470 Mich 186, 680 NW2d 835 (2004). MCL 600.5080 requires that the court review an arbitration award and modify or vacate its provisions if the award is not in the best interests of the child. See §§1.44–1.45 for further discussion of arbitration.

VIII. Provisions in Support Orders and Judgments

A. Uniform Orders

§5.22 Any provisions regarding child support must be prepared on a Uniform Support Order (see SCAO forms FOC 10, FOC 10a (no FOC ser-

vices)). MCR 3.211(D)(1). If the support ordered does not follow the MCSF, FOC 10d, Uniform Child Support Order Deviation Addendum, must also be used. The uniform order must accompany any judgment or order affecting child support, and both documents must be signed by the judge. *Id.* The Uniform Order governs if the terms of the judgment or order conflict with it. *Id.* The final judgment must either incorporate the Uniform Order by reference or state that none is required. MCR 3.211(D)(2). Personal information concerning a party must be provided to the FOC in a Judgment Information Form (SCAO form FOC 100), which is separate from the court order and not a public document. MCR 3.211(F)(2).

B. Mandatory Provisions

§5.23 Per statute, the following provisions (addressed in the Uniform Orders) are required when child support is ordered:

- *notification of contact information:* the parties' notification to the FOC of their addresses, employers, licenses they hold, and their phone numbers, MCL 552.603(7), and notification of any changes in the information within 21 days, MCL 552.603(8)
- *deviation from formula amount:* if deviating from the child support formula, a provision complying with MCL 552.605(2) (The statutory criteria for deviating from the child support formula are mandatory and a judgment or order that deviates from the formula must meticulously set out the criteria required for deviation. *Burba v Burba (After Remand)*, 461 Mich 637, 610 NW2d 873 (2000) (citing MCL 552.17, which was later replaced by MCL 552.605). Note that the statutory criteria does not have to be in the order; it may be on the record.)
- *child reaching age of majority:* that support payments continue until the child reaches majority or age $19^1/_2$ if specific statutory requirements are met and the child is attending high school, MCL 552.605b (Such an order must include a provision that the support terminates on the last day of a specified month, regardless of the actual graduation date. MCL 552.605b(3).)
- *health care coverage:* in an FOC case, a requirement that one or both parents obtain or maintain health care coverage that is accessible to the child and is available to the parent at a reasonable cost, as a benefit of employment, for the benefit of the parties' children, MCL 552.605a(2)
- *notification of health care coverage:* in an FOC case, a requirement that each party keep the FOC informed of health care coverage that is available to the party or that is maintained by the party; the name of the insurance company, nonprofit health care corporation, or health maintenance organization; the policy, certificate, or contract number; and the names and birth dates of the persons for whose benefit they maintain health care coverage under the policy, certificate, or contract, MCL 552.605a(1)(b)

  The order must advise that an order for health care coverage takes effect immediately. MCL 552.603(6)(c).

- *retroactive modification:* a requirement that the order state that it cannot be modified retroactively, MCL 552.603(6)(a)
- *collection of support:* a requirement that the order provide for income withholding, MCL 552.604, and notification to the parties of the imposition of liens, MCL 552.603(6)(b)
- *redirection of support, all cases:* substantially the following language, pursuant to MCL 552.605d(1)(a):

> If a child for whom support is payable under the order is under the state's jurisdiction and is placed in foster care, that support payable under the order is assigned to the department.

- *redirection of support, in an FOC case:* substantially the following language, pursuant to MCL 552.605d(1)(c):

> The office of the friend of the court may consider the person who is providing the actual care, support, and maintenance of a child for whom support is ordered as the recipient of support for the child and may redirect support paid for that child to that recipient of support, subject to the procedures prescribed in section 5d of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605d.
>
> If the payer resides full-time with a child for whom support is payable under this order, support for that child abates in accordance with policies established by the state friend of the court bureau and subject to the procedures prescribed in section 5d of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605d.

- *redirection of support, under court jurisdiction and in county-funded foster care:* substantially the following language, pursuant to MCL 552.605d(1)(b):

> If a child for whom support is payable under the order is under court jurisdiction and is placed in county-funded foster care, that support payable under the order is assigned to the department.

- *abatement for incarceration:* substantially the following language, pursuant to MCL 552.605d(2):

> If the payer will be incarcerated for 180 consecutive days or more and will not have the ability to pay support, the monthly amount of support payable under the order must be abated, by operation of law, subject to section 17f of the friend of the court act, MCL 552.517f.

The court may require that the judgment or order be submitted to the FOC for review to determine whether it contains all of the provisions required by MCR 3.211(C)–(F). MCR 3.211(G).

C. Optional Provisions

§5.24 The following provisions are optional:

Preservation of child support arrearages. Failure to preserve any arrearages from temporary orders waives them. MCR 3.207(C)(6).

Income tax dependency exemptions for minors. Unless the divorce judgment provides otherwise, the parent who has custody for the greater portion of the year is entitled to claim the child as a dependent. IRC 152(e).

Opt out of FOC system. The parties to an FOC case may request that the court order the office of the FOC to close their FOC case. The court must issue such an order unless one or more of the grounds listed in MCL 552.505a(4) exist. See §7.3 for further discussion.

Right to review. The parties have the right to have their order reviewed pursuant to federal law. The notice may be placed in the order. MCL 552.517(1).

Insurance to secure support. The parties may agree to include an insurance provision as security for child support (effective until the support order is no longer in effect) or as part of the parent's support obligation (effective until the child reaches majority or the payer dies, whichever is earlier), or the trial court may order an insurance provision as a lien to secure the payment of child support. *Merchant v Merchant*, 130 Mich App 566, 343 NW2d 620 (1983). The provision requiring the payer to maintain the insurance policy should be carefully worded to indicate the purpose of the insurance and exactly what is required of the payer. *See Sun Life of Canada v Ver Kuilen*, 144 Mich App 612, 375 NW2d 776 (1985) (provision designating a beneficiary but not explicitly requiring the payer to maintain a policy in force does not require the payer to maintain a policy).

IX. Modification

A. Authority to Modify

§5.25 The court may modify child support provisions in judgments at any time until the child reaches 18 years of age and until the age of 19½ under statutes providing for postmajority support (see §5.12). The specific statutes provide for modification

- "as the circumstances of the parents and the benefit of the children require," MCL 552.17(1) (divorce, separate maintenance, annulment);
- "upon proper application to the court and due notice to the opposite party," MCL 552.455 (Family Support Act); and
- "for proper cause shown or because of change of circumstances," MCL 722.27(1)(c) (Child Custody Act).

The trial court may modify support while an appeal is pending, if the motion to modify is based on changed circumstances. *Lemmen v Lemmen*, 481 Mich 164, 749 NW2d 255 (2008). Under MCR 7.208(A)(4), a trial court may only amend a judgment after a claim of appeal has been filed or leave to appeal has been granted if an exception is "otherwise provided by law." Under MCL 552.17(1) and .28, a trial court may modify child or spousal support after the judgment has been entered if there is a change in circumstances. In *Lemmen,* the supreme court held that the statutes are exceptions "otherwise provided by law" with regard to child and spousal support, if the trial court finds that there has been a change in circumstances. Note that the trial court may also modify child custody while an appeal is

pending if proper cause or change of circumstances is shown. *Safdar v Aziz*, 501 Mich 213, 219, 912 NW2d 511 (2018). See §§3.24–3.25.

The modification of child support orders is within the discretion of the court. *Wyzenkiewicz v Wyzenkiewicz*, 224 Mich 11, 194 NW 482 (1923); *Edwards v Edwards*, 192 Mich App 559, 481 NW2d 769 (1992). A child support order may be modified for the welfare of a child at any time during minority. *Stoutenburg v Stoutenburg*, 285 Mich 505, 281 NW 305 (1938); *Puzzuoli v Puzzuoli*, 3 Mich App 594, 143 NW2d 162 (1966). The court must adhere to the requirements of MCL 552.605(2) when the modification of a child support order deviates from the MCSF. *Burba v Burba (After Remand)*, 461 Mich 637, 610 NW2d 873 (2000) (citing MCL 552.17, which was later replaced by MCL 552.605); *Ewald v Ewald*, 292 Mich App 706, 716–717, 810 NW2d 396 (2011). Income disparity, by itself, does not warrant deviation from the formula. *Burba.*

Courts can modify child support orders even when the child support award was negotiated as part of a consent judgment of divorce. Child support is always subject to modification depending on changed circumstances. In *Brendel v Morris*, No 359226, ___ Mich App ___, ___ NW3d ___ (Jan 12, 2023), the mother agreed to make a one-time lump-sum child support payment to the father in the consent judgment of divorce. However, the father stopped exercising parenting time before the payment could be made. This change in circumstances was enough to warrant a review of the child support award.

A parent's general support obligation to support the children is sufficient to modify the judgment to provide support necessary for a child's welfare. *Doughty v Doughty*, 292 Mich 319, 290 NW 812 (1940); *see also Ballard v Ballard*, 40 Mich App 37, 198 NW2d 451 (1972). A Michigan court may order support where the divorce judgment entered in another state does not provide for child support. *Scott v Scott*, 182 Mich App 363, 451 NW2d 876 (1990). See §§5.53–5.67 for interstate support requirements.

A divorce judgment may be modified to provide for the support of a child born after the judgment was entered. *Weaver v Weaver*, 15 Mich App 15, 166 NW2d 4 (1968).

B. Jurisdiction

§5.26 If the court had in personam jurisdiction when it granted a divorce, it has authority to revise, amend, or alter the custody and support provisions. *Talbot v Talbot*, 99 Mich App 247, 297 NW2d 896 (1980); *see* MCL 552.17; *Kelley v Hanks*, 140 Mich App 816, 821, 366 NW2d 50 (1985) (new summons or service of process not required with motion to amend custody and support); *see also* MCR 2.612(B); *Dittenber v Rettelle*, 162 Mich App 430, 413 NW2d 70 (1987) (service of process not required; court had continuing, personal jurisdiction and defendant had actual notice of modification proceedings).

Note that motions for modification that involve interstate orders or parties who reside in other states are governed by other statutes that can affect a Michigan court's authority to modify obligations in cases where it previously had jurisdiction. See §§5.55 and 5.62.

C. Change in Circumstances

§5.27 The court may modify a judgment concerning the support and maintenance of the children "as the circumstances of the parents and the benefit of the children require." MCL 552.17(1). A party seeks a modification based on a change in circumstances and therefore has the burden of establishing a change that would justify the requested modification. *See Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990); *see also* SCAO Administrative Memorandum 2019-03 (guidance and recommendations for FOC staff and courts regarding child support orders when parents may be incapacitated).

Change in circumstances does not have a single, hard-and-fast definition. The supporting parent's means and ability to earn money are important considerations. *Hakken v Hakken*, 100 Mich App 460, 298 NW2d 907 (1980) (approving escalator clause to accommodate father's expected increases in income). Inflation, and the payer's income keeping even with the inflation rate, may warrant an increase in support. *Bickham v Bickham*, 113 Mich App 408, 317 NW2d 642 (1982). Expiration of spousal support is not a changed circumstance that warrants deviation from the child support formula under MCL 552.605(2). *Burba v Burba (After Remand)*, 461 Mich 637, 610 NW2d 873 (2000) (citing MCL 552.17, which was later replaced by MCL 552.605).

A support order may be modified because the amount due under the child support formula has changed. *Calley v Calley*, 197 Mich App 380, 496 NW2d 305 (1992) (substantial change may constitute "change in circumstances" that would justify modification of support order). However, a change in the child support formula does not, by itself, require the modification of support. *Sharp v Talsma*, 202 Mich App 262, 507 NW2d 840 (1993).

The minimum threshold before the FOC is required to petition for modification is 10 percent of the current order or $50 per month, whichever is greater. 2021 MCSF 4.05(A); *see also* MCL 552.517(5)(a).

D. Determining the New Amount

§5.28 The amount of support is determined by the child support formula. MCL 552.605. However, the court may deviate from the formula if it finds that application of the formula would be unjust or inappropriate. See §5.16 for further discussion.

E. Procedural Concerns

1. Initiating Modification

§5.29 The court may modify a child support order on the motion of either party, see, e.g., MCL 552.17, or of the FOC, MCL 552.517. Before modification of child support is warranted, the record must reflect a change in circumstances, and this change must be supported by "proven evidence." *Zammitt v Zammitt*, 106 Mich App 593, 596, 308 NW2d 294 (1981).

Postjudgment motions in domestic relations actions are governed by the procedural rules of MCR 2.119, governing civil actions generally. MCR 3.213. Once

a postjudgment motion to modify child support is filed, the parties may engage in discovery. *See* MCR 2.301(A)(4).

2. Hearings

§5.30 If the parties do not agree on the modification and there are factual disputes, the court must hold an evidentiary hearing. *Baluch v Baluch*, 180 Mich App 689, 447 NW2d 775 (1989). There must be a record of that hearing, and the judge should briefly state the findings that are the basis for the decision. *Dresser v Dresser*, 130 Mich App 130, 342 NW2d 545 (1983). Parties abandon the right to an evidentiary hearing if they fail to assert it. *Mitchell v Mitchell*, 198 Mich App 393, 499 NW2d 386 (1993); *Larner v Larner*, 113 Mich App 126, 317 NW2d 315 (1982).

If a foreign language interpreter is "necessary for a person to meaningfully participate in the case or court proceeding," the court *will* appoint an interpreter (either in response to a request or sua sponte) for a party or a testifying witness. MCR 1.111(B)(1). The court may appoint an interpreter for a person other than a party or a witness who has a "substantial interest" in the proceeding. MCR 1.111(B)(2).

F. Modification Initiated by the FOC

§5.31 Periodic review of support orders and dependent care coverage. The FOC is required to periodically review support orders and dependent health care coverage in open FOC cases. MCL 552.517. See §§7.32–7.34 for a discussion of the review process.

Minimum threshold for modification of support order. Following its review, the FOC must petition for a modification of the support order unless it determines that (1) the difference between the existing and the projected child support is less than the minimum threshold for modification, see 2021 MCSF 4.05(A), or (2) the court previously determined that application of the formula was unjust and inappropriate and the FOC determines that the facts and reasons for that determination have not changed. MCL 552.517(5). If the FOC determines that no modification is required, either party may file written objections within 21 days after receipt of notification of that determination, and the FOC must schedule a hearing before the court. MCL 552.517(7).

Modification of health care coverage. In its review of a support order, the FOC must determine the costs to each parent for dependent health care coverage and child care costs and must disclose those costs in the recommendation under MCL 552.517b(3). MCL 552.517(9). If a support order lacks provisions for health care coverage, the FOC must petition the court for a modification to require that one or both parents obtain or maintain health care coverage for the benefit of each child who is subject to the support order when health care coverage is accessible to the child and available at a reasonable cost. MCL 552.517(8). The FOC may not petition the court to require both parents to provide coverage unless both parents already provide health care coverage or both agree to provide such coverage. *Id.*

Petition process. The petition to modify is made by filing a notice and sending it to the parties and their attorneys stating the amount of the support calculated and the proposed effective date of the support amount. MCL 552.517b(3). See §7.33 for a description of the required notice provisions. If no objections are filed, the FOC must prepare an order for approval of the court. MCL 552.517b(4).

Hearing on objections to recommended modification. If objections are filed, the FOC must schedule a hearing before a judge or referee. Alternatively, the FOC can recalculate the support amount if it receives additional information with the objection. In that case, a new notice and opportunity to object is sent. MCL 552.517b(4).

Use of recommendation. At the hearing on objections, the trier of fact may consider the FOC recommendation as evidence to prove a fact relevant to the support calculation if no other evidence is presented concerning the fact if the parties agree or no objection is made to its use for that purpose. MCL 552.517b(6)(c). The court cannot require proof of a substantial change in circumstances to modify a child support order when the support is adjusted through the FOC petition process under MCL 552.517b(6)(c). MCL 552.517b(7). If a party files a motion to modify support, the court may only modify a child support order upon finding a substantial change in circumstances, including, but not limited to, health care coverage becoming newly available to a party and a change in the support level under MCL 552.517(5). MCL 552.517b(8). See §7.33.

Assistance of in *pro per* parties. The FOC must assist a party by providing forms for requesting or responding to a modification of child support without the assistance of counsel, including form motions, responses and orders, along with instructions for preparing, filing, and serving the forms and scheduling a modification hearing. MCL 552.505(1)(d).

G. Modification Based on the Use of Escalator Clauses

§5.32 Escalator clauses generally refer to formulas, typically based on a percentage of the payer's income, which automatically determine future modifications of support awards. Note that the cases approving these clauses predate legislation requiring that deviations from the child support formula comply with certain requirements. *See, e.g.,* MCL 552.517.

It was not an abuse of discretion to modify support payments based on a percentage of the father's income. *Anneberg v Anneberg*, 367 Mich 458, 116 NW2d 794 (1962). Nor was it an abuse of discretion to use a percentage of plaintiff's current income to calculate a nonvariable, appropriate amount of support. *Herman v Herman*, 109 Mich App 107, 310 NW2d 911 (1981). Requiring a minimum payment was a logical protection for the child and a hedge against manipulation and refusal to work to avoid support. *Hakken v Hakken*, 100 Mich App 460, 298 NW2d 907 (1980). A specific upper limit should be set that does not exceed the amount requested. *Hagbloom v Hagbloom*, 71 Mich App 257, 247 NW2d 373 (1976). But see *Stanaway v Stanaway*, 70 Mich App 294, 245 NW2d 723 (1976),

where the court of appeals held that an escalator clause abrogates the court's required role in modifications, unless there is some upper fixed amount.

H. Retroactive Modification

§5.33 Generally, payments due under a support order are not subject to retroactive modification; they may be modified only from the date that notice of a petition for modification was given to the other party. MCL 552.603(2); *see Harvey v Harvey*, 237 Mich App 432, 603 NW2d 302 (1999) (statutory prohibition on retroactive modification of support orders applies in increases, as well as decreases, in support); *Waple v Waple*, 179 Mich App 673, 446 NW2d 536 (1989) (under unequivocal terms of statute, child support could not be reduced back to date when child moved in with payer). The surcharge on past-due child support payments becomes a part of the arrearage and may not be modified. *Adams v Linderman*, 244 Mich App 178, 624 NW2d 776 (2000). This provision does not apply to ex parte support orders and temporary support orders entered pursuant to MCR 3.207. MCL 552.603(3); *see also Proudfit v O'Neal*, 193 Mich App 608, 484 NW2d 746 (1992) (temporary child support order).

Generally, MCR 2.612, the relief from judgment court rule, may not be used to set aside accrued child support; however, "there may be very rare circumstances in which constitutional due-process protections require a retroactive modification of child support." *Malone v Malone*, 279 Mich App 280, 290, 761 NW2d 102 (2008).

In *McLaughlin v McLaughlin*, 255 Mich App 475, 660 NW2d 784 (2003), defendant moved that his child support be terminated for the period he was incarcerated. The motion was denied and the appellate court affirmed, holding that retroactive modification of child support for the period of incarceration was prohibited by MCL 552.603(2). Defendant owed $78,410.78 in arrearage. This is a common problem, as many prisoners do not seek termination of support until after they are released and enforcement action is taken. This case affirms that no relief will be available if prisoners fail to petition at the start of incarceration.

MCL 552.605d now requires all child support orders to have language that support will abate effective the date a payer becomes incarcerated for 180 consecutive days or more and does not have the ability to pay support as provided in MCL 552.517f. The adjustment to the support record cannot exceed the payer's monthly amount of support and the past due support. MCL 552.517f(8).

Although MCL 552.605d refers to all support orders, it provides cross-references to sections that only apply to child support orders so it is unclear whether the provisions also apply to spousal support orders.

Under MCL 552.517f, it is presumed the payer does not have the ability to pay support. The abatement will not occur if the payer does have the ability to pay support. If the payer has the ability to pay, the FOC must initiate a review of the order according to MCL 552.517 and .517b. MCL 552.517f(2). The abatement terminates after the payer is released from incarceration and the FOC modifies the order pursuant to MCL 552.517f(9).

To effectuate the abatement, the FOC must send a notice of abatement to the payer and recipient of support. MCL 552.517f(3). The notice of abatement must include the effective date of the abatement and reasons to object. MCL 552.517f(4). The notice of abatement must be filed with the court. The payer and recipient of support have 21 days to object in writing based on mistake of fact or mistake of identity. The FOC will not adjust the records to reflect the abatement until 21 days after the FOC notifies each party of the proposed action and each party's right to object. If the FOC receives an objection, the FOC will not adjust the records but will conduct an administrative review and consider only a mistake of fact or mistake of identity in its review. MCL 552.517f(5). If the FOC finds no mistake of fact or mistake of identity, the FOC must notify the payer and recipient of support of the administrative review determination. The payer or recipient of support may object to the review determination by filing a motion in the circuit court that issued the support order within 21 days after the review determination notice. If a motion is not filed in the circuit court within 21 days after the review determination notice, the FOC must adjust the record to reflect the abatement. MCL 552.517f(6). If the FOC finds a mistake of fact or mistake of identity during the administrative review, the FOC must notify the payer and recipient of support of the administrative review determination and take action appropriate to the mistake. MCL 552.517f(7). The FOC must file with the court its review determination.

Under MCL 552.517f, on learning the payer is released from incarceration, the FOC must initiate a review within 30 days. MCL 552.517f(10). Once modified, absent good cause to the contrary, a support payment under a modified support order is due no sooner than the first day of the first month following the 90th day after the payer was released from incarceration. MCL 552.517f(9)(a). The amount of support for each month since the effective date of a modified order to the date of the order must be calculated using the actual resources of each parent during each month in the interim. MCL 552.517f(9)(b).

By agreement. This provision does not prohibit the court from approving an agreement between the parties providing for retroactive modification. MCL 552.603(5).

An exception. After notice and an opportunity for a hearing, the court may retroactively correct the amount of support if an individual who is required by the court to report income to the court or to the FOC knowingly and intentionally fails to report, refuses to report, or knowingly misrepresents their income. MCL 552.603b.

Practice Tip

- *Restricting retroactive modification encourages a party to act promptly as the party becomes aware of changed circumstances that affect support. The statutory exception allows the court to act when a party does not comply with the court's order requiring the reporting of income information, thereby keeping the other party from timely seeking a modification. While there is no reported caselaw on this statute, in Waber v Waber, No 125017 (Mich Ct App Nov 25, 1991)*

(unpublished), the court awarded the husband a credit against future spousal support payments where the wife failed to report an increase in her income.

X. Abatement, Credit for Overpayments, Cancellation, and Termination

A. Abatement and Parenting Time

§5.34 Under older versions of the child support formula, an abatement of support, i.e., a temporary reduction or elimination of support, would be given to a noncustodial parent if the child resided with the noncustodial parent for an extended period. The formula recommended that support be abated by 50 percent when a child resided with a noncustodial parent for 6 consecutive nights or longer. The 2008 formula eliminated abatements in favor of a parental time offset and the 2021 formula maintains the offset. *See* 2021 MCSF 3.03. However, the 2013 formula added, and the 2021 formula maintains, that if a child spends a "significant number of overnights with the payer that causes a significant savings in the nonparent-custodian's expenses," deviation from the formula may be warranted. 2021 MCSF 1.04(E)(16).

B. No Credit for Voluntary Overpayment

§5.35 A payer is not entitled as a matter of law to use prior voluntary overpayments as a credit against existing and future support obligations. *Pellar v Pellar*, 178 Mich App 29, 443 NW2d 427 (1989). The rule applies even if the payments were made under the mistaken belief that they were legally required. *See also Dorfman v Godlove*, 200 Mich App 487, 504 NW2d 692 (1993) (*Pellar* applies only prospectively from date of decision, July 5, 1989).

C. Cancellation of Arrearages

§5.36 Since support payments are not subject to retroactive modification, cancellation of arrearages is generally not available. *See Waple v Waple*, 179 Mich App 673, 446 NW2d 536 (1989) (child support could not be reduced to reflect date when child moved in with payer).

The nonretroactivity provision does not apply to an ex parte interim support order or a temporary support order. MCL 552.603(3); *Thompson v Merritt*, 192 Mich App 412, 420–422, 481 NW2d 735 (1991). Another exception to the nonretroactive modification rule is that a court may still approve an agreement between the parties to retroactively modify a support order. MCL 552.603(5). In addition, after notice and an opportunity for a hearing, the court may retroactively correct the amount of support if an individual who is required by the court to report income to the court or the FOC knowingly and intentionally failed to report, refused to report, or knowingly misrepresented their income. MCL 552.603b.

The nonretroactivity rule clearly supersedes the prior caselaw. Before the statutory change, caselaw held that support and arrearages could be reduced at the discretion of the court if there was reason to believe the payer was unable to provide support during the time it was ordered. *Pronesti v Pronesti*, 368 Mich 453, 118 NW2d 254 (1962) (arrearage canceled when custodian removed children

from state, concealed their whereabouts from payer, and did not pursue enforcement of payments in good faith and when children were not deprived by cancellation); *Ydrogo v Ydrogo*, 332 Mich 530, 52 NW2d 345 (1952); *Ozdaglar v Ozdaglar*, 126 Mich App 468, 337 NW2d 361 (1983).

Parents with child support arrearages may now request that a court create a repayment plan that would discharge any past-due amounts and the surcharges on those amounts. A payer who has an arrearage under a support order may file a motion for a payment plan to pay the arrearage and discharge or abate arrearages. See SCAO form FOC 109, Motion for Payment Plan. The court must approve of the plan if it finds by a preponderance of the evidence that the plan is in the best interests of the parties and children and that either of the following applies:

> (a) The arrearage is owed to an individual payee and both of the following:
>
> (i) The payee has consented to entry of the order under circumstances that satisfy the court that the payee is not acting under fear, coercion, or duress.
>
> (ii) The payer establishes that the arrearage did not arise from conduct by the payer engaged in exclusively for the purpose of avoiding a support obligation.
>
> (b) The arrearage is owed to this state or a political subdivision of this state, and the payer establishes the following:
>
> (i) The arrearage did not arise from conduct by the payer engaged in exclusively for the purpose of avoiding a support obligation.
>
> (ii) The payer has no present ability, and will not have an ability in the foreseeable future, to pay the arrearage absent a payment plan.
>
> (iii) The payment plan will pay a reasonable portion of the arrearage over a reasonable period of time in accordance with the payer's current ability to pay.
>
> (iv) The office of child support or its designee has been served with a copy of the motion at least 56 days before the hearing.

MCL 552.605e(1).

The court must require certain conditions in the payment plan (in addition to the payment of support) that it determines are in the best interests of a child, such as the payer's participation in a parenting program, drug or alcohol counseling, anger management classes, a batterer intervention program, a work program, counseling, or continuing compliance with a current support order. MCL 552.605e(5). The court must discharge any remaining arrearage if the payer completes the payment plan, and the court may grant relief if the payer substantially completes the payment plan. MCL 552.605e(2). However, the plan would have to include a requirement that any arrearage subject to the plan could be reinstated upon motion and hearing for good cause shown at anytime. MCL 552.605e(4).

One frequent cause of arrearages is the incarceration of the payer. See *McLaughlin v McLaughlin*, 255 Mich App 475, 660 NW2d 784 (2003), in which an incarcerated parent incurred over $78,000 in arrearages. Monthly support is abated the date the payer is incarcerated for 180 consecutive days or more and does not have the ability to pay support. MCL 552.517f. See §7.32. Arrearages, as a nondischargeable debt for the maintenance or support of the child, may not be

canceled through bankruptcy. 11 USC 523(a)(5); *see also Kowatch v Kowatch*, 179 Mich App 163, 445 NW2d 808 (1989) (involving spousal support obligation).

SCAO Administrative Memo 2019-03 indicates that the courts can include abatement language regarding incapacitation in support orders to reduce the effect of wait time preceding a review and avoid the prohibition against retroactive modification of support. The abatement provision should provide notice and an opportunity for hearing. The SCAO provides that if the order contains an abatement provision as follows or similar language, notice must be sent to the parties within 14 days as required for initiating a review:

> [I]f the friend of the court becomes aware of a payer's condition that meets the incapacitating events in SCAO's 2019 Memorandum on Adjusting Current Support Due to Incapacitation, or as stated in a subsequent memo or the child support formula, support shall be temporarily reduced to zero effective as of the date the friend of the court provides notice of the abatement to the parties and to the court. Either party may object by filing a written objection with the court within 21 days of the notice date. If a timely objection is received, the friend of the court shall either set the objection for hearing or conduct a support review with an effective date no earlier than the date of the notice.

Social Security benefits received on behalf of a minor child because of a payer's disability may be credited toward the payer's child support arrearage that has accrued since the date of disability, but may not be applied to any prior arrearages. *Frens v Frens*, 191 Mich App 654, 478 NW2d 750 (1991); *Fisher v Fisher*, 276 Mich App 424, 741 NW2d 68 (2007). *But see Jenerou v Jenerou*, 200 Mich App 265, 503 NW2d 744 (1993) (disabled noncustodial parent not entitled to credit because benefits were not paid to mother, but directly to child, who had reached age of majority).

D. Termination Due to Emancipation

§5.37 In general, the parents' joint and several obligation to support can be terminated by a court of competent jurisdiction or if a minor is emancipated by operation of law. MCL 722.3(1). See §§14.1–14.6 for further discussion of the emancipation of a minor.

Emancipation by law occurs when the minor is validly emancipated under the law of another state, is 18 years of age, or is on active duty with the United States Armed Forces. MCL 722.4(2).

A minor may also be emancipated by filing a petition with the court and by demonstrating (1) the ability to handle financial affairs and (2) the ability to manage personal and social affairs. MCL 722.4a–.4e.

XI. Enforcement of Support Orders

A. In General

§5.38 Support awards are enforceable through the SPTEA. They may also be enforced under the FOC Act. MCL 552.509. Interstate enforcement is available through the UIFSA. See a discussion of the UIFSA in §§5.53–5.67.

The Michigan OCS contracts with the counties and the courts for the prosecuting attorney and local FOC offices to provide child support enforcement services.

In open FOC cases, the MiSDU performs a variety of functions formerly undertaken by the FOC, from receiving income withholding payments to sending out checks. Even if parties have opted out of FOC services, payments must still be made through the MiSDU if a party wants "to ensure that child support payments made after a friend of the court case is closed will be taken into account in any possible future office of the friend of the court enforcement action." MCL 552.505a(6). If payments are made through the MiSDU, the FOC case remains open until both parties have provided enough information to the MiSDU to process the child support payments through the unit. See §7.16 for further discussion of the MiSDU.

The FOC is exempt from enforcing a child support order when (1) the payee is excused for good cause related to the safety of a payee or child under Title IV, Part D, of the Social Security Act, 42 USC 651 et seq., or (2) the case either closed or is no longer eligible for federal funding because of a party's failure or refusal to take action. MCR 3.208(D).

B. Income Withholding

1. In General

§5.39 Providing for income withholding in the order. Under the SPTEA, all support orders must provide for an order of income withholding. MCL 552.604. A court may suspend or terminate an order of income withholding if the custodial parent moves out of the state without court authorization. MCL 552.619(5).

Amount of withholding. The amount withheld cannot exceed 50 percent of the payer's disposable income as that term is defined in 15 USC 1672. MCL 552.609(2), .611a.

Immediate income withholding. The order for income withholding takes effect immediately unless the court finds, after notice and a hearing, that there is good cause for the order not to take effect immediately or the parties enter a written agreement for alternative arrangements. MCL 552.604(3). "Good cause" requires the court's written and specific finding why immediate income withholding would not be in the child's best interests; proof of timely payment of previously ordered support; and the payer's agreement to keep the FOC informed of the name, address, and telephone number of the payer's current source of income and information about health insurance coverage (company, policy number, and names and birth dates of beneficiaries). MCL 552.604(3)(a). Any agreement by the parties must be in writing, reviewed by the court, and entered in the record. It must provide that the income withholding not take effect immediately, an alternative payment arrangement, and that the payer keep the FOC informed of the above information. MCL 552.604(3)(b).

An income withholding order in an ex parte order is not effective until the order becomes temporary. MCL 552.604(4).

The other exception to automatic enforcement is for an ex parte support order for which no proof of service has been filed with the FOC. MCL 552.511(1).

Income that may be withheld. *Income* is defined in the SPTEA to include

- commissions, earnings, salaries, wages, and other income due or due in the future to an individual from a current or successor employer;
- payments due or to be due in the future to an individual from sources including a profit-sharing plan, a pension plan, an insurance contract, an annuity, Social Security, unemployment compensation, supplemental unemployment benefits, or worker's compensation; and
- money due as a debt from another individual, partnership, association, or private or public corporation, the United States or a federal agency, this state or a political subdivision of this state, another state or a political subdivison of another state, or another legal entity that is indebted to the individual.

MCL 552.602(o).

Public assistance payments generally may not be withheld to satisfy child support obligations. *Lapeer Cty Dep't of Soc Servs v Harris*, 182 Mich App 686, 453 NW2d 272 (1990) (general assistance payments received under MCL 400.55a could not be diverted by FOC).

See §5.18 for further discussion of sources of income.

Income from federal sources. Income withholding and garnishment of wages of federal employees and members of the armed services for child and spousal support is permissible under federal law. 5 USC 5520a(h), (i), 10 USC 1408, 42 USC 659.

See §7.17 for additional discussion of income withholding.

2. Initiating Income Withholding

§5.40 Only the FOC may initiate an order of income withholding under the SPTEA. *Hagen v Hagen*, 150 Mich App 562, 389 NW2d 130 (1986).

In interstate actions, an individual or a child support agency may enforce an income withholding order issued by another state by sending it directly to the obligor's employer or by registering it with a Michigan tribunal. MCL 552.2501, .2602; *see also* MCL 552.2102(cc). See the discussion of the UIFSA in §§5.53–5.67.

3. Income Withholding Triggered by a Delinquency

§5.41 If income withholding is not immediately ordered and the payer falls behind in payment for one month, income withholding takes effect pursuant to MCL 552.607. Further, an existing income withholding amount may be administratively adjusted for arrears. MCL 552.517e. The FOC makes income withholding immediately effective or administratively adjusts the amount of income withholding through a notice process. The FOC sends a notice to the payer that an order of income withholding is effective or, if the existing withholding is being administratively adjusted, the amount of the adjustment. MCL

552.607(1). The notice must also inform the payer that a withholding order will be sent to the payer's employer. If the payer files a motion contesting the proposed action within 21 days of the notice, the matter is scheduled as a motion hearing before a referee or a judge. Valid objections to the proposed notice are limited. The payer may only challenge the income withholding if it makes a mistake of fact regarding the amount of the current or overdue support or the identity of the payer. *Id.* However, if the notice is for an administrative adjustment of arrearage, the payer may also challenge the adjustment by arguing that it will cause an unjust or inappropriate result. If the payer establishes that the notice is not proper because of a mistake of fact about the amount of current or overdue support or the identity of the payer, or if the administrative adjustment to pay an amount in arrears will cause an unjust or inappropriate result, the court must modify or rescind the income withholding notice. Referee decisions may be reviewed de novo by the judge. MCL 552.607(3), (4).

Practice Tip

- *An income withholding order takes immediate effect; no court action is required for the order to be enforced. The FOC's notice to the payer of an arrearage indicates that the order is then effective. The 21-day period applies only to the payer's right to request a hearing and not to the order's becoming effective. If the payer establishes at the hearing that the order is not proper, the court or referee "rescinds" the order, rather than "delaying" it. MCL 552.607(3).*

See §7.17 for further discussion of the FOC's role in income withholding.

C. License Suspensions

§5.42 Payers who are delinquent in paying child support may have their driver's, occupational, recreational, and/or sporting licenses suspended. The support arrearage must exceed the amount equal to two months of periodic payments and an order of income withholding does not apply or has not been successful in ensuring that the payer makes regular payments for child support and regular payments on the arrearage. MCL 552.628(1). A delinquent payer's driver's license may be suspended if, in addition to the requirements to suspend a payer's occupational, recreational, or sporting licenses, the court determines that the payer has the ability to pay but willfully fails to make payments, and the FOC has determined that suspending the payer's driver's license is the only way to ensure regular payments. *See* MCL 552.628(2). The FOC must notify a payer of an arrearage and a possible suspension of licenses. MCL 552.628(3). If the payer fails to pay the arrearage, request a hearing, or attend a requested hearing, the FOC must notify the Secretary of State to suspend the payer's driver's license. MCL 552.629(4). The court may order a suspension of the payer's occupational, recreational, or sporting licenses if the payer fails to pay the arrearage, request a hearing, attend a requested hearing, or comply with a payment schedule. MCL 552.629(5).

For a discussion of the FOC's role in license suspensions, see §7.20.

An *occupational license* is any "certificate, registration, or license issued by a state department, bureau, or agency that has regulatory authority over an individ-

ual that allows an individual to legally engage in a regulated occupation or that allows the individual to use a specific title in the practice of an occupation, profession, or vocation." MCL 552.602(s). A *recreational or sporting license* is a hunting, fishing, or fur harvester's license and does not include a commercial fishing license or permit. MCL 552.602(dd). This definition covers every state-licensed occupation or profession, including doctors, teachers, real estate agents, plumbers, police officers, mobile home dealers, day care operators, and building contractors. It also applies to a license to practice law. MCL 600.909; AO 1997-2.

The statutory scheme for suspending delinquent payers' licenses, MCL 552.628–.630, involves numerous steps, which are summarized in exhibit 5.1.

D. Contempt Proceedings

§5.43 Civil contempt is a coercive remedy, designed to induce compliance with a court order by threatening incarceration until the contemnor complies. *Smith v Smith*, 155 Mich App 752, 400 NW2d 334 (1986); *Butler v Butler*, 80 Mich App 696, 265 NW2d 17 (1978) (citing *Sword v Sword*, 399 Mich 367, 249 NW2d 88 (1976), *overruled in part on other grounds by Mead v Batchlor*, 435 Mich 480, 460 NW2d 493 (1990)). A showing of willful disobedience is not required. *Walker v Henderson (In re United Stationers Supply Co)*, 239 Mich App 496, 608 NW2d 105 (2000).

Who may initiate. A recipient of support or the FOC may commence a civil contempt proceeding by filing a petition in the circuit court for an order to show cause why the delinquent payer should not be held in contempt. *See* MCL 552.631(1); MCR 3.208, .606.

The FOC is responsible for initiating proceedings to enforce orders, parenting time, custody, or child support. Previously, the procedure for the issuance of a contempt order for failure to pay child support was set out in statute in the SPTEA. MCL 552.631. Under that procedure, the FOC was required to file a motion with the court for an order to show cause, and the payer was then required to appear at the hearing for the order to show cause. In 2014, that procedure was eliminated from the statute with the understanding that a procedure would instead be provided by court rule and would substitute a procedure that did not require a court to issue an order to appear.

The FOC can schedule a hearing before a judge or a referee for the noncompliant party to show cause why the party should not be held in contempt of court. The OCS is responsible for the allocation and distribution of child support payments. MCR 3.208(C).

The FOC is exempt from enforcing a child support order when (1) the payee is excused for good cause related to the safety of a payee or child under Title IV, Part D, of the Social Security Act, 42 USC 651 et seq., or (2) the case either closed or is no longer eligible for federal funding because of a party's failure or refusal to take action. MCR 3.208(D).

Requirements. A petition for an order to show cause may be filed if a person fails or refuses to obey a support order and if income withholding is inapplicable or unsuccessful. *Id.*

The moving party should be prepared to prove that (1) a support order exists, (2) the payer had notice of entry of the order, and (3) an arrearage exists. *See, e.g., Sword.*

The court may find the payer in contempt if the court finds that the payer is in arrears and (1) has the capacity to pay out of currently available resources, (2) could, with diligence, have the capacity to pay, or (3) has failed to obtain an income source and participate in a work activity after referral by the FOC. MCL 552.633(1).

If the claim is that the payer has currently available resources, the court may presume, in the absence of proofs to the contrary, that the payer has currently available resources equal to one month of payments. It may not find the payer has more than one month of payments without proof of those resources by the FOC or the recipient. MCL 552.633(3).

Among the factors that may be considered in determining the ability to pay are the following:

- employment history
- education and skills
- work opportunities
- diligence in trying to find work
- the payer's personal history, including present marital status and present means of support
- real and personal assets and any transfer of assets to another
- efforts to modify the decree if it is considered excessive under the circumstances
- health and physical ability to obtain gainful employment
- availability for work
- the payer's location since the judgment and reasons for moving, if applicable

See Sword, 399 Mich at 378–379. (These considerations are also used in income imputation. *Rohloff v Rohloff*, 161 Mich App 766, 411 NW2d 484 (1987).)

If a person is ordered to pay support under a support order and fails or refuses to obey and perform the order, and if an order of income withholding is inapplicable or unsuccessful, a recipient of support or the FOC may commence a civil contempt proceeding by filing a show-cause petition. If the payer fails to appear in response to an order to show cause, the court must do one or more of the following:

> (a) Find the payer in contempt for failure to appear.
>
> (b) Find the payer in contempt under [MCL 552.633].

> (c) Issue a bench warrant for the payer's arrest requiring that the payer be brought before the court without unnecessary delay for further proceedings in connection with the contempt proceedings.
>
> (d) Adjourn the contempt proceeding.
>
> (e) Dismiss the contempt proceeding if the court determines that the payer is not in contempt.

MCL 552.631(1).

In a bench warrant, the court must require that, on arrest, unless the payer deposits a bond or cash in the manner required by MCL 552.632, the payer must remain in custody until the time of the hearing. MCL 552.631(3). The bond or cash amount must be set at not less than $500 or 25 percent of the arrearage, whichever is greater, and the court may add costs to the amount of the required deposit. *Id.* If a bench warrant is issued, the court also may enter an order allowing a law enforcement agency to render any vehicle owned by the payer temporarily inoperable, by booting or another similar method, until the payer pays an appropriate bond. MCL 552.631(5). Except for good cause shown on the record, the court must order the payer to pay the costs related to the hearing, issuance of the warrant, arrest, and further hearings. MCL 552.631(4).

If a bench warrant is issued and the payer is arrested, the payer must remain in custody until there is a hearing or bond is paid. *See* MCL 552.632(1); *see also* MCR 3.221. If the payer cannot post the cash performance bond in the amount stated in the bench warrant, the payer is entitled to a hearing within 48 hours, excluding weekends and holidays. MCL 552.632(1). The issues to be considered at a hearing are limited to the payer's answer to the contempt proceedings and, if the payer was found in contempt, to further proceedings related to the payer's contempt. MCL 552.632(1). If the hearing is not held as provided in this subsection, the court must review the amount of the cash performance bond, based on criteria prescribed in MCR 3.221(H), to determine an amount that will ensure the payer's appearance and must set a date for the hearing to be held within the 21-day time limit prescribed in MCR 3.221(B). MCL 552.632(1).

The payer may appear at the FOC to answer a bench warrant by either posting bond or submitting to further proceedings before the court. MCL 552.632(7). If bond is posted, the FOC must issue a receipt that complies with MCL 552.632(2). MCL 552.632(8).

Available sanctions. If the payer is found in contempt, the court may immediately enter an order to do one or more of the following:

- commit the payer to the county jail or an alternative to jail
- commit the payer to the county jail or an alternative to jail with work-release provisions
- commit the payer to a penal or correctional facility
- order the payer to participate in a work activity if the child who is the subject of the support order receives federal financial assistance

- if available within the court's jurisdiction, order the payer to participate in a community corrections program
- order the parent to pay a fine of not more than $100
- place the payer under the supervision of the office for a term fixed by the court with reasonable conditions, including (1) participating in a parenting program, (2) participating in drug or alcohol counseling, (3) participating in a work program, (4) seeking employment, (5) participating in other counseling, (6) continuing compliance with a current support or parenting time order, or (7) entering into and compliance with an arrearage payment plan
- apply any other remedy authorized by the SPTEA or the FOC Act if the payer's arrearage qualifies

MCL 552.633(2); *see also* MCL 552.636 (in cases where court is only enforcing spousal support order, permitting it to "assess the payer the actual reasonable expense of the friend of the court in bringing any enforcement action for noncompliance").

Alternative contempt track. A payer who is struggling to make payments due to a documented medical condition or psychological disorder, a substance abuse disorder, illiteracy, homelessness, unemployment for more than 27 weeks, or a temporary curable condition that the payer needs assistance controlling may have a case placed on the alternative contempt track docket with the court's consent. *See* MCL 552.635a.

The alternative contempt track docket is a form of problem-solving court available for difficult child support cases. The alternative contempt track was designed to provide the court with an intermediate solution short of criminal nonsupport for nonpayers who do not have an ability to pay due to personal issues that affect their ability to exercise due diligence. The former contempt statute allowed the court to find a person in contempt for not exercising due diligence, but the court could not maintain jurisdiction to enforce due diligence. Instead the court had to release a payer on payment of a purge payment that could not exceed currently available resources.

Under the contempt law, the court was helpless to impose a long-term remedy in cases where a payer failed to exercise due diligence and that failure to exercise due diligence resulted in the payer having no assets. Under the law of contempt, the court may not impose a jail sentence longer than 90 days, which is often insufficient to cause any real change in a payer's circumstances. The alternative contempt track allows the court to maintain civil jurisdiction over a payer for a year and further allows the court to impose sanctions for a payer's failure to exercise due diligence.

Because the alternative contempt track is voluntary (the payer must agree to be placed on it), it may be difficult to have payers agree to participate unless the consequences of not participating are less appealing than participating or unless the benefits of participating are greater than not participating. Therefore, it would not normally be expected that a person would agree to be in the alternative contempt track if they could merely make a purge payment or perform some other act

to avoid consequences. Some payers may agree to participate when their arrears are owed to the state because under the alternative contempt track plan, some or all of the arrears can be discharged.

Incarceration. An order of commitment should be entered only if other remedies seem unlikely to correct the failure to pay. MCL 552.637(1). The court must specify a purge amount in the order of commitment that cannot exceed the payer's available resources. MCL 552.637(2).

A first commitment may not exceed 45 days and subsequent commitments may not exceed 90 days. MCL 552.637(4). The payer's commitment must end once the payer has paid the amount required by the order of commitment regardless of the number of days they spent in commitment. *Id.*

The court may release an unemployed payer who finds employment, works for two consecutive weeks, and either makes a support payment or has an effective income withholding order. MCL 552.637(6). If the court enters a commitment order but finds the payer can pay certain amounts, the court may establish a payment amount and condition incarceration—sometimes referred to as "pay or stay"—by

- staying the order conditioned on the payer making certain payments;
- staying the order of commitment and further ordering that if the payer fails to make payment, the payer must come before the court for further proceedings in connection with the contempt proceeding that may include committing the payer for the number of days they would have been committed had the order not been stayed; or
- ordering a maximum term of commitment that may be reduced by each complying payment the payer makes.

MCL 552.637(7). The court may also enter similar orders to enforce due diligence, including allowing the court to incarcerate a payer with the right to leave jail to comply with due diligence conditions. MCL 552.637(8).

Right to counsel. *Mead* held that the Fourteenth Amendment's due process clause prohibits the trial court from incarcerating an individual in civil contempt proceedings when the defendant has not had the benefit of counsel.

However, in *Turner v Rogers*, 564 US 431 (2011), the U.S. Supreme Court held that an indigent noncustodial parent who is subject to a child support order at civil contempt proceedings does not have an absolute right to counsel under the Fourteenth Amendment. This is the case even if that individual faces incarceration. The due process clause does not require that counsel be provided when the opposing parent is not represented by counsel and the state provides alternative procedural safeguards equivalent to "adequate notice of the importance of [the] ability to pay, [a] fair opportunity to present, and to dispute, relevant information, and court findings" regarding the supporting parent's ability to comply with the support order. *Id.* at 448.

Practice Tip

- *In most cases it is relatively easy for courts to comply with the procedural safeguards set forth in Turner. First, before a contempt hearing begins, the court could ask the payer to complete a form regarding their financial status. Many courts already do so; others have the FOC interview the payer and report to the court on the payer's financial status. See SCAO form MC 287. Second, at the beginning of the contempt hearing, the court may want to explain on the record the purpose of the hearing and what issues it will hear. Third, the payer must have a chance to respond. Finally, the court should clearly state its reasons for finding the payer in contempt.*

Suspension of licenses. The court may also order a conditional suspension of a payer's driver's license, occupational license, recreational or sporting license, or any combination of these licenses, conditioned on the payer's noncompliance with an installment payment schedule. The arrearage must be greater than two months of support. *See* MCL 552.628–.630.

Costs. If the court issues a bench warrant, the court must also order the payer to pay the costs related to any show-cause hearing, warrant, arrest, or further hearing for failure to pay support. MCL 552.631(4).

E. Liens and Bonds

§5.44 MCL 552.27 provides that the amount of an "allowance for the support and education of the children" constitutes a lien on the obligor's real and personal property under the SPTEA. *See* SCAO Administrative Memorandum 2017-03. The lien is effective when support is due and unpaid and is subordinate to any perfected lien. MCL 552.625a, .625b. On default, the court may order the sale of the property, order execution of the judgment, appoint a receiver, or take some other appropriate action. MCL 552.27, .625. The SPTEA does not allow child support liens against tenancy-by-the-entireties property. *Licavoli v Licavoli*, 292 Mich App 450, 807 NW2d 914 (2011); *Walters v Leech*, 279 Mich App 707, 761 NW2d 143 (2008).

The SPTEA establishes a specific procedure for liens and collection as a result of a child support arrearage. An overdue support order constitutes a lien in favor of the recipient of support against the real and personal property of a payer, including, but not limited to, the following:

- distribution from a decedent's estate
- proceeds from a claim for negligence, personal injury, or death
- proceeds under an arbitration award
- proceeds under a settlement of or judgment issued in a civil action
- compensation under a worker's compensation order, settlement, redemption order, or voluntary payment
- funds held by a financial institution

See MCL 552.625a.

There are also procedures for the IV-D agency (the OCS, prosecutor, or FOC) to perfect and enforce the lien. MCL 552.625a, .625b. The IV-D agency can act to perfect the lien when the arrearage is greater than two months' support payments. MCL 552.625b(2). The payer may request a review within 21 days after the mailing of the notice. MCL 552.625b(5). If no review is requested, if the payer fails to appear at a requested review, or if the payer fails to show a mistake of fact, the IV-D agency can levy on the property, enforcing the lien by methods including ordering the sale of the property or appointing a receiver. MCL 552.625b(7), (8).

The court may also require a payer to provide a bond, security, or some other guarantee to secure the payment of support that is past due, due in the future, or both. MCL 552.625.

In addition, if real or personal property has been transferred without receiving a reasonably equivalent value in exchange for the transfer, the IV-D agency must bring an action to set aside the transfer under the Uniform Voidable Transactions Act, MCL 566.31 et seq., or obtain a settlement in full payment or in periodic repayments of the arrearage as is possible in the best interests of the support recipient. MCL 552.624a. The IV-D agency must notify the child support lien network, and may notify additional national child support information clearinghouses, of each payer who has a support arrearage in an amount that exceeds two months of support payable under the support order. MCL 552.624b.

F. Consumer Reporting

§5.45 The FOC Act gives consumer reporting agencies access to information regarding child support arrearages. MCL 552.512(1). The MiCSES, operated by the OCS, must report to qualifying agencies information on all payers with a support arrearage of two or more months. However, before the information is released, the MiCSES must notify the payer of the proposed information release, the arrearage amount, the payer's right to request a review within a stated time period, and that the payer may avoid credit reporting by paying the arrearage in full within 21 days after the notice of the proposed information release was sent. *See* MCL 552.512.

For a discussion of the restrictions on consumer reporting, see §7.21.

G. Interception of Tax Refunds

§5.46 Support arrearages may be offset by state and federal tax refunds. 45 CFR 303.72, 303.102; MCL 205.30a, 400.233a, 552.624. The FOC requests an offset under MCL 552.624. The OCS, the IV-D agency within the DHHS, initiates offset proceedings against an absent parent's state and federal income tax refunds. MCL 400.233(g).

H. Surcharge on Child Support Arrearages

§5.47 Surcharges were terminated as of December 31, 2009, and the court may not order a new surcharge before January 1, 2011. MCL 552.603a(5), (6). Before ordering a surcharge, the court must find that the payer failed to pay

support under a support order and the failure was willful. MCL 552.603a(1). Such a surcharge will be calculated at a rate tied to the five-year U.S. treasury note rate and added to past-due support payments on January 1 and July 1 of each year. MCL 552.603a.

No surcharge will be assessed if the payer has paid 90 percent or more of the current child support amount. MCL 552.603a(3). Further, the court may waive or suspend the surcharge for good cause if the payer enters into a repayment plan. MCL 552.605e.

Parents with child support arrearages may now request that a court create a repayment plan that would discharge any past-due amounts and the surcharges on those amounts. See §5.36.

I. Restrictions on Passports

§5.48 A parent will be ineligible to receive a passport if the U.S. Department of Health and Human Services certifies that the parent is in arrears on child support payments in an amount in excess of $2,500. 22 CFR 51.60(a)(2).

J. Statute of Limitations

§5.49 An action to enforce a support order under the SPTEA must be brought within 10 years from the date the last support payment is *due* under the support order, regardless of whether the last payment is made. MCL 600.5809(4).

Payments on past-due child support, including income withholding payments, are payments on a debt and therefore act to lengthen the 10-year limitations period of MCL 600.5809(3). *Wayne Cty Soc Servs Dir v Yates*, 261 Mich App 152, 155–156, 681 NW2d 5 (2004), citing the reasoning of *Yeiter v Knights of St Casimir Aid Soc'y*, 461 Mich 493, 497, 607 NW2d 68 (2000). A past-due child support obligation is a debt and payments made pursuant to income withholding renew the full child support obligation and extend the period of limitations.

In *Parks v Niemiec*, 325 Mich App 717, 926 NW2d 297 (2018), the temporary suspension of the payer's child support obligation due to his incarceration reflected the trial court's continuing jurisdiction over the matter. The trial court's continuing jurisdiction tolled the 10-year statutory limitations period and, therefore, the payer remained liable for the past-due child support obligation.

K. Enforcement and Military Personnel

§5.50 42 USC 659 and 5 CFR Part 581 authorize the use of court orders to collect child support payments from members of any branch of the United States military. However, whenever child support is owed by a servicemember in any branch of the service, the provisions of the Servicemembers Civil Relief Act, 50 USC 3901 et seq., must be considered. In addition, persons on active duty in the Michigan state militia may delay legal proceedings brought against them until after the termination of the service. MCL 32.517.

The Servicemembers Civil Relief Act applies to all members of the Army, Navy, Air Force, Marine Corps, and Coast Guard on active duty, all members of

the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days to respond to a declared national emergency, and commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration. 50 USC 3901 et seq. The Servicemembers Act completely replaces the old Soldiers' and Sailors' Civil Relief Act of 1940, but includes many of the same protections.

The Servicemembers Civil Relief Act provides temporary suspension of judicial and administrative proceedings and transactions involving civil liabilities of active duty servicemembers. The act's main effects on child support enforcement efforts are its default protections, stay of proceedings rights, and interest rate limitations.

Default protections. Like the old act, the new Servicemembers Act requires that a party seeking a default in a civil proceeding file an affidavit stating whether the defendant is in military service if the defendant has not made an appearance. Alternatively, a plaintiff must file an affidavit stating that they are unable to determine whether the defendant is in the military service. If there is evidence that proper notice was given but that the defendant failed to answer, a default may be entered, but only if an affidavit verifying proper notice and nonmilitary status is provided.

Stay of proceeding rights. Under the Servicemembers Civil Relief Act, an active duty servicemember has the absolute right to a stay of proceedings of any court hearing or administrative hearing. On a servicemember's request, a court or administrative agency must grant a 90-day stay of proceedings. Additional stays can be granted at the discretion of the judge or hearing official. 50 USC 3932.

Interest rate limitations. The act limits the interest rate on past-due child support to 6 percent a year. 50 USC 3937. This provision forgives any interest exceeding 6 percent a year.

A servicemember may waive any of the rights and protections of the act. 50 USC 3918(a)

Note that Army Regulation 608-99 provides that the military service may not order a servicemember to support the family or use an involuntary military allotment to pay support unless there is a court order requiring it. Army Regulation 608-99 requires the servicemember's company commander to help in procuring support for a soldier's dependents.

Under Michigan law, the amount that can be withheld for support, fees, health care coverage premiums, fines, costs, and sanctions cannot exceed 50 percent of the payer's disposable earnings as defined in 15 USC 1672. MCL 552.609(2), .611a.

The payer may request a military service adjustment on the support obligation if the payer is called to emergency military service. MCL 552.615a.

Dependents defined. 37 USC 401 determines who is a dependent entitled to support under military regulations. The definition of *child* includes a stepchild, an adopted child, and an illegitimate child if parentage of the child is established in accordance with service criteria. A dependent child is one who is unmarried and

> (A) is under 21 years of age;
>
> (B) is incapable of self-support because of mental or physical incapacity and is in fact dependent on the member for more than one-half of the child's support; or
>
> (C) is under 23 years of age, is enrolled in an approved full-time course of study … , and is in fact dependent on the member for more than one-half of the child's support.

37 USC 401(a)(2).

See the American Bar Association (ABA)'s *A Judge's Guide to the Servicemembers Civil Relief Act*. See also *Michigan Family Law* §12.68 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for further discussion.

L. Bankruptcy

§5.51 Bankruptcy does not discharge debts found to be in the nature of a domestic support obligation. Specific federal rules for determining which debts are support have been developed. See §§8.77–8.82 for further information on the bankruptcy rules.

M. Criminal Sanctions

§5.52 Felony nonsupport under MCL 750.165 is a strict liability crime, meaning the prosecutor need only prove the defendant performed the act. *People v Adams*, 262 Mich App 89, 683 NW2d 729 (2004). The defendant's intent or knowledge is irrelevant for consideration of a strict liability crime. *Id.* Therefore, the defendant's "inability to pay is not a defense to felony nonsupport." *People v Likine*, 492 Mich 367, 374, 823 NW2d 50 (2012). A defendant charged with felony nonsupport may, on making the requisite evidentiary showing, establish genuine impossibility as a defense. *Id.* at 398–410. However, a defendant may not challenge the child support calculation in a felony nonsupport prosecution because that is an impermissible collateral attack on the child support order. *People v Iannucci*, 314 Mich App 542, 887 NW2d 817 (2016).

MCL 552.631(3) allows the court to issue a bench warrant for nonsupport that requires that the payer remain in custody until the arraignment or preliminary examination, unless the payer deposits a cash performance bond.

Under an amendment to MCL 750.165, an individual arrested on a felony warrant for criminal nonsupport must now remain in custody until the arraignment, unless the person pays a cash bond of $500 or 25 percent of the arrearage, whichever is greater.

MCL 750.165 no longer requires that the nonpayer leave the state before criminal sanctions can be imposed. The court issuing the support order must have had personal jurisdiction over the nonpayer. MCL 750.165(2). The statute further provides that the court may suspend the sentence of a convicted nonpayer if a bond is posted in the amount and with the sureties the court requires. MCL 750.165(4). A restitution order for violating a support order must direct the nonpayer to pay the arrearage but may not include a separate award for the arrearage

amount. MCL 750.165(5). The restitution order may include additional restitution under MCL 780.751–.834 and terms to ensure payment of the arrearage amount. MCL 750.165(5).

Other statutory provisions may apply. It is also a felony to abandon children under age 17 without providing necessary and proper shelter, food, care, and clothing for them. MCL 750.161. A person of sufficient ability who refuses or neglects to support the family is guilty of a misdemeanor. MCL 750.167, .168.

Additional criminal remedies exist in interstate cases under the Child Support Recovery Act of 1992, 18 USC 228, which makes it a federal crime for any person to willfully fail "to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000." 18 USC 228(a)(1). It is also unlawful for any person to travel in interstate or foreign commerce with the intent of evading a support obligation that has remained unpaid for longer than one year or that is greater than $5,000. 18 USC 228(a)(2). Punishment under the federal law includes imprisonment, fines, and mandatory restitution. 18 USC 228(c), (d).

XII. Interstate Enforcement Remedies: The Uniform Interstate Family Support Act

A. In General

§5.53 The UIFSA, MCL 552.2101 et seq., is intended to assist in the interstate and international enforcement and modification of support orders, including recognizing income withholding orders issued in other states. The UIFSA permits the petitioner to enforce income withholding orders by filing the order directly with an employer or by registering the order with a support enforcement agency. MCL 552.2501–.2507. On request, a support enforcement agency in Michigan, the FOC, or the prosecutor (or another party permitted by statute) must provide services to a resident petitioner or a foreign petitioner meeting the UIFSA's requirements. MCL 552.2307(1)(a)–(b). An agency may also provide services to a nonresident petitioner. MCL 552.2307(1)(c).

Under the UIFSA, a state may be an initiating state or a responding state. These terms specifically refer to the state's role in the UIFSA support enforcement process. For example, Michigan may be an initiating state, which means that a support order is forwarded from Michigan (or filed in Michigan for forwarding) to the state where enforcement is sought. MCL 552.2102(k), .2203. Michigan may also be a responding state, which means that an order is filed in another state and then forwarded here for enforcement or that Michigan is asked to establish an order by another state. MCL 552.2102(w).

See *Michigan Family Law* §6.25 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for a discussion of the act the UIFSA replaced, the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 et seq., which remains in effect.

B. Jurisdictional Requirements

1. Actions to Establish a Support Order

§5.54 If a support action is filed first outside of Michigan and then in Michigan, a Michigan court may exercise jurisdiction to establish a support order only if *all* of the following apply:

- the pleading is filed in Michigan before the time expires for filing a responsive pleading challenging the exercise of jurisdiction in the other state or foreign country,
- the party challenges the other state's or foreign country's exercise of jurisdiction in a timely manner, or
- if relevant, Michigan is the child's *home state*.

MCL 552.2204(1). *Home state* means the state or foreign country in which the child has lived with a parent or a person acting as a parent for six months immediately preceding the filing of the petition for support or since birth if the child is less than six months old. MCL 552.2102(h); *see also* MCL 552.2103(1) (where statute refers to *tribunal,* it means Michigan court).

If a support action is filed first in Michigan and then outside of Michigan, a Michigan court may not exercise jurisdiction to establish a support order if *all* of the following apply:

- the pleading is filed in the other state or foreign country before the time expires in Michigan to challenge Michigan's exercise of jurisdiction,
- the contesting party timely challenges Michigan's exercise of jurisdiction, and
- if relevant, the other state or foreign country is the child's *home state*.

MCL 552.2204(2).

2. Continuing Exclusive Jurisdiction (CEJ) to Modify the Support Order

§5.55 Once a court has established a support order, it can only modify that support order if it has CEJ. A court has CEJ to modify the order if its order is the controlling order and (1) the obligor, the obligee, or the child reside in Michigan when the modification request is filed or (2) the parties consent in a record or in open court that the Michigan court has CEJ to modify the order. MCL 552.2205(1). For a discussion on determining the controlling order, see §5.57.

However, a Michigan court loses CEJ if either of the following applies:

> (a) All of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least 1 of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction.
>
> (b) Its order is not the controlling order.

MCL 552.2205(2).

If another state's tribunal modifies a Michigan support order under that state's UIFSA (or a substantially similar law), the other state obtains CEJ. MCL 552.2205(3); *see also* MCL 552.2611(5). In that case, the Michigan court would retain limited powers to (1) enforce amounts that accrued before the modification and (2) provide other relief for violations of the original order that occurred before the modification's effective date. MCL 552.2612.

A Michigan court without CEJ may also make requests. It may act as an initiating tribunal and request modification from a tribunal in the state that issued the support order. MCL 552.2205(4). In cases where the Michigan court issued a support order but another state has assumed jurisdiction under the UIFSA, the Michigan court may ask the out-of-state tribunal to enforce the Michigan order as long as it is controlling and has not yet been modified. MCL 552.2206(1)(a).

If a Michigan court has continuing jurisdiction over a support order, it may enforce it as a responding state. MCL 552.2206(2).

A temporary support order issued ex parte or pending the resolution of a jurisdictional conflict does not create CEJ in the issuing court. MCL 552.2205(5).

3. Personal Jurisdiction

§5.56 Proceedings to enforce a support order or determine parentage. In a proceeding to enforce a support order or to determine parentage, a Michigan court may exercise personal jurisdiction over a nonresident individual if at least one of the following applies:

- the individual was personally served with notice in Michigan;
- the individual has submitted to jurisdiction by consent, which is shown in a record, or by the person entering a general appearance or filing a responsive document in effect waiving any objection;
- the individual resided with the child in Michigan;
- the individual resided in Michigan and provided prenatal expenses or support for the child;
- the child resides in Michigan as a result of the individual's acts or directives;
- the individual has engaged in sexual intercourse in Michigan and the child might have been conceived by that act;
- the person has acknowledged parentage in Michigan's parentage registry; or
- any other constitutionally acceptable basis for asserting jurisdiction.

MCL 552.2201(1).

Proceedings to modify a support order. In a proceeding to modify a support order of another state, a Michigan court may exercise personal jurisdiction over a nonresident if the requirements of MCL 552.2201(1) and .2611 are met. MCL 552.2201(2). See §5.62. If the support order was issued in a foreign country, the requirements in MCL 552.2201 and .2615 must be met.

Personal jurisdiction extends over the proceeding as long as the Michigan court has CEJ to modify its order or continuing jurisdiction to enforce its order. MCL 552.2202.

A petitioner's participation in a UIFSA proceeding does not confer personal jurisdiction over the petitioner for other proceedings or litigation. MCL 552.2314(1).

If a Michigan court exercises personal jurisdiction over a nonresident, it may apply the UIFSA's provisions concerning communications with an out-of-state tribunal and receiving discovery and evidence from an out-of-state source. *See* MCL 552.2316, .2317, .2318. In all other respects, the court must apply the procedural and substantive law of Michigan. MCL 552.2210.

4. Determining Which Order Controls

§5.57 If only one tribunal has issued a child support order, that tribunal's order controls. MCL 552.2207(1). If two or more orders have been issued for the same obligor and child and a Michigan court has personal jurisdiction over both individual parties, the Michigan court must determine the controlling order. *See* MCL 552.2207(2) (in proceeding under UIFSA), (3)–(4) (at request of party filed either in conjunction with registration or as separate proceeding). The following rules govern which order controls:

1. If only one of the tribunals has CEJ, the order from that state is the controlling order. MCL 552.2207(2)(a).
2. If two or more tribunals have CEJ, the order from the child's current home state is the controlling order. MCL 552.2207(2)(b)(i).
3. If there are two or more orders from courts with CEJ but no order from the child's current home state, the order most recently issued is the controlling order. MCL 552.2207(2)(b)(ii).
4. If none of the tribunals has CEJ, a Michigan court must issue a support order, which controls. MCL 552.2207(2)(c).

The court issuing an order determining which is a controlling order or issuing a new controlling order must state the basis for its determination, any prospective support amount, and the total amount of any consolidated arrears and accrued interest after any credits are deducted. MCL 552.2207(6); *see also* MCL 552.2209 (regarding credits). Within 30 days of obtaining the determination, the party obtaining it must file a certified copy of that order with each court that had issued or registered a prior child support order. MCL 552.2207(7).

C. Establishing, Enforcing, or Modifying a Child Support Order; Determining Parentage

1. Registration

§5.58 To enforce an out-of-state support order, a party must register it with a Michigan court or seek administrative enforcement with a Michigan support enforcement agency. MCL 552.2507, .2601, .2603. See §5.60 regarding administrative enforcement. The documents and information required for regis-

tration are set forth in MCL 552.2602. A petition seeking an affirmative remedy can be filed with the registration or at a later date. MCL 552.2602(3). A registered out-of-state support order is enforceable in the same manner as other Michigan court orders, except that modification is subject to the UIFSA. MCL 552.2603(2)–(3).

If there is more than one effective order, the registering party must provide copies of all orders asserted to be in effect. MCL 552.2602(4)(a). The registering party must also identify any controlling order or consolidated arrears. MCL 552.2602(4)(b)–(c). If it is unclear which order is controlling, a party can request the court to make that determination. MCL 552.2602(5); *see also* MCL 552.2207(3)–(4). See §5.57.

Once a support order is registered in Michigan, the court must notify the nonregistering party. MCL 552.2605(1)–(3). Unless it is a foreign support order governed by the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, see §5.63, the nonregistering party has 20 days after the notice to request a hearing to contest the order's validity or enforcement. MCL 552.2605(2)(b), .2606(1). If the nonregistering party fails to timely contest the order, the order is confirmed as a matter of law and may not be later contested. MCL 552.2606(2), .2608. The party contesting the order must prove one of the defenses set forth in MCL 552.2607(1).

2. Petitions for Affirmative Relief

§5.59 Petition requirements; where to file. To establish a support order, determine parentage, or register and modify an out-of-state support order, the petitioner must file a petition that sets forth the information required in MCL 552.2311. If simultaneously registering a support order for modification, the petitioner must also include the documents and information specified in MCL 552.2602. The court must seal identifying information in the petition if a party alleges under oath that the health, safety, or liberty of a child or a party would be jeopardized by disclosure. MCL 552.2312. The petition may be filed either with an initiating tribunal for forwarding to a responding tribunal or filed directly in the state or foreign country that can obtain personal jurisdiction over the respondent. MCL 552.2301(2).

Standing and physical presence. An individual or a support enforcement agency may start a UIFSA action. MCL 552.2301(2). The physical presence of an individual nonresident party is not required for a Michigan court to establish, enforce, or modify a support order. MCL 552.2316(1).

Nonparentage defense. A party may not plead nonparentage as a defense if the parentage had been previously determined by law. MCL 552.2315.

3. Administrative Enforcement

§5.60 Another avenue to enforce out-of-state support orders and income withholding orders is administrative enforcement. A party or a support agency may send documents required for registration to a Michigan support agency. MCL 552.2507(1). The support agency can enforce the order without

registration as long as the obligor does not contest administrative enforcement. The support agency must register the order if the obligor contests its validity or administrative enforcement. MCL 552.2507(2).

4. Establishing a Support Order

§5.61 A Michigan court acting as a responding tribunal may issue a support order if

- it has personal jurisdiction over the parties,
- either the individual or the support agency seeking the order resides out of state, and
- the obligor was given notice and an opportunity to be heard.

MCL 552.2401(1), (3). A Michigan court may also issue a temporary support order in certain paternity cases. MCL 552.2401(2).

5. Modifying a Support Order

§5.62 A registered support order of another state may only be modified if the requirements of MCL 552.2611 or .2613 are met. MCL 552.2610. MCL 552.2613 applies when the child is not a resident of the issuing state and all individual parties reside in Michigan. In that case, a Michigan court may enforce and modify the issuing state's order in a registration proceeding. Michigan procedural and substantive law applies and certain UIFSA provisions do not. MCL 552.2613(2).

If MCL 552.2613 is inapplicable, the court must follow MCL 552.2611. Under MCL 552.2611, a responding court in Michigan may modify the registered order only if, after notice and a hearing, the court finds one of the following:

> (a) The following requirements are met:
>
> (i) Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state.
>
> (ii) A petitioner who is a nonresident of this state seeks modification.
>
> (iii) The respondent is subject to the personal jurisdiction of the tribunal of this state.
>
> (b) This state is the residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.

MCL 552.2611(1).

An order may be modified only in accordance with Michigan requirements, procedures, and defenses for modification. Orders may be enforced and satisfied in the same manner. MCL 552.2611(2). However, a Michigan court may not modify an aspect of a child support order that may not be modified under the issuing state's law. MCL 552.2611(3). If two or more tribunals have issued child sup-

port orders for the same obligor and child, the order that controls (see §5.57) establishes the aspects of the child support order that are nonmodifiable. *Id.*

Once a Michigan court issues an order modifying a child support order issued in another state, the Michigan court becomes the court of CEJ. MCL 552.2611(5).

A Michigan court retains jurisdiction to modify an order it issued if one party lives in another state and the other party lives outside of the United States. MCL 552.2611(6).

Support orders issued by foreign countries are subject to different rules. See §5.63.

6. Foreign Support Orders

§5.63 If the petitioner seeks action regarding a child support order issued in a foreign country, the petitioner will have to determine if the order falls under the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. *See* MCL 552.2102(c) (defining *Convention*). Proceedings under the Convention are governed by separate provisions under the UIFSA. *See* MCL 552.2701–.2713. See SCAO form FOC 30h.

If the petitioner seeks to modify a support order that does not fall under the Convention, the registration procedures in MCL 552.2601–.2608 apply. MCL 552.2616. A Michigan court may modify an order and bind all individuals subject to its personal jurisdiction if the issuing foreign country lacks or refuses to exercise jurisdiction to modify the order. MCL 552.2615(1).

D. Income Withholding Orders

§5.64 An out-of-state income withholding order may be sent directly to the obligor's employer without filing a petition or registering the order. MCL 552.2501. It may also be registered with a Michigan court, MCL 552.2601, .2603(1), or administratively enforced, MCL 552.2507. See §§5.58 and 5.60. The employer's obligations on receiving the order are outlined in MCL 552.2502–.2505.

E. Discovery and Evidence

§5.65 A Michigan court can request an out-of-state tribunal to assist in obtaining discovery. MCL 552.2318(a). A Michigan court may also compel a person under its jurisdiction to respond to an out-of state discovery order. MCL 552.2318(b).

Under MCL 552.2316, there are special evidence rules that facilitate interstate hearings.

- A certified true copy of child support payments is evidence of the facts asserted in it and is admissible to show payment.

- Copies of bills related to parentage testing and prenatal and postnatal care are admissible to prove the charges. However, the bills must be provided to the adverse party at least 10 days before trial.
- Copies of documentary evidence transmitted from out of state may be admitted into evidence without an original document even if transmitted by telephone or facsimile.
- Documents that might raise a hearsay problem when admitted here are admissible if they were given under penalty of perjury by a party or a witness residing out of state.
- An out-of-state party or witness may be deposed or testify by telephone, audiovisual means, or other electronic means.
- Refusal to testify on the ground of self-incrimination is a basis for drawing an adverse inference.
- Marital privilege and immunity based on a marital or a parental relationship do not apply.
- A certified true copy of a voluntary acknowledgment of paternity is admissible to establish parentage.

F. Duties of the Support Enforcement Agency

§5.66 On request, a support enforcement agency in Michigan, the FOC, or the prosecutor (or another party permitted by statute) must provide services to a resident petitioner or a foreign petitioner meeting the UIFSA's requirements. MCL 552.2307(1)(a)–(b). An agency may also provide services to a nonresident petitioner. MCL 552.2307(1)(c).

These services include

- taking all steps to enable the appropriate tribunal in this state, another state, or a foreign country to obtain jurisdiction over the respondent;
- requesting a hearing date before an appropriate tribunal;
- making a reasonable effort to obtain all relevant information, including information regarding the parties' income and property;
- sending a copy of the notice to the petitioner within five weekdays (excluding legal holidays) after receipt of the notice from an initiating, a responding, or a registering tribunal;
- sending a copy of a written communication from the respondent or the respondent's attorney to the petitioner within five weekdays (excluding legal holidays) after receipt of the communication; and
- notifying the petitioner if jurisdiction over the respondent cannot be obtained.

MCL 552.2307(1)–(2).

The agency may also administratively enforce the support order. See §5.60.

An individual may employ private counsel to represent the individual in proceedings under the UIFSA. MCL 552.2309.

G. Application of Law by a Responding Court; Remedies Available

§5.67 The issuing state's or foreign country's law governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the order. MCL 552.2604(1). In a proceeding for arrearages under a registered support order, the longer of the statutes of limitations of this state or of the issuing state or foreign country applies. MCL 552.2604(2). When a Michigan court acts as a responding tribunal, it must apply Michigan procedures and remedies when enforcing an out-of-state support order registered in Michigan. MCL 552.2604(3). When there are two or more orders in effect, once a court determines the controlling order, the law of the state or foreign country that issued the controlling order governs current and future support, including arrears. MCL 552.2604(4).

The responding tribunal has the power to

> (a) Establish or enforce a support order, modify a child-support order, determine the controlling child-support order, or determine parentage of a child.
>
> (b) Order an obligor to comply with a support order, specifying the amount and the manner of compliance.
>
> (c) Order income withholding.
>
> (d) Determine the amount of any arrearages and specify a method of payment.
>
> (e) Enforce orders by civil or criminal contempt, or both.
>
> (f) Set aside property for satisfaction of the support order.
>
> (g) Place liens and order execution on the obligor's property.
>
> (h) Order an obligor to keep the tribunal informed of the obligor's current residential address, electronic-mail address, telephone number, employer, address of employment, and telephone number at the place of employment.
>
> (i) Issue a bench warrant for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants.
>
> (j) Order the obligor to seek appropriate employment by specified methods.
>
> (k) Award reasonable attorney's fees and other fees and costs.
>
> (*l*) Grant any other available remedy.

MCL 552.2305(2).

All support orders issued by a Michigan court under the UIFSA must include the calculations on which the support order is based. MCL 552.2305(3). A responding court in Michigan may not condition the payment of a support order issued under the UIFSA on a party's compliance with provisions for visitation. MCL 552.2305(4).

In addition to the remedies that are available through the court, the governor of Michigan may issue a demand to another state's governor for an individual who has been charged with criminal nonsupport in Michigan. MCL 552.2801(2)(a), .2802.

XIII. Additional Interstate Enforcement Remedies

A. The Interstate Income Withholding Act

§5.68 Only the FOC can request income withholding in other jurisdictions under the Interstate Income Withholding Act (IIWA), MCL 552.671 et seq. MCL 552.675. To enter withholding orders for foreign support obligations, Michigan offices of the FOC are authorized to receive and process requests from agencies, recipients of support, payers, or attorneys for support recipients and payers. MCL 552.676. A payer subject to a foreign support order may initiate voluntary income withholding by filing a request with the FOC. MCL 552.682.

The Michigan payer against whom an income withholding order is sought has the right to request a hearing to contest the withholding. At the hearing, the payer may contest the withholding on the grounds available under the SPTEA. In addition, the payer may contest withholding on other grounds, including

- that withholding is not proper because of a mistake of fact concerning the amount of current or overdue support or the identity of the payer,
- that the court that issued the support order lacked personal jurisdiction over the payer,
- that the support order was obtained by fraud, and
- that the statute of limitations precludes the enforcement of all or part of the arrearage.

These are the only available defenses, and the burden of establishing a defense rests with the payer. MCL 552.678(2), (3).

Once an order of income withholding is entered under the IIWA, it has the same force and effect as those obtained under the SPTEA. MCL 552.679. Payments under the order must be made to the MiSDU, which in turn must forward the monies to the foreign agency or individual. MCL 552.680.

In general, Michigan law applies in actions under the IIWA. However, the laws of the foreign jurisdiction apply for the interpretation of the foreign support order, the amount of arrearage necessary for an order of income withholding, and the definition of costs included as arrearages. MCL 552.683.

A certified statement of arrearage provided by the other state is sufficient to make a prima facie case for the amount of arrears. *Brodeur v Brodeur*, 183 Mich App 668, 455 NW2d 387 (1990). Entry of another state's support order for purposes of this act does not confer jurisdiction on the courts of this state for any purpose other than income withholding. *Id.*

B. The Uniform Enforcement of Foreign Judgments Act

§5.69 Under the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171 et seq., a party seeking to enforce another state's judgment in Michigan is not required to file a new complaint in a Michigan court. A foreign judgment authenticated in accordance with an act of Congress or the laws of Michigan may be filed with the court clerk and must be treated in the same manner as a Michigan judgment. MCL 691.1173. A judgment that is filed in this manner is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a Michigan judgment and may be enforced or satisfied in a similar manner. *Id.*

Once a foreign judgment is properly filed with the clerk of the court and notice is mailed, the foreign judgment is enforceable 21 days after the notice of filing of the foreign judgment was mailed to the debtor. MCL 691.1174(4). The court must stay enforcement of the foreign judgment under MCL 691.1175 if the debtor can show either

1. that an appeal from the foreign judgment is pending or will be taken, or a stay of execution has been granted, on proof that the judgment debtor has furnished the security for satisfaction of the judgment required by the state in which it was rendered, or
2. any ground on which enforcement of a judgment of this state's courts would be stayed, on requiring the same security for satisfaction of the judgment that is required in Michigan.

If a stay is granted for the first reason, the period of stay is until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated. MCL 691.1175(1). If a stay is granted for the second reason, the stay is effective for an appropriate period of time. MCL 691.1175(2).

When the judgment is enforced, postjudgment interest is awarded in accordance with the law of the jurisdiction in which the judgment was awarded. MCL 691.1176.

A judgment creditor may bring an action to enforce the judgment instead of proceeding under this act. MCL 691.1177.

C. The Uniform Foreign Money-Judgments Recognition Act

§5.70 The Uniform Foreign Money-Judgments Recognition Act (UFMJRA), MCL 691.1151 et seq., was repealed by 2008 PA 20, which precludes recognition of a judgment for divorce, support, or maintenance or other judgment rendered in connection with domestic relations. The official comment said this was because of other applicable uniform state laws, such as UIFSA.

Foreign divorce judgments that include child support orders have been enforced under the doctrine of comity. *Dart v Dart*, 460 Mich 573, 597 NW2d 82 (1999). In *Dart,* an English divorce judgment that included child support and property division, part of which were lump-sum awards, was enforceable in Michigan based on the principle of comity. The supreme court did not address whether the UFMJRA applied in this case, even though the lower court had considered

that issue. *See also Gaudreau v Kelly*, 298 Mich App 148, 826 NW2d 164 (2012). In *Gaudreau,* a child support order issued by a Quebec court was enforceable under the principle of comity because the foreign proceeding was fair and the order was supported by the evidence. Quebec's status as a nonreciprocating state under UIFSA was irrelevant to the decision because the "enforcement of a foreign judgment by a circuit court can be achieved under either [UIFSA or comity]." *Id.* at 155.

Enforcing foreign awards based on comity was also achieved in *Jeong Suk Bang v Joon Hong Park*, 116 Mich App 34, 321 NW2d 831 (1982) (Korean spousal support award), and *Growe v Growe*, 2 Mich App 25, 138 NW2d 537 (1965) (Ontario spousal support judgment).

Exhibit 5.1
License Suspension Procedure

1. **Informing the Friend of the Court of licenses.** Every support order must inform the parties that they must keep the Friend of the Court informed of any driver's or occupational licenses they hold. MCL 552.603(7)(d).
2. **Conditions for suspension.** The Friend of the Court may petition for the suspension of a driver's license, an occupational license, a recreational or sporting license, or any combination of these licenses if both of the following are true:
   - An arrearage has accrued under a support order that is in an amount greater than two months of periodic support payments.
   - An income withholding order either does not apply or has been unsuccessful in ensuring regular payments on the support obligations and on the arrearages.

   MCL 552.628(1). A payer's driver's license may be suspended if both conditions above are true and both of the following are true:
   - The court has conducted an ability to pay assessment and determined that the payer has an ability to pay the support but is willfully not making support payments.
   - The Friend of the Court determines that no other sanction would be effective in ensuring regular payments on the support obligations and on the arrearage.

   MCL 552.628(2).
3. **Prepetition notification.** Before filing a petition for suspension, the Friend of the Court must mail a notice to the payer including the following:
   - the amount of the arrearage
   - that the payer's driver's license, occupational license, recreational or sporting license, or any combination of these licenses is at risk of being suspended
   - that the payer has 21 days after the date of the mailing of the notice to request a hearing or pay the arrearage
   - that the payer may object at the hearing on the basis that there is a mistake of fact concerning the overdue support amount or the payer's identity, or the payer may suggest a schedule for payment of the arrearage
   - that the payer may file a petition with the court to modify the support order if the payer believes that there has been a change in circumstances

   MCL 552.628(3).
4. **Filing of the petition and request for a hearing.** The Friend of the Court is not required to schedule a hearing on the suspension petition.

- When no hearing is requested and the arrearage is not paid, after the 21-day time limit, the Friend of the Court must notify the Secretary of State of the payer's failure and the Secretary of State must suspend the payer's driver's license. MCL 552.629(4). The court may also order a suspension of the payer's occupational, recreational, or sporting licenses. MCL 552.629(5). The procedure then skips to step 7.
- If there is a timely request for a hearing, the entry of the suspension order is delayed pending the outcome of that hearing. MCL 552.629(1).

5. **Suspension hearing.**
   - If the payer appears at the hearing, the court must determine that the payer has accrued an arrearage on support and either has or could have (with the exercise of due diligence) the capacity to pay all or some of the amount due. MCL 552.629(3). If the payer appears but does not prevail on these issues, the procedure continues with step 6.
   - If the payer fails to appear at a requested hearing, the Friend of the Court must notify the Secretary of State to suspend the payer's driver's license, and the court may order an immediate suspension of the payer's occupational, recreational, or sporting licenses. MCL 552.629(4), (5). The procedure continues with step 7.
   - The payer's petition to modify support, if pending, is consolidated with the suspension hearing absent a good cause showing that the hearings should be separate.
6. **Conditional suspension order.** If the court rules against the payer, the court enters a "second chance" order—a conditional suspension order—that requires payment of the arrearage "in 1 or more scheduled installments of a sum certain." MCL 552.629(3).
7. **Entry of unconditional suspension order.** If the arrearage is still not paid, the court orders suspension of any of the payer's licenses. MCL 552.630(1).
8. **The "one more chance" payment plan and rescission of a suspension order.** After a suspension order is entered, the court may agree to a proposed payment plan and reinstatement of the payer's licenses. MCL 552.630(2).

6
Spousal Support

Summary of Spousal Support

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Factors in awarding spousal support. §6.1, §§6.4–6.17.

The court may award spousal support as is just and reasonable if the property award is insufficient for the suitable support of either party and any children of the marriage of whom the party has custody. The court must consider "the ability of either party to

pay and the character and situation of the parties, and all the other circumstances of the case." MCL 552.23(1).

Factors to be considered include the following:

- **Past relations and conduct of the parties.** How the parties conducted the marriage as well as fault in the breakdown of the marriage. Fault is only one factor and should not be assigned disproportionate weight.
- **Length of the marriage.** A long-term marriage is especially relevant where one spouse has no career or marketable skills and the standard of living may be reduced because of the divorce.
- **Ability of the parties to work.**
- **Source of and amount of property awarded to the parties.** The focus is on the income-earning potential of the assets rather than their value; a spouse is not required to dissipate property awarded to meet daily needs where spousal support can be available.
- **Ages of the parties.**
- **Ability of the parties to pay spousal support.** Sources considered in determining the ability to pay include earnings, pension plans, unemployment compensation, tax refunds, and Social Security benefits. *Ability to pay* includes the payer spouse's unexercised ability to earn if income is voluntarily reduced to avoid paying spousal support. Factors relevant to the ability to pay include (1) the parties' employment histories, (2) reasons for any termination of employment, (3) work opportunities available, (4) diligence in trying to find employment, and (5) availability of employment.
- **Present situation of the parties.**
- **Needs of the parties.**
- **Health of the parties.** The parties' health is relevant to the ability to work and to the personal needs of the spouse seeking support.
- **Prior standard of living of the parties.**
- **Whether either party is responsible for the support of others.**
- **Contributions to the joint estate by the parties.**
- **A party's fault in causing the divorce.**
- **How cohabitation affects a party's financial status.**
- **General principles of equity.**

The court must make findings on each factor relevant to the claim before it.

Amount and duration of spousal support. §§6.18–6.20.

Factors relevant to the amount of support.

- duration of the marriage
- the parties' contribution to the joint estate
- the parties' ages

- the parties' health
- the parties' stations in life
- the parties' necessities and circumstances
- the parties' earning abilities

Rehabilitative spousal support.

Rehabilitative spousal support is temporary spousal support to help the dependent spouse make the transition to self-support. It can be appropriate to

- encourage a spouse to seek full-time employment and self-sufficiency
- allow a spouse to complete an advanced degree or obtain a marketable skill when the spouse had worked while the other spouse obtained a degree
- allow a spouse to adjust to a lifestyle not based on combined incomes
- allow a spouse to obtain new job skills and enter the workforce

Permanent spousal support (generally until death or remarriage).

It has been found appropriate when there is

- a long-term marriage with a spouse who has no career or marketable skills
- a long-term marriage, one spouse with superior earning skills, and the other spouse with questionable earning capacity
- great discrepancy between incomes and a spouse who devoted most of their adult life to homemaker role
- serious doubt that a spouse could support themself because of a disability

Mandatory and Optional Judgment Provisions. §§6.22–6.24.

If spousal support is not granted, the judgment must either reserve the question or state that neither party is entitled to spousal support. If the judgment is silent regarding spousal support, the issue is reserved for possible later consideration. MCR 3.211(B)(4).

Any provisions regarding spousal support must be prepared on a Uniform Support Order (see SCAO forms FOC 10b, FOC 10c). This order must accompany any judgment or order affecting spousal support, and both documents must be signed by the judge. The Uniform Order governs if the terms of the judgment or order conflict with it. The final judgment must either incorporate the Uniform Order by reference or state that none is required.

See §6.23 for a list of mandatory judgment provisions.

Enforcement. §§6.26–6.36.

Like child support (see §§5.38–5.46), enforcement mechanisms include income withholding, liens, contempt, license suspensions, and interception of tax refunds.

Enforcement of other states' orders. §§6.37–6.41.

Michigan courts enforce other states' orders if the payer was personally served or present in that court.

A Michigan party who has properly applied to another state's court for modification of the spousal support order may apply for a stay of proceedings in Michigan. The stay is effective for 60 days pending submission of satisfactory evidence that the other state has changed its order.

The Uniform Interstate Family Support Act (UIFSA). §6.39.

The act permits the petitioner to enforce income withholding orders by filing the order directly with an employer or by registering the order with the state's support enforcement agency.

On request, a support enforcement agency must provide services to a resident petitioner or a foreign petitioner meeting the UIFSA's requirements and may provide services to a nonresident petitioner.

Only the state court that issued the spousal support order may modify the order.

The Interstate Income Withholding Act. §6.40.

Only the Friend of the Court can request income withholding in other jurisdictions under the act. A payer subject to a foreign support order may initiate voluntary income withholding by filing a request with the Friend of the Court.

Once an order of income withholding is entered under the act, it has the same force and effect as those obtained under the Support and Parenting Time Enforcement Act (SPTEA).

Modification. §§6.43–6.51.

If the court had personal jurisdiction over the payer at the time of the judgment, the court has continuing jurisdiction to revise or amend the order.

No minimum period must elapse before modification can be requested.

Retroactive modification is not available. However, the court can approve the parties' agreement for retroactive modification.

Modification is possible only on a showing of new facts or changed circumstances since the judgment that justify a revision. The petitioner has the burden of justifying a change by a preponderance of the evidence.

Once a change in circumstances is shown, the court considers all the circumstances in deciding what modification to make.

Factors indicating a change in circumstances.

- **Remarriage**—can trigger modification or termination unless specifically stated otherwise in the judgment, but remarriage can be only one consideration.
- **Cohabitation**—does not constitute a de facto marriage; can be relevant where it improves a spouse's financial position.

- **Changes in need**—see examples in §6.48.
- **Changes in ability to pay**—see examples in §6.49.
- **Retirement**—effect appears to depend on whether parties fashioned award with retirement in mind; see examples in §6.50.
- **Death of the payer**—does not terminate the support obligation, which can be enforced against the estate, unless stated otherwise.

I. General Considerations

A. Statutory Authority

§6.1 The court's authority to award spousal support to either party in a divorce action is established by MCL 552.23(1).

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

In other words, when the property award is insufficient to provide for the suitable support of a party and any children committed to their care, a court may award spousal support to that party after considering all the circumstances of that particular case.

B. When Support Orders May Be Sought

§6.2 Spousal support may be awarded on entry of a judgment of divorce or separate maintenance. MCL 552.23. In case of a default judgment, the party moving for entry of judgment must provide the trial court with sufficient evidence to make the necessary findings and conclusions in order to equitably divide the marital property and determine any other issues, such as spousal support. *Koy v Koy*, 274 Mich App 653, 735 NW2d 665 (2007).

During the pendency of the case, a party may request a temporary or interim order. MCL 552.13. The request is made by filing a verified motion. Notice and a hearing are required, and the order must state its effective date and whether its provisions may be modified retroactively by a subsequent order. MCR 3.207(C).

Pending entry of a temporary order, spousal support can be requested in an ex parte motion. MCR 3.207(B). An ex parte order requires a showing, set forth in a verified motion or affidavit, that irreparable injury, loss, or damage will result from the delay required to give notice or that giving notice itself will precipitate adverse action before the temporary order can be issued. *Id.*

C. Spousal Support Established by an Agreement of the Parties

§6.3 There are a number of methods by which the parties may reach enforceable agreements regarding spousal support. The bulk of the law on these methods has developed in the context of property distribution and a more detailed discussion of the methods appears in §§8.4–8.11.

Antenuptial agreements. An antenuptial agreement is a contract entered into before marriage by which the parties can vary or relinquish marital rights, such as spousal support. *See generally* MCL 557.28, 700.2205.

Further, the Qualified Dispositions in Trust Act was created in 2016 to address some of the uncertainties created by caselaw in this area. *See* MCL 700.1041 et seq. This statute could replace or be used in addition to an antenuptial agreement. The requirements of this act are as follows:

- The transfer to the trust should be completed 30 days before the marriage, unless otherwise agreed in writing.
- Property placed in an asset protection trust is not considered marital property and cannot be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.
- If the trust beneficiary is the transferor of the qualified disposition, the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition is not considered marital property; is not considered, directly or indirectly, part of the trust beneficiary's real or personal estate; and must not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance if either
  - the trust beneficiary transferred the property that is the subject of the qualified disposition more than 30 days before the trust beneficiary's marriage that is the subject of the action or
  - the parties to the marriage agree that this subdivision apples to the qualified disposition.

  It remains unclear whether or not this law deprives the court of its equitable authority to invade assets protected by a trust when considering MCL 552.28 or .401. Regarding traditional antenuptial agreements, several court decisions have offered guidance on their use.
- An enforceable antenuptial agreement must be in writing, must have been entered voluntarily after full disclosure, and must be fair when executed. *Rinvelt v Rinvelt*, 190 Mich App 372, 475 NW2d 478 (1991). One issue that may be raised in trying to void an agreement is that facts and circumstances have changed since the agreement was executed that would make its enforcement unfair and unreasonable. *See Rinvelt.*
- Parties cannot agree to waive a circuit court's equitable discretion under MCL 552.23(1) and .401 when ordering relief the court deems necessary to adequately support minor children, including through spousal support. *Allard v Allard (On Remand)*, 318 Mich App 583, 899 NW2d 420 (2017).
- The length of a marriage cannot be deemed a change in circumstances for the purposes of voiding an antenuptial agreement. *Reed v Reed*, 265 Mich App 131, 693 NW2d 825 (2005). Further, if the agreement expressly contemplated that the parties would separately acquire assets after the marriage, the fact that one party's assets grew significantly more than the other party's was foreseeable and not a change in circumstances requiring the court to void the agreement. *Id.*

Postnuptial agreements. As with prenuptial agreements, postnuptial agreements must meet certain requirements to be valid: They must be fair and equitable, and they must be supported by sufficient consideration. *Rockwell v Estate of Rockwell*, 24 Mich App 593, 180 NW2d 498 (1970). Postnuptial agreements must not be made in contemplation of divorce or separation. *Wright v Wright*, 279 Mich App 291, 761 NW2d 443 (2008). A postnuptial agreement signed in connection with an attempted reconciliation is enforceable if it is designed to keep the parties together and does not leave one party in a much better position in the event of divorce. *Hodge v Parks*, 303 Mich App 552, 844 NW2d 189 (2014). Postnuptial agreements are not invalid per se. In *Skaates v Kayser*, 333 Mich App 61, 72, 959 NW2d 33 (2020), "some postnuptial agreements may be intended to promote harmonious marital relations and keep the marriage together." (Quoting *Hodge,* 303 Mich App at 558–559). In *Skaates,* the parties negotiated a prenuptial agreement for 16 months before marriage but did not sign the agreement until approximately a month after the marriage. The agreement provided for a "cooling off" period requiring joint marital counseling and a 4-month wait between the time a party first contemplated divorce and the time at which the party could actually file for divorce. The wife filed for divorce without waiting 4 months or going to counseling. She did eventually participate in counseling and put off the divorce. The postnuptial agreement was enforceable because it "initially acknowledge[d] their mutual desire 'to *define and clarify their respective rights* in each other's property and in any jointly owned property [then existing] or might accumulate after [the agreement was signed]." *Id.* at 75. Notably, the agreement "contain[ed] terms to help support the marriage." *Id.* For example, the agreement referred "to the creation of a joint marital checking account." *Id.* In addition, the agreement did not significantly favor one spouse over the other and did not offend public policy by promoting divorce.

Domestic relations mediation. A spousal support dispute may be referred for domestic relations mediation under MCR 3.216. This mediation is not binding. *See* MCR 3.216(I). To be enforceable, any resulting settlement agreement must be put in writing, signed by the parties and their attorneys, or placed on the court's record when reached, and acknowledged by the parties at the eventual hearing for entry of the judgment of divorce. MCR 3.216(H)(7).

Private mediation. On stipulation of the parties, private mediation may be used. See §§1.38–1.43 for further discussion of court rule and private mediation.

Arbitration. Generally, arbitration is available on stipulation of the parties. MCL 600.5070 et seq.; MCR 3.216(A)(4); *Dick v Dick*, 210 Mich App 576, 534 NW2d 185 (1995). Once arbitration is chosen, the parties must proceed under the domestic relations arbitration statute, Uniform Arbitration Act, and court rule. *Dick; see* MCL 600.5070 et seq., 691.1681 et seq.; MCR 3.602. See §§1.44–1.45 for further discussion of domestic relations arbitration.

Settlement agreements. Courts are bound by the parties' agreement regarding a property settlement reached through negotiation and agreement absent fraud, duress, or mutual mistake, *Lentz v Lentz*, 271 Mich App 465, 721 NW2d 861 (2006); *Keyser v Keyser*, 182 Mich App 268, 451 NW2d 587 (1990), although the

court remains free to exercise its discretion on issues like spousal support, see *Kline v Kline*, 92 Mich App 62, 284 NW2d 488 (1979). Once an agreement is merged into a judgment of divorce, it becomes the order of the court and can be enforced by execution, attachment, and garnishment. *See Landy v Landy*, 131 Mich App 519, 345 NW2d 720 (1984). The agreement must be written and signed by the parties or their attorneys or it must be made in open court. *Fear v Rogers*, 207 Mich App 642, 526 NW2d 197 (1994).

II. Factors Affecting Spousal Support

A. In General

§6.4 A spousal support award must be just and reasonable under the circumstances of the individual case. MCL 552.23; *see Maake v Maake*, 200 Mich App 184, 187, 503 NW2d 664 (1993).

Relevant factors in determining whether spousal support should be awarded include the following:

- the past relations and the conduct of the parties
- the length of the marriage
- the ability of the parties to work
- the source of and amount of property awarded to the parties
- the ages of the parties
- the ability of the parties to pay spousal support
- the present situation of the parties
- the needs of the parties
- the health of the parties
- the prior standard of living of the parties and whether either party is responsible for the support of others
- parties' contributions to the joint estate
- a party's fault in causing the divorce
- how cohabitation affects a party's financial status
- general principles of equity

Loutts v Loutts, 298 Mich App 21, 31, 826 NW2d 152 (2012) (*Loutts I*) (quoting *Myland v Myland*, 290 Mich App 691, 695, 804 NW2d 124 (2010), quoting *Olson v Olson*, 256 Mich App 619, 631, 671 NW2d 64 (2003)).

The court must make findings on each factor that is relevant to the claim before it. *Sparks v Sparks*, 440 Mich 141, 159, 485 NW2d 893 (1992). MCL 552.23 prohibits the court's use of "rigid and arbitrary formulas that fail to account for the parties' unique circumstances and relative positions" when determining spousal support. *Myland v Myland*, 290 Mich App 691, 804 NW2d 124 (2010). In *Myland,* the trial court erred in applying a formula that failed to account for the parties' unique circumstances and relative positions, including the parties' ages,

health, abilities to work, needs, previous standard of living, and whether one of them would be supporting a dependent. *See also Loutts v Loutts*, 309 Mich App 203, 871 NW2d 298 (2015) (*Loutts II*) (just and reasonable under circumstances for trial court to use value of plaintiff's business for property division only and not spousal support); *Loutts I* (trial court erroneously applied bright-line test against "double dipping" and reduced husband's income for support purposes to level deemed to be "reasonable compensation" as determined by valuation expert in valuing husband's company because wife was awarded half of said value as part of property settlement).

See exhibit 6.1 for a chart used to grade each factor for both parties.

Judges should require litigants and attorneys to provide detailed support for their motions, including pay stubs and itemization of expenses. If the party refers to guidelines, they should be attached to the motion as well. Some judges develop worksheets for use in reviewing spousal support motions.

B. The Past Relations and the Conduct of the Parties

§6.5 This factor includes how the parties conducted their marriage as well as the conduct contributing to the breakdown of the marriage (fault). *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995). However, fault is only one factor and should not be assigned disproportionate weight. *See Sparks v Sparks*, 440 Mich 141, 485 NW2d 893 (1992).

The following facts have been found relevant to awarding spousal support on this factor:

- the husband's vile temper, obscene language, accusations of infidelity, and insanity that forced his wife to file for divorce, *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956). *But see Loutts v Loutts*, 298 Mich App 21, 32, 826 NW2d 152 (2012) (fact that wife obtained personal protection order against husband "did not 'automatically import a finding of domestic violence'").
- the husband's fraud in the inducement to marry that resulted in expenses to his wife and the loss of her earning capacity, *Gubin v Lodisev*, 197 Mich App 84, 494 NW2d 782 (1992)
- the husband's uncaring attitude and actions during the marriage, including at least one affair, *Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992)
- the husband's drinking-related behavior, *Welling v Welling*, 233 Mich App 708, 592 NW2d 822 (1999) (husband had claimed that trial court placed undue weight on fact that he was alcoholic)

The following facts have been found not relevant:

- The wife's cohabitation with a male companion at the time of the divorce was not by itself determinative, although it could be relevant to the wife's financial needs. *Ianitelli v Ianitelli*, 199 Mich App 641, 502 NW2d 691 (1993).

- A wife is not at fault because she asked her husband to leave the marital home. *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986).

While the parties' past relations may be relevant in determining whether to award spousal support, considering the length of the parties' relationship before their marriage undermines Michigan's public policy supporting the institution of marriage and is improper. *Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003).

C. The Length of the Marriage

§6.6 A long-term marriage is particularly relevant where a spouse has no career or marketable skills and will likely be reduced to a lower standard of living as a result of the divorce. *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956) (20-year marriage; husband at fault; permanent spousal support appropriate). For example, the length of the marriage was determinative in the following circumstances:

- A 30-year marriage: the wife did not have enough credits to qualify for Social Security and was unlikely to acquire sufficient retirement benefits or to find employment with sufficient income given her late start in the workforce. *Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996).
- A 23-year marriage: the husband was at fault and the wife's health and future were precarious. *Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992).
- A 24-year marriage: the wife spent most of her adult life in the traditional mother/homemaker role and her employment prospects were uncertain. *McNamara v McNamara*, 178 Mich App 382, 443 NW2d 511 (1989).
- A 27-year marriage: the husband and wife agreed that she would take herself out of the job market to become the homemaker. *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986).

While the length of the marriage is a proper consideration in determining whether spousal support should be awarded, the length of the couple's relationship is not. *Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003).

D. The Ability to Work

§6.7 **Physical or mental inability to work.** In *Sullivan v Sullivan*, 175 Mich App 508, 438 NW2d 309 (1989), where there were serious doubts whether the wife, who suffered from schizophrenia, would ever be fully able to support herself, a temporary award of spousal support was inequitable. However, in *Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990), where there was no evidence that defendant's health affected her ability to work, the spousal support award was found to be excessive.

Encouraging the spouse to work. In *Olah v Olah*, 135 Mich App 404, 354 NW2d 359 (1984), the spousal support award to the wife for the time needed to complete an advanced degree was appropriate where the wife had worked while

the husband attained his dental degree. In *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986), an award was insufficient where the spouse would have to dissipate marital assets to meet her daily needs while acquiring new job skills.

A spouse's efforts at earning income do not release the other spouse from spousal support obligations. *Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990). Nor should a spouse be presumed to have income based on being qualified for a job when persistent efforts to secure a position have been fruitless. *McCarthy v McCarthy*, 192 Mich App 279, 480 NW2d 617 (1991) (that wife let her teaching certificate lapse was not basis for imputing income to her).

The objective of using a limited award to encourage a spouse to work full-time is not always attainable for men or women in their fifties or older. *Wiley v Wiley*, 214 Mich App 614, 543 NW2d 64 (1995) (error to award only two years of rehabilitative spousal support; permanent spousal support was better option where husband had far superior earnings and wife's earning potential was questionable); *see also Maake v Maake*, 200 Mich App 184, 503 NW2d 664 (1993) (where wife had not worked outside home except in family business, refusal to award spousal support was inequitable given husband's business success).

E. The Source and Amount of Property Awarded

§6.8 The focus for this factor is the income-earning potential of the assets, rather than their value, especially when both parties have substantial assets and there is a significant disparity in income. *Gates v Gates*, 256 Mich App 420, 664 NW2d 231 (2003); *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995). The objective is to balance the incomes and needs of the parties in a way that will not impoverish either one. *Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996). That the assets awarded to the spouse seeking spousal support produce no income is a relevant consideration. *Id.*

A spouse is not required to dissipate the property awarded to meet daily needs where spousal support can be available. *Gates; Hanaway; see also Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986) (spouse should not be required to liquidate her share of property settlement to survive while husband could support himself without dipping into his share of property settlement).

Religious marital agreements may be examined when a court applies neutral principles of law. In *Seifeddine v Jaber*, 327 Mich App 514, 934 NW2d 64 (2019), the court affirmed the trial court's decision to enforce a "mahr" provision in the parties' Islamic marriage agreement and required plaintiff to pay $50,000 to defendant in addition to the trial court's separate division of the parties' marital assets. Further, although the $50,000 was not awarded as part of a division of marital assets, the trial court's consideration of the $50,000 award when deciding whether to award spousal support was proper because the property awarded to the parties is a factor that must be considered in deciding whether to award spousal support. 327 Mich App at 523–524.

An award of spousal support is appropriate when only a small fraction of a party's property award is liquid or capable of income generation. *Olson v Olson*, 256 Mich App 619, 671 NW2d 64 (2003). If the parties have unequal income,

and unequal income potential, it may be inequitable to require a party to consume capital for support. *Id.*

In finding the wife's spousal support award inequitable, the court in *Maake v Maake*, 200 Mich App 184, 503 NW2d 664 (1993), found that the facts that the husband received the home mortgage-free and had his own business, which permitted him to take deductions for certain personal expenses, were relevant. *See also Moser v Moser*, 184 Mich App 111, 457 NW2d 70 (1990) (where wife retained $20,000 of her own savings and husband was awarded custody of children, award of $65 per week in spousal support plus periodic payment of $110 per week as alimony in gross for $6^1/_2$ years was equitable).

Note that a party's income from a closely held business may be considered for spousal support purposes even if part of that business' value is included in the property award. *Loutts v Loutts*, 298 Mich App 21, 826 NW2d 152 (2012) (*Loutts I*). In *Loutts I,* defendant-wife received half the value of plaintiff-husband's company as part of the property settlement, so the trial court reduced plaintiff's income for the support calculation, reasoning that it should not award the same asset twice (known as "double dipping"). The court of appeals rejected the trial court's support calculation and "bright-line test" concerning double dipping. The court remanded, instructing the trial court to consider "whether the equities in th[e] case warrant[ed] utilizing the value of [the company] for purposes of both property division and [imputing plaintiff's income for] spousal support." *Loutts,* 298 Mich App at 31. In *Loutts v Loutts*, 309 Mich App 203, 871 NW2d 298 (2015) (*Loutts II*), the court of appeals affirmed the trial court's holding that under the circumstances, it was just and reasonable to use the value of plaintiff's business only for purposes of property division and not spousal support. In addition to relying on testimony from plaintiff's business expert, the trial court noted that defendant had behaved badly throughout the proceedings by making a number of unsubstantiated allegations against plaintiff. Defendant was also receiving half the value of the business plaintiff had built. Further, because defendant had inside knowledge of the business, she could establish a competing business, which would reduce the value of plaintiff's business.

F. The Ages of the Parties

§6.9 An older couple's divorce after a long marriage generally results in an award of permanent, rather than temporary or rehabilitative, spousal support, unless the estate is large.

- A 58-year-old wife and a 30-year marriage: the spousal support award ($2,400/month for two years and $250/year thereafter) was not "even remotely just and reasonable" given the disparity in incomes and that it was unlikely that the wife could find employment sufficient to maintain even a modest lifestyle. *Magee v Magee*, 218 Mich App 158, 164, 553 NW2d 363 (1996).
- A 30-year marriage: although the trial court intended to encourage the wife to work full-time, that objective is not always possible for people in their fif-

ties, male or female; two years of rehabilitative spousal support was inequitable. *Wiley v Wiley*, 214 Mich App 614, 543 NW2d 64 (1995).

- A 47-year-old wife and a 23-year marriage: the spousal support award was upheld where the husband was at fault and the wife had little earning power and was in poor health. *Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992).
- A 60-year-old husband, a 47-year-old wife, and a 10-year marriage: an award to the wife of $420 per month for 15 years was inequitable considering, among other factors, the relative ages of the parties, where the husband was retired and the wife was able to work. *Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003).

G. The Ability to Pay

1. Actual Assets and Income Available

§6.10 Income is broadly interpreted and is not limited to taxable income. MCL 552.602(o) defines *income* to include sources such as earnings, pension plans, unemployment compensation, tax refunds, and Social Security benefits. A husband's disability payments, from disability insurance he purchased after the divorce, were the current equivalent of income derived from employment and could be used to make spousal support payments. *Ackerman v Ackerman*, 197 Mich App 300, 495 NW2d 173 (1992); *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992).

This factor is reflected, in part, in the court's consideration of the disparity in incomes. *Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003) (husband's retirement and fixed income balanced against wife's younger age and ability to work); *Torakis* (husband's assets and ability to meet spousal support obligation balanced against wife being unable to work and having depleted her savings).

Spousal support is not a matter of simply assigning some set fraction of the spouse's assets; the financial situation of the parties and the money needed for support must be considered. *Bialy v Bialy*, 167 Mich 559, 133 NW 496 (1911).

2. Imputed Income

§6.11 The ability to pay spousal support includes the payer spouse's unexercised ability to earn if income is voluntarily reduced to avoid paying spousal support. *Knowles v Knowles*, 185 Mich App 497, 462 NW2d 777 (1990). The interest is in protecting the dependent spouse from impoverishment as a result of the other spouse's spite or avoidance of responsibility. *Healy v Healy*, 175 Mich App 187, 437 NW2d 355 (1989). While the court should not unduly interfere with personal lives and career choices, it does have to protect the spouse who is dependent on the other for support, especially where there was a traditional breadwinner-homemaker household. *Id. Healy* relied on a child support case, *Rohloff v Rohloff*, 161 Mich App 766, 771, 411 NW2d 484 (1987), that also provided criteria for determining the "ability to pay." The criteria include

- the parties' employment histories,

- reasons for any termination of employment,
- work opportunities available,
- diligence in trying to find employment, and
- the availability of employment.

In some cases, it may be appropriate to consider whether a *payee* has voluntarily reduced their income in determining the proper amount of spousal support. For example, if the payee elects not to receive pension benefits, it is appropriate to consider whether the income may be imputed in determining the amount of spousal support. If immediate withdrawal of pension benefits would not reduce the pension, the income should be imputed to the payee. However, if the payee would receive a reduced benefit by immediate withdrawal, the income should not be imputed. *Moore v Moore*, 242 Mich App 652, 619 NW2d 723 (2000).

H. The Present Situation of the Parties

§6.12 In general, cases cited for this factor consider the combined effect of individual factors on the present ability of one spouse to pay and on the present or anticipated needs of the spouse seeking spousal support. See *Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996), where the relevant factors were the wife's bleak employment and retirement prospects, the husband's work history and pension, and the meager marital estate. See also *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992), where the wife was awarded spousal support 13 years after the original judgment, based on a clause reserving spousal support. In *Torakis,* the wife was in poor health, was unable to work, and had depleted her savings; the husband had extensive property holdings and pensions.

I. The Needs of the Parties

§6.13 In general, cases cited for this factor evaluate the combined effect of various factors on the present or anticipated needs of the spouse seeking spousal support. In *Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996), the husband was a laborer at an automotive company; the wife had stayed home and raised her daughter and granddaughter. The main asset appears to have been a trailer home awarded to the wife. In evaluating the wife's needs, the court noted that she did not have enough credits to qualify for Social Security and that she was unlikely to find employment with sufficient income to maintain a modest lifestyle or to attain sufficient retirement benefits to support herself. See also *Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990), where the wife received an extension of spousal support. Relevant considerations included that she had been unable to keep up the marital home, had been forced to move to a cheaper but in-need-of-repair residence, and was caring for a minor child whose brain damage had not been diagnosed until after the divorce. In *Olson v Olson*, 256 Mich App 619, 671 NW2d 64, *leave denied,* 469 Mich 912, 670 NW2d 219 (2003), the trial court erred by awarding the wife one-half of the husband's pretax disposable income without making a finding regarding the wife's needs.

J. The Health of the Parties

§6.14 Health is relevant to the ability to work and to the personal needs of the spouse seeking spousal support. In *Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990), spousal support was denied where there was no evidence that the wife's health claims affected her work performance. Health claims were not a relevant factor in *Moser v Moser*, 184 Mich App 111, 457 NW2d 70 (1990), where the wife took a trip to Europe with the children instead of pursuing additional medical care.

The following health factors have been found relevant in making an award:

- a wife's broken health caused by her husband's beatings, *Kiplinger v Kiplinger*, 172 Mich 552, 138 NW 230 (1912)
- a wife's bout with cancer, the possibility of further needed procedures, and a general concern for her well-being and for reducing causes of acute anxiety, *Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992)
- a wife's declining health that resulted in a spousal support award 13 years after the original judgment, *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992)
- a wife's schizophrenia and serious doubts that she would be able to support herself, *McLain v McLain*, 108 Mich App 166, 310 NW2d 316 (1981)
- public assistance in supporting a party to a divorce, *Zalewski v Zalewski*, 342 Mich App 429, 995 NW2d 553 (2022) (The agency providing public assistance does not have standing in a trial court matter but may have standing at the court of appeals. *Zalewski*.)

In *Zalewski,* the wife filed a complaint for separate maintenance from the husband contending that the husband had suffered a stroke and no longer lived in the marital home but required care in a nursing home. The wife petitioned the trial court to award her the entirety of the marital estate in spousal support arguing that if she becomes disabled, the estate would not have sufficient funds to support her as the estate was paying for the support of husband. If the wife were to be awarded the entirety of the estate as spousal support, the husband could have his care paid by Medicaid.

Following the entry of a consent order, the Department of Health and Human Services (DHHS) appeared as an interested party in the matter and filed a motion for reconsideration asking the trial court to set aside the support order arguing that Medicaid coverage is for those without the financial resources to pay for their own care and that the support order went against caselaw that requires an equitable distribution of the marital estate. The husband and wife opposed the DHHS appearing in a domestic relations case. The trial court ruled that it was not proper for the DHHS to appear in the case and dismissed their motion for reconsideration finding the jurisdiction of a divorce court is strictly statutory and limited to determining "'the rights and obligations between the husband and wife, to the exclusion of third parties.'" *Zalewski,* 342 Mich App at 434(quoting *Estes v Titus*, 481 Mich 573, 582–583, 751 NW2d 493 (2008)). The courts have rou-

tinely held that divorce actions are not the forum to address the concerns of third-party creditors. The DHHS could have pursued its claims in another action against the parties, but it was not proper to do so in the context of a divorce action. Even though the DHHS did not have standing to intervene in the underlying divorce action, the court of appeals found that it did have standing as an aggrieved party in the appellate action. However, the DHHS failed to properly intervene in the appellate matter.

K. Prior Standard of Living

§6.15 The parties' station in life and standard of living establish a qualitative basis for determining the extent of the support duty. *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956) (wife's right to support at level commensurate with that which she would have enjoyed had marriage survived). The proper support of a spouse includes maintaining an accustomed station in life, commensurate with the other spouse's ability to provide spousal support and child support for any dependent children. *Tomlinson v Tomlinson*, 338 Mich 274, 281, 61 NW2d 102 (1953); *see also Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992) (spousal support needed to ensure maintenance of wife's prior standard of living).

Temporary spousal support of $200 per week for one year was appropriate in *Voukatidis v Voukatidis*, 195 Mich App 338, 489 NW2d 512 (1992), considering the standard of living the parties had established with their combined incomes and as a means of allowing the wife a chance to get on her feet financially.

L. Responsibility for Others' Support

§6.16 In *Parrish v Parrish*, 138 Mich App 546, 361 NW2d 366 (1984), the court was not precluded from taking into consideration the claimant spouse's assumption of responsibility for the support of an 18-year-old child who had cerebral palsy. When determining a party's spousal support obligation, the trial courts are expected "to consider the extent to which such support is either legally or morally obligatory, the extent to which it might be naturally expected by longstanding ties of friendship or family, whether it is a sham or otherwise in bad faith, and any other appurtenant factor." *Andrusz v Andrusz*, 320 Mich App 445, 458, 904 NW2d 636 (2017).

M. General Principles of Equity

§6.17 One of the few cases to mention equity is *Parrish v Parrish*, 138 Mich App 546, 361 NW2d 366 (1984), where the court considered general principles of equity in determining the appropriate award to a wife caring for her disabled adult daughter.

In *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986), the court applied a balancing test to determine the fairness of a spousal support award. The issue was what was sufficient support to allow the wife the opportunity to get the training she needed and to enter the workforce without expending marital assets.

The court considered the amount needed and the amount the husband could reasonably afford, balancing both parties' incomes, needs, and abilities.

III. The Amount and Duration of Support

A. In General

§6.18 In *Parrish v Parrish*, 138 Mich App 546, 557, 361 NW2d 366 (1984), the court referred to seven factors relevant to determining the amount of spousal support. These factors are a subset of the eleven factors identified in *Parrish* as relevant to deciding if spousal support should be awarded (see §6.4). The factors relevant to determining the amount of support are

1. the duration of the marriage,
2. the parties' contributions to the joint estate,
3. the parties' ages,
4. the parties' health,
5. the parties' stations in life,
6. the parties' necessities and circumstances, and
7. the parties' earning abilities.

The objective is to balance the incomes and needs of the parties in a way that will not impoverish either. *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995).

B. Guidelines

§6.19 There is no statutory formula for calculating spousal support. However, nonbinding guidelines have been developed that are accepted to various degrees in different circuits. If the caselaw requirements are met for spousal support, reference to these guidelines may be helpful in deciding the motion. Although guidelines are useful, it is important to remember the trial court's use of a formula to determine spousal support in place of considering the relevant factors is an error of law. *Myland v Myland*, 290 Mich App 691, 804 NW2d 124 (2010).

Craig Ross, an attorney and former family law referee in Washtenaw County, has developed guidelines and software intended to assist friends of the court, family courts, and attorneys in determining whether spousal support should be ordered, for how long, and at what approximate level. The guidelines give greatest weight to the length of the marriage, followed by the income of the proposed recipient, the education or training level of the proposed recipient, the age of the proposed recipient, and the number of children born to the couple, as adjusted by the income differential of the parties. Mr. Ross's software is available by contacting him directly, Craig Ross, 1709 Ferndale, Ann Arbor, MI 48104, 734-663-0998, or by accessing MarginSoft's website.

Unlike the Child Support Formula, which is presumptive, these spousal support guidelines are designed to provide a starting point for analyzing a case. The programs cannot typically factor in extenuating circumstances, such as spousal disability, which should be explained in the pleadings.

Permanent spousal support. Where there is a disparity in earning abilities, the Washtenaw County guidelines would generally award permanent spousal support if there is

- a marriage of 30 or more years,
- a recipient 60 years old or older,
- a recipient who earns little or no income, and
- a recipient who has less than a high school education.

No spousal support. Spousal support in any amount or duration is not recommended by the Washtenaw County guidelines when there is

- a marriage of 4 or fewer years,
- a proposed recipient 30 years old or younger,
- a proposed recipient who earns a substantial income, and
- a proposed recipient who has a doctorate degree.

Calculating the strength of the claimant's need for spousal support. The Washtenaw County guidelines use four primary factors to define the claimant's need and the likelihood of success in the labor market. The four factors are

1. the length of the marriage (35 percent),
2. the claimant's income (30 percent),
3. the claimant's education or training level (20 percent), and
4. the claimant's age (15 percent).

There is a general assumption that post–high school training is needed to compete in today's labor market. However, a claimant with an advanced degree or training who has not been in the labor market for many years may be in no better position in seeking employment than someone with only a high school diploma.

Exceptional circumstances not easily "scored." Some circumstances must be evaluated on a case-by-case base, including the following:

- the parties' health limitations
- fault
- contractual agreements on spousal support
- the difference in the parties' incomes, particularly when the family's past standard of living is considered
- a significant period of time out of the workforce
- other circumstances particular to this couple

C. Rehabilitative Versus Permanent Spousal Support

§6.20 Rehabilitative spousal support is temporary spousal support awarded to help a financially dependent spouse make the transition to self-support. It can be appropriate to

- encourage a spouse to seek full-time employment and self-sufficiency, *Wiley v Wiley*, 214 Mich App 614, 543 NW2d 64 (1995);
- allow a spouse to complete an advanced degree where the spouse had worked while the other spouse had attained a degree, *Olah v Olah*, 135 Mich App 404, 354 NW2d 359 (1984);
- allow a spouse to adjust to a lifestyle not based on combined incomes, *Voukatidis v Voukatidis*, 195 Mich App 338, 489 NW2d 512 (1992); or
- allow a spouse time to acquire new job skills and enter the workforce, *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986).

Practice Tip

- *Rehabilitative support can be reduced to a cash value and distributed in ways other than a monthly payment that may be of greater value or worth to the recipient spouse.*

Permanent spousal support generally continues until death or remarriage (see MCL 552.13(2)). It has been found appropriate when there is

- a long-term marriage with a spouse who has little or no career or marketable skills, *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956); *see also Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996) (wife would have late start in workforce with little possibility of employment or retirement security);
- a long-term marriage, one spouse with far superior earnings, and the other spouse with a questionable earning potential, *Wiley;*
- great discrepancy between incomes and the wife had devoted most of her adult life to the traditional role of wife and homemaker, *McNamara v McNamara*, 178 Mich App 382, 443 NW2d 511 (1989); or
- a serious doubt that a spouse would be able to fully support themself because of schizophrenia or other mental illness, *Sullivan v Sullivan*, 175 Mich App 508, 438 NW2d 309 (1989).

IV. Requirements for Judgments and Spousal Support Orders

A. The Award or Reservation of Spousal Support

§6.21 If spousal support is not granted, the judgment must either reserve the question or state that neither party is entitled to spousal support. If the judgment is silent regarding spousal support, the issue is reserved for possible later consideration. MCR 3.211(B)(4); *see Key v Key*, No 357749 (Mich Ct App Oct 20, 2021) (order) (unpublished). See §6.43.

B. Uniform Orders

§6.22 Any provisions regarding spousal support must be prepared on a Uniform Support Order (see SCAO forms FOC 10b, FOC 10c). MCR 3.211(D)(1). This order must accompany any judgment or order affecting spousal support, and both documents must be signed by the judge. *Id.* The Uniform

Order governs if the terms of the judgment or order conflict with it. *Id.* If a Uniform Support Order "specifically provided that spousal support were nonmodifiable or that a change in circumstances would not justify modification of spousal support … a 'conflict' would exist with the judgment of divorce." *Smith v Smith*, 328 Mich App 279, 284, 936 NW2d 716 (2019). But when a Uniform Support Order was "more accurately characterized as simply being a partial or incomplete expression of the parties' intent and agreement, which was plainly and unambiguously set forth in the divorce judgment," and which "expressly allows *either party* to seek modification of spousal support on a showing of a change in circumstances," "it is difficult to logically conclude that the judgment of divorce conflicts" with the Uniform Support Order. *Id.* The final judgment must either incorporate the Uniform Order by reference or state that none is required. MCR 3.211(D)(2). Personal information concerning a party must be provided to the Friend of the Court in a Judgment Information Form (SCAO form FOC 100), which is separate from the court order and not a public document. MCR 3.211(F)(2).

C. Mandatory Provisions

§6.23 Per statute, several provisions are required when spousal support is ordered. Spousal support may be payable through the Michigan State Disbursement Unit (MiSDU), and Friend of the Court services are available when SCAO form FOC 10b, Uniform Support Order, is used. However, when SCAO form FOC 10c, Uniform Support Order, is used, no Friend of the Court services are available for ongoing account management and enforcement. Provisions found in the Uniform Support Orders are as follows:

- Income withholding is to take immediate effect, unless the court finds, on notice and hearing, that there is good cause for the order of income withholding not to take effect immediately. MCL 552.604(3). Note that SCAO form FOC 10c does not include an income withholding provision as payment is made directly between the individual parties and not administered by the MiSDU or the Friend of the Court.
- The name, address, and telephone number of the payer's source of income, if known, MCL 552.603(7)(e), and a requirement that the parties keep the Friend of the Court informed of any changes. MCL 552.605a(1). Note that SCAO form FOC 10c does not require the parties to notify the Friend of the Court of changes in employment information.
- The parties must inform the Friend of the Court in writing within 21 days of any change in residential or mailing addresses, health insurance, occupational or driver's licenses, or Social Security numbers (unless exempt by law pursuant to MCL 552.603). *See* SCAO form FOC 10c (parties must notify each other of changes).
- Payment of any statutory fees required for support payments must be made by the payer of support. *See* MCL 600.2538(1). However, SCAO form FOC 10c does not include this provision since Friend of the Court services are not provided when using this form.

- The following statutory notice regarding nonretroactive modification, liens for unpaid support, and surcharge:

  > Support is a judgment the date it is due and is not retroactively modifiable. A surcharge may be added to past-due support. Unpaid support is a lien by operation of law and the payer's property can be encumbered or seized if an arrearage accrues for more than the periodic support payments payable for two months under the payer's support order.

  However, note that when using the SCAO form FOC 10c, surcharge is not addressed because by using this form the parties are agreeing to administer their own case.

The order should also indicate (1) how long spousal support will be paid, (2) whether payments on behalf of the spouse to a third party (for example, car, insurance, mortgage) will be counted as spousal support, and (3) when payments will begin.

D. Optional Provisions

§6.24 A judgment or order awarding or modifying spousal support may include provisions concerning the following:

- **Attorney and litigation fees.** If an award of attorney fees is necessary to enable a party to prosecute or defend the action, a trial court may award the amount it finds necessary and reasonable. MCL 552.13(1); MCR 3.206(D); *see, e.g., Gates v Gates*, 256 Mich App 420, 664 NW2d 231 (2003); *Maake v Maake*, 200 Mich App 184, 503 NW2d 664 (1993). MCR 3.206(D) provides that, in addition to the award of attorney fees because of a party's inability to bear the costs of prosecuting or defending the action, attorney fees may be awarded when they were incurred because the other party refused to comply with a court order or engaged in discovery practices in violation of the rules. *See Richards v Richards*, 310 Mich App 683, 701, 874 NW2d 704 (2015) ("[MCR 3.206(D)(2)(a)] allows payment of attorney fees based on one party's inability to pay and the other party's ability to do so, [and MCR 3.206(D)(2)(b)] considers only a party's behavior, without reference to the ability to pay"). A motion for attorney fees under MCR 3.206(D) must be brought within a reasonable time after the fees sought were incurred, and what constitutes a reasonable time depends on the particular facts and circumstances of each case. *Colen v Colen*, 331 Mich App 295, 952 NW2d 558 (2020) (trial court did not abuse its discretion in denying plaintiff's motion for attorney fees on ground that by neglecting matter for almost two years, plaintiff had failed to timely pursue attorney fees).
- **Contingencies.** Contingencies that may end spousal support, such as the payee's remarriage, MCL 552.13(2), or the payee's cohabitation, *see, e.g., Petish v Petish*, 144 Mich App 319, 375 NW2d 432 (1985), should be addressed.
- **Preservation of arrearages.** If a judgment does not specifically preserve arrearages accruing under temporary orders, they may be waived by the state.

MCR 3.207(C)(6). Exception: Support arrearages assigned to the state are preserved unless specifically waived or reduced by the order. *Id.*

V. Tax Considerations

§6.25 Until 2019, spousal support was generally deductible by the payer and included in the gross income of the recipient. However, the Tax Cuts and Jobs Act, which was signed into law in late 2017, eliminated the 75-year-old tax deduction for payments defined by the tax code as alimony. This rule is effective with divorces commenced after December 31, 2018.

Before 2019, the tax code required the following provisions to ensure deductibility:

- Payments must be in cash or a cash equivalent.
- The recipient's Social Security number must be included in the payer's tax return.
- Payments are made pursuant to a written divorce or separation agreement or order.
- Payments cannot extend beyond the death of the payee spouse. (While this language is no longer required, it may reasonably be requested.)
- The payer is not liable to make substitute payments on the death of the payee (such as child support).
- Except for temporary spousal support, the parties are not members of the same household, nor do they file a joint return.

See also chapter 9 for further discussion of tax considerations.

VI. Enforcement

A. The Roles of the Friend of the Court and the Michigan State Disbursement Unit

§6.26 The MiSDU is the single location to which a payer or source of income sends a support or fee payment. MCL 400.236. While payments are made through the MiSDU, the enforcement of support orders falls mainly on the Friend of the Court. See §7.16 for further discussion of the MiSDU.

B. Enforcement Through the Friend of the Court

1. In General

§6.27 In a Friend of the Court case, the Friend of the Court must initiate enforcement under the SPTEA, MCL 552.601 et seq., when one of the following applies:

- An arrearage in an amount equal to the amount of support payable for one month under the payer's support order is reached.
- A parent fails to obtain or maintain health care coverage for the parent's child as ordered by the court.

- A person legally responsible for the actual care of a child incurs an uninsured health care expense and submits a written complaint as required under MCL 552.511a.

MCL 552.511(1)(a)–(c). The Friend of the Court will not initiate enforcement under subsection (1)(a) if the support order was entered ex parte and the office has not received a copy of proof of service of the order. MCL 552.511(1)(a).

The parties to a domestic relations matter may opt out of Friend of the Court services. MCL 552.505a(2). If the parties opt out, they have "full responsibility for the administration and enforcement of the obligations imposed in the domestic relations matter." MCL 552.505a(3).

Enforceable support includes spousal support awarded pursuant to a court order, whether the order is temporary or ex parte, see MCR 3.207(B)(1), permanent, or modified. In cases where the court is only enforcing a spousal support order, MCL 552.636 permits the court to "assess the payer the actual reasonable expense of the friend of the court in bringing any enforcement action for noncompliance." If the court is simultaneously enforcing a spousal support order and a child support order in a Friend of the Court case, MCL 552.636 does not apply.

Because much of the law in this area concerns the enforcement of child support orders, it may also be helpful to consult §§5.38–5.48 for general procedures.

2. Statute of Limitations

§6.28 Under the SPTEA, an action to enforce a support order must be started 10 years from the date the last support payment is due under the support order, regardless of whether that last payment was made. MCL 600.5809(4). This is different from the general 10-year limit for enforcement of a judgment that begins to run when the cause of action accrues (when each support installment becomes due). MCL 600.5809(3). Payments on past-due support, including income withholding payments, are payments on a debt and therefore act to lengthen the 10-year limitations period of MCL 600.5809. *Wayne Cty Soc Servs Dir v Yates*, 261 Mich App 152, 155–156, 681 NW2d 5 (2004) (citing reasoning of *Yeiter v Knights of St Casimir Aid Soc'y*, 461 Mich 493, 497, 607 NW2d 68 (2000), and *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich App 635, 491 NW2d 864 (1992)). A past-due support obligation is a debt and payments made pursuant to income withholding renew the full support obligation and extend the period of limitations. In addition, in *Parks v Niemiec*, 325 Mich App 717, 926 NW2d 297 (2018), the 10-year statute of limitations was tolled by the court's continuing jurisdiction as it continued to enter orders to show cause defendant and bench warrants against defendant. The court also issued an order to suspend defendant's support obligation while he was imprisoned for 10 years. Therefore, the payer remained liable for the unpaid child support amount.

3. Income Withholding

§6.29 Under the SPTEA, all support orders must provide for an order of income withholding. MCL 552.604. The order takes immediate effect unless good cause has been shown or the court has approved the parties' alterna-

tive arrangement (see §6.23 for the specific findings required). Income withholding under the SPTEA may only be initiated by the Friend of the Court. *Hagen v Hagen*, 150 Mich App 562, 389 NW2d 130 (1986). Where the parties do not use Friend of the Court services, see SCAO form FOC 10c, which does not include an income withholding provision. See §§5.39–5.41 and §7.17 for further discussion of income withholding.

4. Liens and Bonds

§6.30 MCL 552.27 provides that the amount of a spousal support award constitutes a lien on the adverse party's real and personal property under the SPTEA, MCL 552.625a; *see also* SCAO Administrative Memorandum 2017-03. The lien is effective when support is due and unpaid and is subordinate to any perfected lien. MCL 552.625a, .625b. On default, the court may order the sale of the property, order execution of the judgment, appoint a receiver, or take some other appropriate action. MCL 552.27, .625.

In *Licavoli v Licavoli*, 292 Mich App 450, 807 NW2d 914 (2011), the trial court erred in granting a motion to attach assets owned as tenants by the entirety by the ex-husband and his new wife to fulfill the ex-husband's spousal support obligation.

See §5.44 for further discussion of liens and bonds.

5. Contempt Proceedings

§6.31 The recipient of support or the Friend of the Court may initiate contempt proceedings. MCL 552.631(1); MCR 3.208, .606. If the payer fails to appear at the hearing, the court may issue a bench warrant. MCL 552.631(1). If a bench warrant is issued, the payer must remain in custody until there is a hearing or bond is posted of not less than $500 or 25 percent of the arrearage, whichever is greater. MCL 552.631(3), .632. At its own discretion, the court may add costs to the amount of the required deposit. MCL 552.631(3). See §5.43 for further discussion of contempt proceedings.

6. Suspension of State Licenses

§6.32 Every support order must require that the payer and the payee keep the Friend of the Court informed of any driver's or occupational licenses they hold. MCL 552.603(7)(d). Separate from contempt proceedings, the Friend of the Court can petition the court for an order to suspend a driver's license, occupational license, recreational or sporting license, or any combination of these licenses when the arrearage is greater than two months' worth of payments and income withholding has not been successful or does not apply. MCL 552.628. The procedure involves numerous steps set out in MCL 552.628–.630, which are summarized in exhibit 5.1. See §5.42 for further discussion of license suspensions.

7. Interception of Tax Refunds

§6.33 Spousal support arrearages may be offset by state and federal tax refunds. See §5.46 for further discussion of tax refund intercepts. These pro-

ceedings are handled by the state's Office of Child Support. See §5.46. The Michigan Child Support Enforcement System, which handles the automated process of intercepting tax refunds, will submit a spousal support debt for tax refund intercept only when a child support debt on the same case is being submitted at the same time. If a case being managed by the Friend of the Court is for spousal support only, any debt for spousal support will not be submitted for tax refund intercept.

C. Direct Enforcement

1. In General

§6.34 A support order that is part of a judgment or is an order in a domestic relations matter is a final judgment as to any payment due and owing, and a party may enforce it like any other judgment. MCL 552.603(2). This includes execution and other remedies available for the collection of judgments. The garnishment of periodic payments (such as wages, land contract payments, and periodic contract payments) to enforce court-ordered support is given priority over other debts. MCL 600.4012.

A trial court has inherent power as a court of equity to enforce its own directives and to mold its relief according to the character of a case, making any order necessary to fully enforce its directives. MCL 600.611; *see, e.g., Schaeffer v Schaeffer*, 106 Mich App 452, 308 NW2d 226 (1981) (affirming court's efforts to enforce spousal support payments).

2. Statute of Limitations

§6.35 The 10-year statute of limitations begins to run when the cause of action accrues, which is when each support installment becomes due. MCL 600.5809(3); *Rybinski v Rybinski*, 333 Mich 592, 596, 53 NW2d 386 (1952). The time limit is not applicable where modification of the judgment is sought. *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992).

This limit is different from the SPTEA's 10-year limit that begins when the last support payment is due under the support order, regardless of whether that last payment was made. MCL 600.5809(4). Payments made after the limitations period can waive a statute of limitations defense. *Wayne Cty Soc Servs Dir v Yates*, 261 Mich App 152, 155–156, 681 NW2d 5 (2004), citing the reasoning of *Yeiter v Knights of St Casimir Aid Soc'y*, 461 Mich 493, 497, 607 NW2d 68 (2000); *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich App 635, 491 NW2d 864 (1992).

3. Enforcement Procedures Available

§6.36 Civil contempt proceedings may be used to enforce temporary or permanent support orders. MCL 552.151; *Hill v Hill*, 322 Mich 98, 33 NW2d 678 (1948).

A lien may be imposed on real or personal property to secure the payment of spousal support. MCL 552.27. The lien is to be treated as a lien under the SPTEA, which means that the requirement that the lien must be created in the

divorce judgment to be enforceable does not apply. *See Wells v Wells*, 144 Mich App 722, 375 NW2d 800 (1985).

The Michigan Child Support Enforcement System monitors cases in which a lien or levy has been initiated against accounts held at a financial institution for a payer when support is past due. The Michigan Child Support Enforcement System will submit a spousal support debt for consideration of a lien only when a child support debt on the same case is being submitted at the same time. If a case being managed by the Friend of the Court is for spousal support only, any debt for spousal support will not be submitted for a lien against assets held in a financial institution. *See* Office of Child Support Enforcement, Child and Spousal Support for Courts and Attorneys.

As a final order or judgment (*see* MCL 552.603(2)), a support order is enforceable by garnishment, execution, and other remedies available for the collection of judgments. *See* MCL 600.4012 (providing for garnishment of periodic payments (such as wages, land contract payments, and rent) and giving priority to court-ordered support); MCR 3.101 (garnishment after judgment).

In addition to civil remedies, criminal sanctions may be brought to assist in the enforcement of support obligations. See §5.52.

VII. Enforcing Spousal Support Orders from Other States

A. Recognition and Enforcement

§6.37 Michigan courts acknowledge and enforce spousal support awards decreed by the courts of another state if the party directed to pay was personally served or present in that court. MCL 552.121. *Another state* means a state of the union and not a foreign country. *Growe v Growe*, 2 Mich App 25, 138 NW2d 537 (1965) (Canada not another state under MCL 552.121, but spousal support judgment was enforced on other grounds). See §6.39.

Once a court of another state has issued a final judgment of divorce that does not provide for spousal support, and if all jurisdictional requirements were met in the other state, an action for spousal support may not be instituted in Michigan under a full faith and credit argument. *See generally Gaylord v Stuart*, 372 Mich 216, 125 NW2d 485 (1964).

Delinquent installments of spousal support awarded by the courts of another state may be collected in Michigan. *Gutowski v Gutowski*, 266 Mich 1, 253 NW 192 (1934).

B. Stay of Proceedings

§6.38 A Michigan defendant who has properly applied to the court of another state to modify its spousal support award may apply for a stay of proceedings in Michigan on whatever terms the Michigan court desires to impose. MCL 552.122. The stay is effective for 60 days pending submission of satisfactory evidence that the other state has changed its decree. MCL 552.123. Note that if an obligor wants to contest the validity or enforcement of a support order or income withholding order issued in another state that has been registered for

enforcement in Michigan under the UIFSA, the request for a hearing on the matter must generally be made within 20 days after the date of mailing or personal service of the notice of registration. MCL 552.2605(2)(b). However, for a proceeding under the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, the contesting party has 30 days after the notice of registration to file a contest (60 days if the contesting party lives outside of the United States). MCL 552.2707(2).

C. The Uniform Interstate Family Support Act

§6.39 The UIFSA, MCL 552.2101 et seq., is intended to assist in the interstate and international enforcement of support orders, including recognizing income withholding orders issued in other states and foreign countries subject to the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. While this act is usually associated with child support enforcement, it may also be used to enforce spousal support. *See* MCL 552.2211(3). The UIFSA permits the petitioner to enforce income withholding orders by filing the order directly with an employer. MCL 552.2501. On request, a support enforcement agency must provide services to a resident petitioner or a foreign petitioner meeting the UIFSA's requirements and may provide services to a nonresident petitioner. MCL 552.2307(1). If the support agency neglects or refuses to provide services, the attorney general may order it to do so, or the attorney general may provide the services directly to the individual. MCL 552.2308(1).

Practice Tip

- *Unlike child support, only the state court issuing the spousal support order may modify the order. MCL 552.2202, .2211.*

See §§5.53–5.67 for a more detailed discussion of the UIFSA. While many provisions specifically address child support problems and do not apply in spousal support enforcement, some helpful general procedural information also appears in *Michigan Family Law* §§6.25–6.30, 12.73, 16.30 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed).

D. The Interstate Income Withholding Act

§6.40 Unlike the UIFSA, income withholding under the Interstate Income Withholding Act, MCL 552.671 et seq., rests exclusively in the Friend of the Court. MCL 552.675. Once a support order is entered, it is enforced in the same manner as provided in the SPTEA. *Id.* See §5.68 for further discussion of this act.

E. The Uniform Enforcement of Foreign Judgments Act

§6.41 Under the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171 et seq., a party trying to enforce another state's judgment in Michigan is not required to file a new complaint in Michigan. An authenticated foreign judgment may be filed with the court clerk and then treated—and enforced—in the same manner as a Michigan judgment. MCL 691.1173. See §5.69 for further discussion of this act.

F. Support Orders from Foreign Countries

§6.42 The Uniform Foreign Money-Judgments Recognition Act (UFMJRA), MCL 691.1151 et seq., was repealed by 2008 PA 20, which precludes recognition of a judgment for divorce, support, or maintenance or other judgment rendered in connection with domestic relations. The official comment said this was because of other applicable uniform state laws, such as UIFSA.

Foreign divorce judgments that include child support orders have been enforced under the doctrine of comity. *Dart v Dart*, 460 Mich 573, 597 NW2d 82 (1999). In *Dart,* an English divorce judgment that included child support and property division, part of which were lump-sum awards, was enforceable in Michigan based on the principle of comity. The supreme court did not address whether the UFMJRA applied in this case, even though the lower court had considered that issue. Enforcing foreign awards based on comity was also achieved in *Jeong Suk Bang v Joon Hong Park*, 116 Mich App 34, 321 NW2d 831 (1982) (Korean spousal support award), and *Growe v Growe*, 2 Mich App 25, 138 NW2d 537 (1965) (Ontario spousal support judgment).

VIII. Modification of Spousal Support

A. In General

§6.43 Jurisdiction. If the court had personal jurisdiction over the payer at the time of judgment, then the court has continuing jurisdiction to revise or alter the support order. MCL 552.28. A new action is not required. Either party can petition for a modification of a judgment for spousal support. *Id.*

The trial court may modify support while an appeal is pending, if the motion to modify is based on changed circumstances. *Lemmen v Lemmen*, 481 Mich 164, 749 NW2d 255 (2008).

Time limits. There is no minimum period of time that must elapse following the judgment before a modification can be requested. *Yanz v Yanz*, 116 Mich App 574, 323 NW2d 489 (1982). A petition for modification does not come under the 10-year statute of limitations. *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992).

The court's powers. The statutory power to modify spousal support is not extinguished even if it is once exercised to eliminate spousal support. *Rickner v Frederick*, 459 Mich 371, 590 NW2d 288 (1999) (trial court had power to consider plaintiff's petition to reinstate spousal support, despite having canceled the initial spousal support award and ordering file closed); *see also Andrusz v Andrusz*, 320 Mich App 445, 904 NW2d 636 (2017) (on appeal, court may consider parties' conduct to determine intent where consent judgment is ambiguous); *Loutts v Loutts*, 309 Mich App 203, 871 NW2d 298 (2015) (trial court erroneously concluded that any request to modify or extend spousal support under MCL 552.28 must occur before support terminated).

Where a decree provides for spousal support until further order of the court, the court has authority to modify spousal support. *Tomblinson v Tomblinson*, 183 Mich App 589, 455 NW2d 346 (1990).

A divorce judgment must grant spousal support, deny spousal support, or reserve the issue of spousal support. MCR 3.211(B)(4). If the judgment does not mention spousal support, the issue is treated as reserved, and the court retains jurisdiction to award it at a later date. *Id.* See also *Key v Key*, No 357749 (Mich Ct App Oct 20, 2021) (order) (unpublished), where the court of appeals concluded that the issue of spousal support was reserved because "the divorce judgment merely acknowledge[d] the decision of the trial court to foreclose consideration of the spousal support issue; it did not memorialize an initial determination whether defendant-appellant had a right to spousal support at all." When spousal support is reserved, a later award is a modification of the original judgment. *See Torakis.*

A trial court may not order that spousal support is nonmodifiable. *Koy v Koy*, 274 Mich App 653, 735 NW2d 665 (2007). A spousal support order may not include a time limit to the extent that the time limit renders the order nonmodifiable. *Richards v Richards*, 310 Mich App 683, 692–693, 874 NW2d 704 (2015) (holding that trial court order that spousal support was "limited in time to six (6) years from the date hereof" violated plain reading of MCL 552.28).

Parties to a divorce may agree to waive the right to modification of spousal support under MCL 552.28 if their agreement sets forth that the parties forgo their statutory right to petition the court for modification and agree that the spousal support provision is final, binding, and nonmodifiable, and the agreement is reflected in the judgment of divorce. *Staple v Staple*, 241 Mich App 562, 616 NW2d 219 (2000).

The required showing. In general, modification is possible only upon a showing of new facts or changed circumstances arising since the judgment that justify a revision. MCL 552.28. The petitioner has the burden of justifying a change. *Gates v Gates*, 256 Mich App 420, 664 NW2d 231 (2003); *Ackerman v Ackerman*, 197 Mich App 300, 495 NW2d 173 (1992). In *Estate of Luckow v Luckow*, 291 Mich App 417, 805 NW2d 453 (2011), the court found that the trial court did not commit palpable error in denying a motion for modification of spousal support after the payer plaintiff's death where the court acknowledged that it had the authority to increase spousal support after an arbitration award had abated the support to zero and after plaintiff's death but chose not to do so in its discretion and after considering all of the circumstances presented and applying general principles of equity.

MCL 552.28 provides the authority to a court to modify support awards. However, "[t]he parties are free … to forgo their statutory rights by clearly expressing in a settlement their intent to render a spousal support award final, binding, and nonmodifiable." *Smith v Smith*, 328 Mich App 279, 283–284, 936 NW2d 716 (2019). Accordingly, when "the consent divorce judgment so clearly evinces the parties' intent to allow consideration of a change in spousal support when there is a change in circumstances, … the terms of the judgment of divorce must be enforced." 326 Mich App at 284–285.

Retroactive modification. Generally, retroactive modification of support is not available. MCL 552.603(2). A delinquent payer who has been notified of an impending order of income withholding may file a petition requesting modifica-

tion due to a change in circumstances. MCL 552.607(1)(h). Any modification would only affect payments due from the date of notice.

The court can approve the parties' agreement for retroactive modification. MCL 552.603(5). The court may retroactively correct the amount of support if a party knowingly and intentionally fails to report, refuses to report, or knowingly misrepresents their income. MCL 552.603b.

B. Fraud, Duress, and Mutual Mistake

§6.44 Generally, a consent judgment may not be set aside or modified except for fraud, duress, or mutual mistake. *Hilley v Hilley*, 140 Mich App 581, 364 NW2d 750 (1985) (that plaintiff did not understand that her spousal support would terminate if she remarried was unilateral mistake and not sufficient for modification).

It is an abuse of discretion to dismiss a motion without holding a full evidentiary hearing on allegations of fraud, misrepresentation, and other misconduct with respect to the order. *Rapaport v Rapaport*, 185 Mich App 12, 460 NW2d 588 (1990).

C. Factors Indicating a Change in Circumstances

1. In General

§6.45 The court has the authority to modify spousal support due to a change in circumstances. *Crouse v Crouse*, 140 Mich App 234, 363 NW2d 461 (1985). The moving party has the burden of proof by a preponderance of the evidence. *Id.* Once a change in circumstances is found, the court then considers all the circumstances in determining what modification to make (see the factors discussed in §§6.4–6.17). *McCallister v McCallister*, 205 Mich App 84, 517 NW2d 268 (1994) (payer's drop in income because of retirement).

In *Stroud v Stroud*, 450 Mich 542, 542 NW2d 582 (1995), the court did not err in deciding not to modify the award where the changes that occurred were clearly within the future contingencies the parties had in mind when they reached the original agreement on spousal support.

When the question of spousal support is expressly reserved in the judgment of divorce, no change of circumstances is required as a prerequisite for the court to consider the award of spousal support at a later date. *McCarthy v McCarthy*, 192 Mich App 279, 480 NW2d 617 (1991) (wife asked for extension of spousal support beyond stated two years; judgment expressly reserved later consideration).

2. Remarriage

§6.46 Modification or termination of spousal support can be triggered when a recipient remarries, unless a contrary agreement is specifically stated in the divorce judgment. MCL 552.13(2). However, remarriage has been treated as only one factor in the court's reassessment of the newly discovered circumstances. *See Ackerman v Ackerman*, 163 Mich App 796, 806, 414 NW2d 919 (1987). In *Lueck v Lueck*, 328 Mich App 399, 937 NW2d 729 (2019), the trial

court erred by finding that plaintiff's acting as though she were married to her significant other constituted conduct that could be interpreted to trigger the spousal support termination provisions. Without a valid marriage license and solemnization, plaintiff's conduct did not constitute a legal remarriage that would trigger the spousal support termination provision. Similarly, it is within the trial court's discretion to determine what effect to give a specific provision in the divorce judgment providing for spousal support to continue if the recipient remarries. *Arnholt v Arnholt*, 129 Mich App 810, 343 NW2d 214 (1983).

3. Cohabitation

§6.47 Cohabitation with an unrelated adult does not constitute a de facto marriage justifying termination of spousal support. *Crouse v Crouse*, 140 Mich App 234, 363 NW2d 461 (1985). However, cohabitation can be relevant where it improves that spouse's financial position. *See Ianitelli v Ianitelli*, 199 Mich App 641, 502 NW2d 691 (1993). In *Smith v Smith*, 278 Mich App 198, 748 NW2d 258 (2008), the court of appeals adopted a multifactor test for determining whether a couple is "cohabitating" for purposes of terminating spousal support. Among several other factors, the court held that the trial court should consider whether (1) there is an actual living together, that is, the man and woman reside together in the same home or apartment; (2) the living together is of a sustained duration; and (3) the couple shares expenses with respect to financing the residence (i.e., rent or mortgage payments) and incidental day-to-day expenses (e.g., groceries). The court emphasized that no one factor defining a couple's relationship is dispositive on the question of cohabitation and that the fact finder should consider the totality of the circumstances in each particular case.

4. Changes in Need

§6.48 In *Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990), changes in need—including loss of the home, high cost of repairs and maintenance of the replacement home, legal expenses incurred in attempting to enforce defendant's obligation to pay child support, and unforeseen costs for special care needed by a disabled child—were sufficient to extend the period of spousal support.

In *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992), the wife's declining health that developed in the years following the divorce and her depleted savings were sufficient for the court to modify the original judgment by making a spousal support award 13 years after the judgment was entered. *Cf. Loutts v Loutts*, 309 Mich App 203, 871 NW2d 298 (2015) (no change in need based on claims of deteriorating health where defendant failed to show her health issues prevented her from working and no change in need based on lack of employability where defendant failed to identify jobs for which she had applied and been rejected).

5. Changes in the Ability to Pay

§6.49 The change in circumstances must result in diminished income rather than just a change in the form of income. *Eckhardt v Eckhardt*, 155 Mich

App 314, 399 NW2d 68 (1986) (although husband's wages had been drastically reduced, his income had remained stable; diverting wages for tax or Social Security purposes did not justify modification of spousal support).

The obligor's voluntary reduction in income does not always mean a change in circumstances that warrants a reduction in spousal support payments. *Couzens v Couzens*, 140 Mich App 423, 364 NW2d 340 (1985) (that former husband purchased condominium and thus lost substantial interest income did not warrant reduction in spousal support payments); *see also Gerlach v Gerlach*, 82 Mich App 605, 267 NW2d 149 (1978).

Benefits received from a disability insurance policy acquired after the divorce are still income and available for making spousal support payments. *Ackerman v Ackerman*, 197 Mich App 300, 495 NW2d 173 (1992).

6. Retirement and Pension Benefits

§6.50 Whether retirement will trigger a modification of an award appears to depend on whether the parties fashioned the award with retirement in mind. In *McCallister v McCallister*, 205 Mich App 84, 517 NW2d 268 (1994), while plaintiff's retirement was a change of circumstances, it did not warrant a change in the spousal support award. Plaintiff's pension had been awarded solely to him in the divorce judgment, but the benefits drawn from that pension were properly considered in the assessment of plaintiff's postretirement ability to pay. However, in *Weaver v Weaver*, 172 Mich App 257, 431 NW2d 476 (1988), the court stated that "when the trial court awards a spouse his or her pension benefits free and clear of claims of the other spouse as part of the property settlement, the other spouse has received sufficient property to offset the value of the pension awarded." *Id.* at 262. The case was remanded to determine whether the parties had contemplated defendant's early retirement when the judgment was entered. If they had and defendant's only source of income was his pension, the court directed that spousal support should cease.

If the payee elects not to receive pension benefits, it is appropriate to consider whether the income may be imputed to the payee in determining the amount of spousal support. If immediate withdrawal of the pension would not reduce benefits, the income should be imputed to the payee. However, if the payee would receive a reduced benefit by immediate withdrawal, the income should not be imputed. *Moore v Moore*, 242 Mich App 652, 619 NW2d 723 (2000).

A divorce judgment that "expressly allow[ed] *either party* to seek modification of spousal support on a showing of a change in circumstances" was modifiable when plaintiff retired 20 months after the divorce. *Smith v Smith*, 328 Mich App 279, 936 NW2d 716 (2019). The trial court erred when it denied the motion for modification "on the basis that the divorce judgment did not specifically refer to 'retirement' as constituting a change in circumstances" warranting a change in spousal support because the retirement would have been contemplated at the time of the divorce. The court of appeals concluded that the parties' intent to allow a change in spousal support on a change of circumstances was so clearly reflected in the consent judgment of divorce that the terms of the judgment must be enforced.

7. Other Considerations

§6.51 **Death.** The payer's death does not terminate spousal support obligations; the obligation can be enforced against the payer's estate. *Easley v John Hancock Mut Life Ins Co*, 403 Mich 521, 271 NW2d 513 (1978). Factual findings indicating a change in circumstances resulting from the payer's death can lead to a modification in or the termination of spousal support on application of the surviving spouse or the estate. *Flager v Flager*, 190 Mich App 35, 475 NW2d 411 (1991).

Inflation. Cost of living is a relevant factor in determining if there has been a change in circumstances. *Rapaport v Rapaport*, 158 Mich App 741, 749, 405 NW2d 165 (1987).

IX. The Effect of Bankruptcy

A. In General

§6.52 Generally, bankruptcy discharges all debts of the bankrupt spouse, including some debts created by the property settlement. See §8.77. Debts created by a property settlement can be nondischargeable if the debt is found to be actually in the nature of support or maintenance. See §8.79. On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Bankruptcy Reform Act), Pub L No 109-8, 119 Stat 23 (2005). This law applies to all bankruptcy cases filed on or after October 17, 2005. Cases filed before that date continue to be subject to the old law. The Bankruptcy Reform Act awards a new high priority status for "domestic support obligations." 11 USC 507(a)(1)(A). These obligations have a broad definition under 11 USC 101(14A). The Bankruptcy Reform Act largely does away with the old distinction between property debts and support debts, making both types of debts nondischargeable in most cases. 11 USC 523(a)(5) (domestic support obligations), (15) (property debts owed to spouse, former spouse, or child).

B. The Effect of the Label Used in the Judgment

§6.53 The label used (i.e., property settlement versus spousal support) in a judgment of divorce is not controlling. *In re Singer*, 787 F2d 1033 (6th Cir 1986); *In re Calhoun*, 715 F2d 1103 (6th Cir 1983), *distinguished by Fitzgerald v Fitzgerald (In re Fitzgerald)*, 9 F3d 517 (6th Cir 1993).

If a judgment specifically designates an obligation as spousal support, the debt is not dischargeable if the court agrees that the payments are actually what the judgment calls them. *Fitzgerald.* If, on the other hand, a debt is *not* expressly labeled as spousal support, then the court must apply a four-part test:

1. Was the debt intended to provide support for the debtor's spouse?
2. Did the obligation have the effect of providing support necessary for the daily needs of the spouse?
3. If the first two conditions are met, was the amount of support so excessive that it was manifestly unreasonable?

4. If the amount was unreasonable, what portion of the award was necessary for such support?

Id. at 520. Only the portion of the debt determined necessary for support in the fourth question survives.

In applying this "present needs" test, *Fitzgerald* clarified for the Sixth Circuit that the relevant inquiry was not whether the spouse could support themself at the time of the bankruptcy without the payments. The purpose of the four-part test was to address whether the payments are actually spousal support. In *Fitzgerald,* it was sufficient that the payments were intended to ensure the wife the standard of living she was entitled to expect had the marriage continued—a classic purpose of spousal support.

C. Antibankruptcy Clauses

§6.54 An antibankruptcy clause reserves or creates a spousal support obligation that will arise when and if a property settlement obligation is discharged in bankruptcy. There is an open question as to whether a spousal support obligation created in this manner is nondischargeable under the test found in *Fitzgerald v Fitzgerald (In re Fitzgerald)*, 9 F3d 517 (6th Cir 1993). However, other jurisdictions have accepted the argument that if a spouse's bankruptcy leaves the other spouse owing unanticipated debts, the nonbankrupt spouse might have a *need* for support that would justify enforceable spousal support under these new circumstances. *See In re Danley*, 14 BR 493 (Bankr D NM 1981); *In re Marriage of Clements*, 134 Cal App 3d 737, 184 Cal Rptr 756 (1982); *Coakley v Coakley*, 400 NW2d 436 (Minn Ct App 1987); *Siragusa v Siragusa*, 108 Nev 987, 843 P2d 807 (1992); *Hopkins v Hopkins*, 487 A2d 500 (RI 1985); *In re Marriage of Myers*, 54 Wash App 233, 773 P2d 118 (1989); *Eckert v Eckert*, 144 Wis 2d 770, 424 NW2d 759 (Wis Ct App 1988).

In *Krist v Krist*, 246 Mich App 59, 631 NW2d 53 (2001), defendant argued that the arbitrator exceeded his authority by awarding spousal support in contravention of the parties' settlement agreement, which provided that no spousal support would be awarded to either party. The arbitration decision provided:

> In return of Defendant/Husband receiving all of the above described marital property and all interests in his employment at General Motors, the Defendant/Husband shall pay to Plaintiff/Wife $28,500.00 payable within 45 days. *In the event the monies are not paid this amount shall be considered spousal support and non dischargeable in Bankruptcy Court.*

Id. at 61–62 (emphasis added). Defendant argued that by characterizing the property award as spousal support, the arbitrator had exceeded his authority and contravened the settlement agreement. However, the court held that the offending paragraph was actually a provision providing for a lump-sum payment, i.e., "alimony in gross." This was in the nature of the division of property and was a device to frustrate any attempt by the husband to circumvent what the arbitrator deemed an equitable division of the marital estate by filing for bankruptcy, thereby discharging the obligation.

X. Alimony in Gross

§6.55 Alimony in gross is not technically support but is a property division that is payable by either a lump-sum award or installments of a definite amount over a specific period of time. *Couzens v Couzens*, 140 Mich App 423, 364 NW2d 340 (1985).

Not modifiable. In general, alimony in gross, unlike permanent spousal support, is not modifiable except for fraud, mistake, excusable neglect, or the other grounds for relief from judgment generally provided for in MCR 2.612(C). *See Keeney v Keeney*, 374 Mich 660, 133 NW2d 199 (1965).

Contingencies and modification. That an award contains a contingency (e.g., termination of payments on remarriage or death) does not necessarily make it a modifiable spousal support award rather than alimony in gross. The court is to give effect to the intent expressed in the agreement; there is no bright-line rule. The number and types of contingencies in the spousal support award are factors but are not per se determinative, but any language indicating the expected future role of the court may be significant. *Pinka v Pinka*, 206 Mich App 101, 520 NW2d 371 (1994) (alimony in gross where there was specified monthly award, purpose of award was to provide support until employment was found, and award specified it was not subject to further court order); *see also Wiley v Wiley*, 214 Mich App 614, 543 NW2d 64 (1995) (alimony in gross where award was nontaxable, final, and nonmodifiable); *Tomblinson v Tomblinson*, 183 Mich App 589, 455 NW2d 346 (1990) ("until further order of the court" made an award spousal support and modifiable).

Parties to a divorce may agree to waive the right to modification of spousal support under MCL 552.28 if their agreement sets forth that the parties forgo their statutory right to petition the court for modification and agree that the spousal support provision is final, binding, and nonmodifiable, and the agreement is reflected in the judgment of divorce. *Staple v Staple*, 241 Mich App 562, 616 NW2d 219 (2000).

Enforcement. Alimony in gross is enforced like property settlement provisions, rather than as spousal support. *See Van Houten v Van Houten*, 159 Mich App 713, 407 NW2d 69 (1987).

Exhibit 6.1
Chart for Spousal Support Factors

Note: This form can be useful in the preparation for giving oral opinions from the bench. You can use the boxes to check off the factors that favor a particular party and use the additional spaces for notes about relevant facts.

Factors	*[Name of Spouse]*	*[Name of Spouse]*
The past relations and conduct of the parties	☐	☐
The length of the marriage	☐	☐
The abilities of the parties to work	☐	☐
The source and amount of property awarded to the parties	☐	☐
The ages of the parties	☐	☐
The abilities of the parties to pay spousal support	☐	☐
The present situation of the parties	☐	☐
The needs of the parties	☐	☐
The health of the parties	☐	☐
The prior standard of living of the parties and whether either is responsible for the support of others	☐	☐
The contributions of the parties to the joint estate	☐	☐
A party's fault in causing the divorce	☐	☐
The effect of cohabitation on a party's financial status	☐	☐
General principles of equity	☐	☐
Other	☐	☐

See Loutts v Loutts, 298 Mich App 21, 31, 826 NW2d 152 (2012) (quoting *Myland v Myland*, 290 Mich App 691, 695, 804 NW2d 124 (2010), quoting *Olson v Olson*, 256 Mich App 619, 631, 671 NW2d 64 (2003)).

7
Friend of the Court

Summary of Friend of the Court

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Governing statutes. §7.1.

The Friend of the Court (FOC) is governed by the Friend of the Court Act (FOC Act), MCL 552.501 et seq., and the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 et seq. The FOC is also regulated by court rule, MCR 3.201 et seq.

The FOC Bureau, a part of the State Court Administrative Office (SCAO), develops and recommends guidelines for the conduct, operations, and procedures of the FOC. It also oversees the committee charged with updating the Michigan Child Support Formula Manual.

The Office of Child Support (OCS), a part of the Michigan Department of Health and Human Services (DHHS), enters into contracts with courts to have local FOC offices provide child support services in Title IV-D cases and is primarily responsible for maintaining the Michigan Child Support Enforcement System (MiCSES) (the centralized computerized case management system).

The Michigan State Disbursement Unit (MiSDU), a division of the OCS, is the centralized office for the collection and disbursement of child support payments in FOC cases.

Opening of FOC cases. §7.2.

The FOC must maintain a case file for every domestic relations matter in which child custody, parenting time, or child or spousal support are at issue unless the parties opt out of receiving FOC services.

Opting out of FOC cases. §7.3.

The parties may opt out by filing a motion with their initial pleadings or at any time before the commencement of the case. The court must grant the motion filed with the initial pleadings unless

- a party is eligible for Title IV-D services and applies for Title IV-D services;
- a party asks the FOC to open and maintain an FOC case file even if the party may not be eligible for Title IV-D services;
- there is evidence of domestic violence or uneven bargaining positions, and the party has chosen not to apply for Title IV-D services against the party's or child's best interests; or
- a party has not signed SCAO form FOC 101, Advice of Rights Regarding Use of Friend of the Court Services.

A motion filed after commencement of the case must be granted unless

- a party objects;
- a party is required to participate with the Title IV-D program as a requirement for receiving public assistance;
- a party is eligible for Title IV-D services because the party formerly received public assistance, and an arrearage is owed to the governmental entity that provided the assistance;
- a child support arrearage or custody or parenting time order violation has occurred in the last 12 months;
- the FOC case has been reopened within the last 12 months;
- there is evidence of domestic violence or uneven bargaining positions and the party has chosen to close the FOC case against the best interests of the party or the child; or
- the parties have not signed SCAO form FOC 101, Advice of Rights Regarding Use of Friend of the Court Services.

Reopening an FOC case.

An FOC case must be reopened at the request of a party or if a party applies for public assistance.

Role of the FOC. §§7.4–7.5.

The FOC must be served with all pleadings if there is a child under the age of 18 or child or spousal support is requested. The parties must also file with the FOC a verified statement that contains personal and business contacts, employment, income, and health care coverage information.

The FOC must try to resolve objections to ex parte support, custody, or parenting time orders. The FOC may move for a temporary order for support. The party submitting the first temporary order and the party submitting the final proposed judgment awarding child custody, parenting time, or support must serve the FOC with a Judgment Information Form, SCAO form FOC 100.

A service fee of $3.50 a month is assessed on payers of support orders, $2.25 of which is used to reimburse the county for FOC services.

Access to FOC records. §7.6.

A party, third-party custodian, guardian, guardian ad litem, counsel for a minor, lawyer–guardian ad litem, attorney of record, the personal representative of a party's estate, and a judge advocate general officer acting on behalf of an active duty service member must be given access to FOC records other than confidential information. Under certain circumstances, governmental agencies and personnel (including auditors) must be given access to both nonconfidential and confidential records. A person denied access may file a motion for an order of access with the judge assigned to the case, or if none, with the chief judge.

Alternative Dispute Resolution. §§7.7–7.10.

The FOC provides alternative dispute resolution, including domestic relations mediation, on a voluntary basis before and after judgment. This alternative dispute resolution is independent from, but may be used concurrently with, domestic relations arbitration. Alternative dispute resolution providers must undergo training through the Michigan Judicial Institute (MJI) and meet certain qualifications. An FOC employee who provides domestic relations mediation in a case may not perform referee, investigation and recommendation, or enforcement functions in that case.

FOC domestic relations mediation proceedings for custody or parenting time disputes are confidential and may not be used as evidence in court. The FOC Act does not provide for mediation for child support or property division issues. The parties may still informally use the FOC's expertise on such matters.

Custody or parenting time recommendation. §7.11.

The FOC must investigate and make a written report and recommendation to the parties and to the court regarding child custody or parenting time, or both, if ordered to do so by the court. If custody has been established by court order, the court shall order an investigation only if the court first finds that proper cause has been shown or that there has been a change of circumstances. MCL 552.505(1)(g); *see also Bowling v McCarrick*, 318 Mich App 568, 899 NW2d 808 (2016).The recommendation must be based on the Child Custody Act's best interests of the child standards. The court is not bound by the FOC findings and recommendations.

If the child's preferences are considered by the judge or the FOC, the parties must be informed although they may not be told the child's preference. If a guardian is appointed for the child, the guardian must be informed of the child's preference.

Child support recommendation. §§7.12–7.13.

The FOC must investigate and make a written report and recommendation on child support if ordered by the court. Support is calculated using the Michigan Child Support Formula (MCSF) unless the FOC determines that it would be unjust or inappropriate to apply the formula. The FOC may consider shared economic

responsibility, parenting time abatement, health care expenses, and child care expenses in calculating the recommended support. The court is not bound by the FOC recommendation regarding support.

If the investigation shows voluntary reduction of income or voluntary unexercised ability to earn, the FOC must make one recommendation showing the reported income and one recommendation showing the imputed income. The imputed income recommendation must include all factual assumptions, the reasons for the imputation, and all evidence known to the FOC that the party is or is not able to earn the potential income.

Admissibility of recommendations. §7.13.

The rules of evidence expressly do not apply to the court's consideration of the FOC's report and recommendation on child custody, parenting time, or support. MRE 1101(b)(9).

Enforcement of support orders. §7.14, §§7.17–7.23.

If there is an open FOC case, the FOC provides enforcement services on all custody, parenting time, and support orders.

Enforcement by the FOC may be done through income withholding, tax offsets, liens and bonds, license suspensions, consumer reporting, and contempt proceedings.

Role of the Michigan State Disbursement Unit. §7.16.

In all cases with open FOC cases, the MiSDU receives income withholding payments, sends out checks, and issues notices for periodic reviews of child support amounts.

Income withholding. §7.17.

All support orders must provide for income withholding that takes effect immediately unless the court finds after notice and hearing that there is good cause for the order not to take immediate effect or the parties enter into a written agreement for alternative arrangements. If the order is not given immediate effect, the FOC may invoke income withholding if an arrearage occurs. Notice of the arrearage must be given to the parties. The payer may request a hearing before a judge or referee.

The FOC must terminate an order of income withholding when the location of the child and the custodial parent cannot be found for 60 days or more, when the court determines that the support obligation has been terminated, when otherwise determined by the court on a showing of good cause, or when the parties agree. An agreement may not be entered if there is an arrearage or if a prior income withholding order was suspended or terminated due to the payer's failure to pay support.

Employers must provide the FOC with certain information on request, including such things as names, addresses, Social Security numbers, income, employment status, and availability of dependent health care coverage.

Health care coverage. §7.25.

If a child support order is entered, the court must make one or both parents responsible to obtain or maintain health care coverage for the benefit of the parents' children that is available at a reasonable cost. The support order should also declare each parent's responsibility to pay for qualified uninsured medical expenses, which must be apportioned between the parents based on their share of total family income.

All support orders must include provisions that allow someone other than the employee-parent to enroll the child, submit claims, and receive payments under the employee's health care plan. Employers have 20 days to notify the health care provider and take any other action necessary to enroll dependent children in the health care plan if the parent is required by court order to provide health care coverage, the child is eligible for coverage under the plan, and the employee, the FOC, or the other parent applies for coverage for the child.

The FOC may enforce health care coverage through contempt proceedings. It may also send a notice of noncompliance to the parent ordered to provide the coverage, informing the parent that the FOC will notify the employer to withhold the premiums and notify the carrier to enroll the children in dependent coverage. After receiving the notice, the parent has 21 days to either submit proof of the children's enrollment in a health care coverage plan or request a hearing to determine the availability or reasonable cost of the health care coverage.

A party may submit a complaint to the FOC for enforcement of health care expenses. If the FOC office determines that the complaint meets the criteria, it must mail the complaint to the parent who is obligated to pay. That parent has 21 days to make the payment or file an objection. If a written objection is filed, the FOC sets a court hearing before either a judge or a referee to resolve the complaint. If no payment or objection is made, the health care expense stated in the complaint becomes a support arrearage subject to enforcement.

Enforcement of custody or parenting time orders. §§7.27–7.30.

The FOC must initiate enforcement if it receives a written complaint of a custody or parenting time order violation, which means an individual has interfered with a parent's right to interact with the child as established in the custody or parenting time order. If the FOC determines the complaint is warranted, it must apply a makeup parenting time policy, initiate contempt proceedings, file a motion to modify the parenting time order, or schedule mediation or a joint meeting.

If a court finds that a party to a parenting time dispute acted in bad faith, the court may order sanctions of not more than $250 for the first time, not more than $500 for the second time, and not more than $1000 for a third or subsequent time. The sanctions are deposited in the FOC fund.

Makeup parenting time policy. §7.28.

Each circuit must establish a makeup parenting time policy. Under the policy, the makeup parenting time must be of the same type and duration as the time denied, and the makeup parenting time must be taken within one year after the wrongfully denied

parenting time was to have occurred. The wrongfully denied parent must have the right to choose the time of makeup parenting time but must notify the FOC and the other parent in writing not less than one week before the desired time for weekend or weekday time and 28 days in advance for makeup holiday or summer parenting time.

If the FOC determines that there was a parenting time order violation, it must send notice to the parties. The parties are presumed to have agreed to implementation of the policy if no objections are filed within 21 days. If objections are filed, the FOC must use another enforcement mechanism.

Review and modification of orders. §§7.31–7.34.

Parenting time orders. §7.31.

If a party wants to ask for a modification of a parenting time order without assistance of counsel, the FOC provides form motions, responses, orders, and instructions. If there is an unresolved parenting time dispute, the FOC can ask for modification of the parenting time order if it is in the best interests of the child. If the parties do not object to the FOC recommendation for a modification within 21 days of notice, the FOC submits an order with the proposed modification. If objections are filed, a hearing is scheduled before a judge or referee.

Support orders. §§7.32–7.34.

After final judgment in a case where the child is supported by public assistance, the FOC must review the support amount not less than every 36 months. Review is not required for a child receiving Medicaid if there is good cause under the DHHS-established criteria. The FOC can also review support if there are reasonable grounds for modifying the amount or if health care coverage becomes available but is not already ordered. Reasonable grounds include unordered changes in the child's physical custody, increased or decreased needs of the child, change in financial circumstances of the parties, a party's incarceration or release from incarceration of more than one year, or a mistake of fact on which the original order was based.

A party may request FOC review of the support amount once every 36 months, but the FOC is not required to investigate more than one request received from a party each 36 months. The FOC must also review the support order at the direction of the court.

A review must be completed within 180 days. Notice is sent to the parties requesting information for the review. The amount of support is determined using the MCSF. See §7.12. The FOC must petition for modification of the support order if the difference between the existing support and the projected support meets the minimum threshold for modification set forth in the Michigan Child Support Formula Manual. If the court previously determined application of the support formula was unjust or inappropriate, modification must be sought if the FOC determines that the facts and reasons for that determination have changed.

If no party objects to the FOC petition for modification of the support order, an order with the new recommended support is submitted to the court. If a party objects to the

petition, the FOC must either schedule a hearing before a judge or referee or recalculate the support amount if it receives additional information with the objection.

If the FOC review shows that modification is not warranted, the parties may object and a hearing must be scheduled before the court.

If a party moves for modification of the support order, the court may modify the order only if there is a substantial change in circumstances.

Interstate matters. §§7.35–7.37.

The Uniform Interstate Family Support Act (UIFSA) is intended to assist in the interstate enforcement and modification of support orders. A petitioner under UIFSA is entitled to the following services: (1) assistance in obtaining jurisdiction over the respondent, (2) assistance in obtaining a hearing date, (3) assistance in obtaining relevant information regarding the respondent, (4) assistance in sending notices to the respondent and receiving communication from the respondent, and (5) notification if jurisdiction over the respondent cannot be obtained. A party seeking to enforce an order issued in another state must first register the order as provided in the UIFSA.

Interstate income withholding. §7.36.

Support orders from another state entered under the Interstate Income Withholding Act (IIWA) are enforceable in Michigan, as are liens that arise in another state for past-due support. Only the FOC can request income withholding in another state under the IIWA. If the OCS receives a support order from another state for enforcement, it sends the order to the FOC for entry with the court.

Complaints concerning the FOC. §7.38.

Each year, the chief judge must review the performance of the FOC and submit a written evaluation to the FOC Bureau and the FOC.

Parties may make complaints concerning the policies and employees of the FOC through a grievance process involving the FOC and the chief judge. In addition, each county can establish a citizen advisory committee empowered to investigate grievances. Committees have not been established in most circuits.

I. Governing Statutes

§7.1 The FOC is governed by the FOC Act, MCL 552.501 et seq., and the SPTEA, MCL 552.601 et seq. Generally, one FOC office serves each circuit court's family division, although some multi-county FOC offices continue to exist. The employees of each FOC office are employees of the circuit court, and the duties of the office are performed under the direction and supervision of the chief judge. MCL 552.503(4) and (5).

The FOC Act imposes preadjudication duties on the FOC and allows it to provide alternative dispute resolution services in child custody and parenting time disputes. The SPTEA imposes enforcement duties on the FOC for child and spousal support, custody, and parenting time, whether ordered under the Divorce Act, MCL 552.1 et seq., the Family Support Act, MCL 552.451 et seq., the Child Custody Act of 1970, MCL 722.21 et seq., the Status of Minors and Child Support Act, MCL 722.1 et seq., the Paternity Act, MCL 722.711 et seq., the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 et seq., or the UIFSA, MCL 552.2101 et seq.

The FOC is regulated by court rule. *See* MCR 3.201 et seq. Many of the functions performed by the FOC are derived from federal law and regulation and are tied to federal funding for the state.

Model guidelines and forms. MCL 552.519(3) requires the FOC Bureau to develop guidelines for the conduct, operations, and procedures of the FOC offices and their employees. The FOC Bureau, a part of the SCAO, has developed models for custody and parenting time investigations and recommendations as well as enforcement procedures. See *Custody and Parenting Time Investigation Manual, Michigan Custody Guideline,* and *Michigan Parenting Time Guideline,* all of which are available through the FOC Bureau's website. The bureau has created a committee to help the FOC Bureau with developing and updating of the Michigan Child Support Formula Manual. FOC model forms developed by the SCAO are available on ICLE's website as well as the SCAO's website.

Office of Child Support. Title IV-D of the Social Security Act, 42 USC 651 et seq., was intended to minimize federal expenditures for Temporary Assistance to Needy Families, formerly known as Aid to Families with Dependent Children, by requiring states to maintain effective child support enforcement programs. The OCS (within the DHHS) is responsible for overseeing Michigan's child support enforcement program.

The OCS contracts with courts to have local FOC offices provide child support evaluation, enforcement, and modification services. Formerly, FOCs disbursed child support, but federal law now requires centralized collection and disbursing of support.

Michigan Child Support Enforcement System. As part of this centralization process, Michigan maintains a computerized case management system, MiCSES. This connects child support information between Michigan's DHHS, circuit court FOC, and prosecutors' offices.

Michigan State Disbursement Unit. The second part of the centralized process is the MiSDU. Excluding most cases where the parties have opted out of receiving FOC services (see §7.3), the collection of child support payments and the disbursement of those payments to the recipients are conducted by the MiSDU. MCL 400.236. The FOC does not receive or mail child support payments except those allowed under MCR 3.208(C)(2) and (3). See §7.16 for a more complete discussion of the MiSDU.

II. FOC Cases

A. Opening an FOC Case File

§7.2 Unless the parties file a motion to opt out (see §7.3), the FOC is required to open and maintain a case file for every domestic relations matter in which child custody, parenting time, or child or spousal support are at issue. MCL 552.505a(1), .502(m). If there is an open case file, the FOC must administer and enforce the parties' obligations as provided in the FOC Act. MCL 552.505a(1).

B. Opting Out of FOC Services

§7.3 On the filing of a domestic relations matter. The parties to a domestic relations matter may opt out of receiving FOC services by filing a motion with their initial pleadings. MCL 552.505a(2). The court must grant the motion (see SCAO form FOC 102, Order Exempting Case from Friend of the Court Services), unless one or more of the following exists:

> (a) A party to the domestic relations matter is eligible for title IV-D services because of the party's current or past receipt of public assistance.
>
> (b) A party to the domestic relations matter applies for title IV-D services.
>
> (c) A party to the domestic relations matter requests that the office of the friend of the court open and maintain a friend of the court case for the domestic relations matter, even though the party may not be eligible for title IV-D services because the domestic relations matter involves, by way of example and not limitation, only spousal support, child custody, parenting time, or child custody and parenting time.
>
> (d) There exists in the domestic relations matter evidence of domestic violence or uneven bargaining positions and evidence that a party to the domestic relations matter has chosen not to apply for title IV-D services against the best interest of either the party or the party's child.
>
> (e) The parties have not filed with the court a document, signed by each party, that includes a list of the friend of the court services and an acknowledgment that the parties are choosing to do without those services. [See SCAO form FOC 101, Advice of Rights Regarding Use of Friend of the Court Services.]

MCL 552.505a(2).

During pending domestic relations matter. An existing FOC case may be closed at the request of both parties. The court must grant the motion (see SCAO form FOC 102, Order Exempting Case from Friend of the Court Services) unless one or more of the following exists:

(a) A party to the friend of the court case objects.

(b) A party to the friend of the court case is eligible for title IV-D services because the party is receiving public assistance.

(c) A party to the friend of the court case is eligible for title IV-D services because the party received public assistance and an arrearage is owed to the governmental entity that provided the public assistance.

(d) The friend of the court case record shows that, within the previous 12 months, a child support arrearage or custody or parenting time order violation has occurred in the case.

(e) Within the previous 12 months, a party to the friend of the court case has reopened a friend of the court case.

(f) There exists in the friend of the court case evidence of domestic violence or uneven bargaining positions and evidence that a party to the friend of the court case has chosen to close the case against the best interest of either the party or the party's child.

(g) The parties have not filed with the court a document, signed by each party, that includes a list of the friend of the court services and an acknowledgment that the parties are choosing to do without those services. [See SCAO form FOC 101, Advice of Rights Regarding Use of Friend of the Court Services.]

MCL 552.505a(4).

Effect of opting out. If the parties opt out, they have "full responsibility for administration and enforcement of the obligations imposed in the domestic relations matter." MCL 552.505a(3).

If the parties move to opt out either with the initial pleadings or after the start of the case, the FOC must provide both parties with a list of the services that will not be provided by its office. MCL 552.505a(8). See SCAO form FOC 101, Advice of Rights Regarding Use of Friend of the Court Services.

Optional payments through MiSDU. If a party wants to ensure that support payments made after an FOC case is closed are taken into account in any possible future FOC enforcement action, the payments must be made through the MiSDU. In such case, the FOC must maintain an open FOC case until each party provides the MiSDU with the information necessary to process the child support payments. MCL 552.505a(6).

Opening/reopening an FOC case. If a party thereafter applies for FOC services or for public assistance, the FOC must open or reopen a case file. The court must then issue an order that contains the provisions required by the FOC Act and by the SPTEA for an FOC case. MCL 552.505a(7). See §§1.59–1.62. The FOC may refuse to provide services to any party who refuses to sign up for Title IV-D services.

C. Role of the FOC in Open FOC Case

§7.4 Service of pleadings on FOC. If there is an open FOC case, the FOC must be served with a copy of all pleadings and other papers filed in a divorce action if

- a child of the parties or a child born during the marriage is under the age of 18,
- a party is pregnant, or
- child or spousal support is requested.

MCR 3.203(G). The court can order the appearance and participation of the prosecuting attorney or the FOC where there are no minor children if the court determines that the public good so requires. MCL 552.45.

Alternative electronic service of notices and court documents by a court or the FOC is also available by filing an agreement between the parties with the court or the FOC. MCR 2.107(C)(4); *see also* MCR 3.203(A)(3). Pursuant to MCR 2.107(G), "all service of process *except for case initiation* must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]" (emphasis added). This subsection is one of several amendments made to retain provisions of the administrative orders adopted by the court during the COVID-19 pandemic. Alternative electronic service may be by email, text messages, or an alert consisting of an email or text message to log into a secure website to view notices and court papers. MCR 2.107(C)(4)(a).

Verified statement. If an action involves a minor or if child or spousal support is requested, the party seeking relief must serve on the other party and provide to the FOC a verified statement. MCR 3.206(C). "[V]erifying of documents are prescribed in [MCR 1.109(D) and (E)]. MCR 3.206(A)(1). Preprinted court forms are used for this purpose, see SCAO form FOC 23. Verified statements must include the following:

- each party's last known telephone number and post office, residence, and business addresses
- each party's Social Security number and occupation
- the name and address of each party's employer
- each party's estimated weekly gross income
- each party's driver's license number and physical description
- any other names by which the parties are or have been known
- the name, age, birth date, Social Security number, and residence address of each minor involved and each minor child of each party
- the name and address of any other person who may have custody of a minor during the pendency of the action

- any public assistance applied for or received on behalf of a minor, or a statement that it has not been requested or received
- the health care coverage available for each minor child

MCR 3.206(C)(1).

The information in the verified statement form is confidential and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. MCR 3.206(C)(3).

For good cause, the addresses of the parties and of the minor children may be omitted from the copy of the verified statement served on the opposing party. MCR 3.206(C)(3). If a party excludes their address for good cause, that party must either submit to electronic filing and electronic service under MCR 1.109(G), or provide an alternative address where mail can be received. MCR 3.206(C)(3)(a)–(b). If any of the information required to be in the verified statement is omitted, the party seeking relief must explain the reasons for the omission in the form, or in a separate statement, verified under MCR 1.109(D)(3)(b) to be filed with the court by the due date of the form. MCR 3.206(C)(4).

Information and forms provided by the FOC. After the filing of the complaint or other initiating pleading, the FOC must

- inform the parties that, unless one party is required to cooperate with the Title IV-D child support program, they may choose not to have the FOC administer and enforce obligations that may be imposed in the case, MCL 552.505(1)(a);
- inform the parties that, unless one party is required to cooperate with the Title IV-D child support program, they may direct the FOC to close the FOC case, MCL 552.505(1)(b);
- as soon as possible after the filing of the complaint, provide to the parties an informational pamphlet explaining the procedures of the court and the FOC, the duties of the FOC, the rights and responsibilities of the parties, the availability of and procedures used in domestic relations alternative dispute resolution, the availability of human services in the community, the availability of joint custody, and how to file a grievance regarding the FOC (see the *Model Friend of the Court Handbook*, available at the SCAO's website), MCL 552.505(1)(c);
- make available form motions, responses, and orders to be used by a party, without the assistance of legal counsel, in making or responding to a motion for a payment plan under section 5e of the SPTEA, MCL 552.605e, or for the modification of a child support, custody, or parenting time order, including a domicile or residence provision; and provide instructions on preparing and filing each of those forms, making service of process, and scheduling a modification hearing, MCL 552.505(1)(d);
- inform the parties of the availability of domestic relations alternative dispute resolution through the FOC if there is a dispute as to child custody or parenting time, MCL 552.505(1)(e);

- inform the parties of the availability of joint custody if there is a dispute as to child custody, MCL 552.505(1)(f).

Ex parte orders. True copies of ex parte orders must be served on the FOC. MCR 3.207(B)(2). If objections are filed to an ex parte support, custody, or parenting time order, the FOC must try to resolve the dispute; or, if a party wishes to have the matter resolved without the benefit of counsel, the FOC must provide form pleadings with instructions and schedule a court hearing. MCR 3.207(B)(5). See §5.9 for a discussion of ex parte orders.

Temporary orders for support. Either party, the FOC, or the court may move for entry of a temporary order for support pending final disposition of a domestic relations matter. MCL 552.15. See §5.10.

Judgment information form. The party submitting the first temporary order and the party submitting the final proposed judgment awarding child custody, parenting time, or support must serve the FOC, and unless the court orders otherwise, all other parties with a completed copy of the latest SCAO Judgment Information Form (FOC 100) along with a proof of service. MCR 3.211(F)(2). For a more complete discussion of this requirement, see §1.57.

D. Fees

§7.5 Everyone with a support obligation must pay a service fee to the FOC or the MiSDU of $3.50 a month for every month or portion of a month that support or maintenance is required to be paid. MCL 600.2538(1). The service fee is paid as long as the support order is operative. The court may hold a person who fails or refuses to pay the service fee in contempt. MCL 600.2538(2).

E. Access to FOC Records

§7.6 A party, a third-party custodian, a guardian, a guardian ad litem, the counsel for a minor, a lawyer–guardian ad litem, an attorney of record, the personal representative of a party's estate, and a judge advocate general officer acting on behalf of an active duty service member must be given access to nonconfidential FOC records. MCR 3.218(B). Confidential information includes staff notes, confidential information from the DHHS child protective services unit, information in FOC reports to protective services, alternative dispute resolution records, communications from minors, FOC grievances filed by the opposing parties and responses, information prohibited from release by court order, and all information classified as confidential under Title IV-D. MCR 3.218(A)(3). Confidential information also includes privileged information or information provided by a governmental agency subject to the express written condition that it remain confidential. *Id.* However, pursuant to MCR 3.219, if there is a dispute involving custody, visitation, or change of legal residence, and the court uses a community resource to assist its determination, the court must assure that copies of the written findings and recommendations of the resource are provided to the FOC and the parties or their counsel. The information in the verified statement attached to the complaint (required by MCR 3.206(C)(1)) is considered confidential and is

not be released other than to the court, the parties, or the parties' attorneys without a court order. MCR 3.206(C)(3).

Under certain circumstances, governmental agencies and personnel (including auditors) must be given access to both nonconfidential and confidential records. MCR 3.218(C). The citizen advisory committee established under the FOC Act is also entitled to information concerning grievances filed with the FOC, including "confidential information related to a grievance if the court so orders." MCR 3.218(D).

The FOC may refuse access to records it did not create. If that happens, "the requestor may request access from the person or entity that created the record." MCR 3.218(E).

If denied access, a person may file a motion for an order of access with the judge assigned to the case or, if none, to the chief judge. MCR 3.218(F).

A court may make reasonable regulations to protect FOC records and to prevent excessive and unreasonable interference with the discharge of FOC functions by administrative order adopted pursuant to MCR 8.112(B). MCR 3.218(G).

III. Alternative Dispute Resolution

A. In General

§7.7 The FOC provides alternative dispute resolution services, including domestic relations mediation, on a voluntary basis. MCL 552.513. Alternative dispute resolution is provided in varying ways around the state, from trained alternative dispute resolution providers on staff to outside fee-based providers. FOC alternative dispute resolution can be used both before and after judgment. MCR 3.224 is an attempt to provide uniformity to alternative dispute resolution processes in local FOC offices. The chief judges of each circuit court must submit an FOC alternative dispute resolution plan to the SCAO for approval as a local administrative order. MCR 3.224(A). The plan must have a domestic violence screening component. MCL 552.513(1); *see also* MCR 3.224(A)(1).

Referral to FOC alternative dispute resolution. The court may order any contested custody, parenting time, or support issue (pre- or postjudgment) in a domestic relations case to FOC mediation on

- written stipulation of the parties,
- written motion of a party, or
- the court's own initiative.

MCR 3.224(C)(1). The court may also order through its FOC alternative dispute resolution plan that parties with a custody, parenting time, or support issue meet with a person conducting alternative dispute resolution other than FOC mediation, unless otherwise provided by statute or court rule. MCR 3.224(C)(2).

Cases exempt from FOC alternative dispute resolution. Certain cases cannot be referred to FOC alternative dispute resolution without a hearing to determine whether the process is appropriate:

- parties who are or have been subject to a personal protection order or other protective order or
- parties who are involved in a past or present child abuse and neglect proceeding.

MCR 3.224(D)(1). If a protected person requests FOC alternative dispute resolution, the court may order it without a hearing. *Id.*

The FOC may exempt cases with the following circumstances from FOC alternative dispute resolution:

- child abuse or neglect;
- domestic abuse, unless the protected party submits a written consent and the FOC takes precautions to ensure the protected party's and FOC staff's safety;
- inability of one or both parties to negotiate for themselves at the alternative dispute resolution, unless attorneys for both parties are present at the alternative dispute resolution session;
- reason to believe that one or both parties' health or safety would be endangered by alternative dispute resolution; or
- for good cause shown.

MCR 3.224(D)(2). If the FOC exempts a case from alternative dispute resolution, a party may file a motion and schedule a hearing to request FOC alternative dispute resolution. MCR 3.224(D)(4).

Objections to FOC alternative dispute resolution. A party may object to alternative dispute resolution on the basis of one or more factors in MCR 3.224(D)(2). MCR 3.224(E)(1). A party may object to mediation, MCR 3.224(E)(2), the facilitative information-gathering conference, MCR 3.224(E)(3), and joint meetings, MCR 3.224(E)(4).

Qualifications of FOC alternative dispute resolution providers. MCL 552.513 discusses the qualifications for persons who conduct alternative dispute resolution and notes that the SCAO and the chief judge of the circuit court may prescribe other qualifications for persons who conduct alternative dispute resolution. *See* MCL 552.513(4). Under MCL 552.513, domestic relations mediation providers must possess knowledge of the court system, the procedures used in domestic relations matters, and other resources in the community to which the parties to a domestic relations matter can be referred for assistance. *Id.* FOC staff conducting joint meetings must meet the qualifications of MCL 552.642a. MCL 552.513(5). In addition, per MCR 3.224(J), the SCAO must establish training and qualification requirements for people conducting each type of alternative dispute resolution. Only the SCAO will provide a process for waiving training and qualification requirements. MCR 3.224(J)(2). Anyone who meets the requirements for mediation under MCR 3.216 would also meet the requirements under MCR 3.224.

Restrictions on further participation of an FOC domestic relations mediator. An FOC employee may not perform referee, investigation and recommendation, or enforcement functions in any domestic relations matter involving a party to the case in which the employee provided domestic relations mediation. MCL 552.515.

Other forms of alternative dispute resolution. FOC mediation exists independently and concurrently with other forms of alternative dispute resolution, such as domestic relations arbitration (see §1.44). FOC offices may also have facilitative and information-gathering conferences. MCR 3.224(F). If the parties resolve all contested issues, the facilitator must submit a report to the court and may provide a proposed order to the court setting forth the parties' agreements. MCR 3.224(F)(2). If the parties do not resolve all contested issues at the conference or the parties agree to resolve all or some contested issues but fail to sign the proposed order, the facilitator will submit a report to the court and may prepare a recommended order or submit a recommendation to the court for further action. *Id.*

Participation. The court may order a party to meet with an alternative dispute resolution provider. MCL 552.513(1).

Confidentiality. Communications between a party and an FOC domestic relations mediator about the dispute are generally confidential. MCL 553.513(3); *see also* MCL 553.513(2). Facilitative and information-gathering conferences and joint meetings as described in MCR 3.224(F)(2)(c), (H)(2) are not confidential.

B. Child Custody and Parenting Time

§7.8 The FOC must inform the parties of the availability of alternative dispute resolution if the parties dispute custody or parenting time. MCL 552.505(1)(e). Mediation proceedings are confidential and may not be used as evidence in court. MCL 552.513(3); MCR 3.224(G). Other FOC alternative dispute resolution processes are not confidential. If the parties reach agreement after alternative dispute resolution, the FOC or a party's attorney prepares the consent order for entry by the court. See SCAO form FOC 89a. MCL 552.513(2).

Practice Tips

- *Before scheduling or ordering alternative dispute resolution, indicators of hostility or domestic violence should be considered. See MCL 552.513(1) (FOC alternative dispute resolution services must include screening process for domestic violence, personal protection order between parties, child abuse or neglect, and other safety concerns). Indicators can range from information obtained from interviewing the parties to an arrest record for domestic abuse or a personal protection order. The problem can be an abusive parent who is manipulative or an abused parent who is unable to realistically participate. There also can be safety or security problems that need to be addressed. Michigan Judicial Institute, Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings §7.6 (4th ed 2024), has a wealth of information and suggested steps to ensure safety and fairness, including the following suggestions:*

- *Be aware of problem situations and be prepared with alternatives.*
- *Establish a system of screening cases.*
- *Use a consistent, written protocol to identify risk situations and record preferred arrangements.*
- *Coordinate with other county or circuit offices so information is shared on arrests, protection orders, or other relevant proceedings.*
- *Consider security measures for the protection of the parties, children, and staff.*

- *The court may receive FOC documents that contain no party addresses because a Family Violence Indicator has been set. AO 2002-3 requires the FOC to set a Family Violence Indicator where, inter alia, a personal protection order has been entered, there are specific incidents or threats of domestic violence or child abuse, or other risk factors exist. This administrative order implements 42 USC 654(26), which precludes FOC offices from disclosing information concerning the location of a party or a child when there is evidence of domestic violence or child abuse and the disclosure could be harmful to the party or child. The administrative order merely requires restrictions on addresses and is not a substitute for statutory and injunctive measures to provide protection to victims of domestic abuse.*

C. Child Support

§7.9 FOC alternative dispute resolution provisions generally do not apply to support issues, see MCL 552.513, but MCR 3.224(B)(2) defines *FOC alternative dispute resolution* to include support to allow the court to employ the FOC's expertise in resolving disputes. For a discussion of formal court rule mediation available for resolving child support, see §5.21 and §§1.38–1.42. A joint meeting may also be used to settle child support. See §7.29.

D. Property Division

§7.10 The FOC Act does not explicitly provide for alternative dispute resolution of property division issues. *See* MCL 552.513. Nothing in the act, however, prohibits the alternative dispute resolution expertise of the FOC from being used for informal alternative dispute resolution of disputed property issues. Local practice varies. For a discussion of the formal court rule mediation available for resolving property division issues, see §8.6.

IV. Recommendations

A. Child Custody and Parenting Time

§7.11 If the court orders it to do so, the FOC must "investigate all relevant facts, and … make a written report and recommendation to the parties and to the court regarding child custody or parenting time, or both." MCL 552.505(1)(g). "If custody has been established by court order, the court shall order an investigation only if the court first finds that proper cause has been shown or that there has been a change of circumstances." *Id.; see also Bowling v McCarrick*, 318 Mich App 568, 899 NW2d 808 (2016) (trial court improperly referred motion for change of custody immediately to FOC without requiring

moving party, father, to prove by preponderance of evidence that there was proper cause).

The investigation. Investigation practices among the FOC offices also vary. Some conduct independent investigations, others rely on a review of the written responses of the parties to questionnaires, and some have outsourced the investigation function to mental health professionals who provide services to the parties for a fee. MCL 552.505(1)(h). If requested by a party, the investigation may include a meeting with the party. MCL 552.505(1)(g). If the party fails to attend the requested meeting without good cause, the investigation may be completed without a meeting with the party. MCL 552.505(2).

The recommendation. The FOC recommendation must be based on the best interests of the child standards set forth in the Child Custody Act, MCL 722.21–.31. MCL 552.505(1)(g).

Use of the recommendation. Before the court takes any action on a recommendation, the written report and recommendation must be made available to the parties and their attorneys. MCL 552.507a(1). The court is not bound by the FOC findings and recommendations. *See Marshall v Beal*, 158 Mich App 582, 405 NW2d 101 (1986). It is error for the court to decide custody solely on the pleadings and the FOC report. *Stringer v Vincent*, 161 Mich App 429, 411 NW2d 474 (1987).

Child's custody preference. The parties must be informed if the child's custody preference was considered, evaluated, and determined by the judge or the FOC. However, the parties will not be informed of the child's stated preference. MCL 552.507a(2). If a guardian is appointed for a child, the guardian will be informed if a custody preference was considered, evaluated, and determined by the judge or FOC, and, if so, the preference expressed. MCL 552.507a(3).

B. Child Support

§7.12 If ordered by the court, the FOC must make a written report and recommendation as to child support to the parties, their attorneys, and the court. MCL 552.505(1)(h).

The investigation. The investigation may include reports and evaluations by outside persons or agencies if requested by the parties or the court. Documentation of alleged facts must be included, if practicable. MCL 552.505(1)(h).

The report and recommendation. The written report and recommendation are placed in the court file. MCL 552.505(1)(h). They must include the support amount determined and all factual assumptions on which the amount was based. The child support recommendation is to be calculated using the MCSF, unless the FOC determines that application of the formula would be unjust or inappropriate. *Id.* The amount of support is determined by the MCSF. *See* MCL 552.501 et seq. The 2021 MCSF is available on the SCAO website under the Friend of the Court Bureau link.

"When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the *potential* income that parent could

earn, subject to that parent's actual ability." 2021 MCSF 2.01(G) (emphasis added).

In evaluating whether there is an unexercised ability to earn, the FOC should consider the following factors:

1. Prior employment experience and history, including history of earnings and reasons for changes in employment or termination.
2. Educational level, literacy, and any special skills or training.
3. Physical and mental disabilities that may affect the ability to work or the ability to obtain and maintain gainful employment.
4. Availability for work (excluding periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.).
5. Availability of opportunities to work in the local geographical area.
6. The prevailing wage rates and number of hours available in the local geographical area.
7. Diligence exercised in seeking appropriate employment.
8. Evidence that the parent in question is able to earn the imputed income.
9. Personal history, including present marital status, age, health, residence, means of support, criminal record, ability to drive, and access to transportation.
10. The presence of the parties' children in the parent's home and its impact on that parent's earnings.
11. Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification.

2021 MCSF 2.01(G)(2); *see also Ghidotti v Barber*, 459 Mich 189, 586 NW2d 883 (1998).

In calculating the amount of support to recommend, the FOC may consider shared economic responsibility, health care expenses, and child care expenses. See §§5.13–5.14.

Deviation from the child support formula. If the FOC determines application of the formula would be unjust or inappropriate, the report must include

- the support amount determined by application of the MCSF and all factual assumptions on which the support amount is based;
- an alternative support recommendation;
- all factual assumptions on which the alternative recommendation is based, if applicable;
- how the alternative recommendation deviates from the formula;
- the reasons for the alternative support recommendation.

MCL 552.505(1)(h). See §5.16 for a list of circumstances under which a court may deviate from the formula.

Use of the recommendation. The court is not bound by the FOC findings and recommendations. *See Marshall v Beal*, 158 Mich App 582, 405 NW2d 101 (1986). The court may not delegate to the FOC its judicial discretion in setting child support. *Mann v Mann*, 190 Mich App 526, 476 NW2d 439 (1991); *Orlowsky v Orlowsky*, 174 Mich App 637, 436 NW2d 419 (1989) (court erred in deferring completely in modifying child support).

C. Admissibility of Recommendations

§7.13 At a hearing based on an objection to an FOC recommendation, the court may consider the recommendation as evidence to prove a fact relevant to the support calculation if no other evidence is presented concerning that fact and if the parties agree or no objection is made to its use for that purpose. MCL 552.517b(6)(c).

The rules of evidence expressly do not apply to the court's consideration of the FOC's report and recommendation on child custody, parenting time, or support pursuant to MCL 552.505(1)(g) or (h). MRE 1101(b)(9). See §1.67 for further discussion of admissibility issues.

V. Enforcement

A. In General

§7.14 An order awarding support requires the parties to keep the FOC informed of their mailing addresses, whether the parties hold occupational or driver's licenses, their sources of income, Social Security numbers (with some exceptions), and their health care coverage. See §§1.61–1.62.

The FOC provides enforcement services on all custody, parenting time, and support orders entered by the court if there is an open FOC case. The basis for the FOC's enforcement responsibilities lies in the FOC Act, MCL 552.501 et seq., and the SPTEA, MCL 552.601 et seq. If there is no open FOC case, the parties are responsible for administering and enforcing the custody, parenting time, and support orders entered by the court.

B. Child and Spousal Support

1. In General

§7.15 Enforceable support includes both child and spousal support pursuant to a circuit court order. Temporary and permanent orders are equally enforceable, and support is broadly defined to include the payment of money; medical, dental, and other health expenses; child care expenses; and educational expenses. MCL 552.602(ii)(*i*). Enforcement may include income withholding from wages and tax refunds, license suspensions, credit reporting, liens on real and personal property, and contempt proceedings.

2. Role of Michigan State Disbursement Unit

§7.16 In open FOC cases, the MiSDU performs a variety of functions formerly undertaken by the FOC, from receiving income withholding payments to sending out checks. Currently, the clerk of the circuit court provides a copy of all domestic relations case filings to the FOC office. If there is a IV-D application, the FOC opens a computer file in MiCSES. Once there is a support order, payment coupons are available at individual FOC offices for use at the beginning of a case and when special payments need to be made. Soon after a new order is entered, the MiSDU issues monthly payment coupons to the payer if the payer does not have income withholding payments coming in. The coupon books are used by payers who are not subject to income withholding orders, such as the self-employed, and by new payers until income withholding is in place. Payments are sent to the MiSDU office in Lansing.

Even if parties have opted out of FOC services, payments may still be made through the MiSDU if a party wants "to ensure that child support payments made after a friend of the court case is closed will be taken into account in any possible future office of the friend of the court enforcement action." MCL 552.505a(6). If payments are made through the MiSDU, the FOC case remains open until both parties have provided enough information to the MiSDU to process the child support payments through the unit. If a party receives services from the FOC office or applies for public assistance, an FOC case will be opened or reopened. The court is required to issue the necessary orders but may direct the party making the application or the FOC to prepare a written order and submit it for approval. MCL 552.505a(7). For the case to be enforced by the FOC, the court must use a Uniform Support Order, SCAO form FOC 10 or FOC 10b.

3. Income Withholding

§7.17 **Immediate income withholding.** The SPTEA requires all support orders to provide for income withholding. MCL 552.604. The order takes effect immediately unless the court finds, after notice and hearing, that there is good cause for the order not to take immediate effect or the parties enter into a written agreement for alternative arrangements. MCL 552.604(3). A finding of "good cause" and a written agreement require the payer's agreement to keep the FOC informed of the name, address, and telephone number of the payer's current source of income and information about health insurance coverage (company, policy number, and names and birth dates of beneficiaries). MCL 552.604(3)(a) and (b). For a discussion of income withholding, see §5.39.

Ex parte orders. Unless excepted from immediate enforcement or unless objections are filed, an ex parte interim order of income withholding becomes effective 21 days after service on the opposite party. MCL 552.604(4). An ex parte support order also may not be enforced by the FOC until one month after a proof of service has been filed with the FOC. MCL 552.511(1)(a).

Initiating income withholding. If the income withholding provision in a support order was not given immediate effect and an arrearage occurs, only the FOC may invoke income withholding. *Hagen v Hagen*, 150 Mich App 562, 389 NW2d

130 (1986); MCR 3.208(B). The FOC must give notice of an arrearage to the payer and the recipient of support. The FOC may use a similar notice process to administratively adjust an income withholding order. The notice must also state

- that the payer's income is subject to income withholding and the amount to be withheld and/or that the payer's income withholding is being administratively adjusted and the amount of the adjustment;
- that the income withholding will be applied to current and subsequent employers and periods of employment and other sources of income;
- that the order of income withholding is effective and notice to withhold income will be sent to the payer's source of income;
- that the payer may request a hearing within 21 days after the date of the notice, but the payer may contest the withholding only on the grounds that it is not proper because of a mistake of fact concerning the amount of current or overdue support or the identity of the payer, and if the notice includes an administrative adjustment of arrears, that the administrative adjustment will cause an unjust or inappropriate result;
- if the hearing is held before a referee, that the payer has a right to a de novo hearing before the court; and
- if the payer believes that the support amount should be modified due to a change in circumstances, that the payer may file a petition for modification of the support order.

MCL 552.607(1).

If the payer requests a hearing, a hearing is held before a referee or judge. MCL 552.607(3). The FOC may review an objection administratively before a hearing is held before a referee or judge. In that case, either party may object to a proposed review, and a hearing will be held before a referee or judge.

Suspension or termination of income withholding. The FOC must terminate an order of income withholding when the location of the child and the custodial parent cannot be found for 60 days or more, when the court determines the support obligation has been terminated, when otherwise determined by the court on a showing of good cause, or when the parties agree. For the parties' agreement to be effective, it must provide

1. that the order of income withholding will be suspended;
2. an alternative payment arrangement;
3. for an FOC case, that the payer must keep the office apprised of the source of income and any available health care coverage.

MCL 552.619(2).

The agreement may not be entered if there is a support arrearage or if a prior income withholding order was suspended or terminated due to the payer's failure to pay support. MCL 552.619(3). The court may terminate income withholding when a custodial parent moves with the child out of the state without prior court permission. MCL 552.619(5).

Employer's obligations. Any employer or former employer must provide the FOC with information on request. The following information may be requested, by subpoena if necessary:

> (a) Full name and address.
>
> (b) Social security number. The requirement of this subdivision to provide a social security number with the information does not apply if the parent is exempt under federal law from obtaining a social security number or is exempt under federal or state law from disclosure of his or her social security number under these circumstances. The friend of the court shall inform the parent of this possible exemption.
>
> (c) Date of birth.
>
> (d) Amount of wages earned by or other income due the custodial parent or absent parent. Both net and gross income shall be reported, regardless of method of payment.
>
> (e) The following information concerning the person's current and former employment status: whether or not the custodial parent or absent parent is currently employed, laid off, on sick, disability, or other leave of absence, or retired, and the amount of income due from an employment related benefit plan, if any.
>
> (f) Dependent health care coverage available to the custodial parent or absent parent as a benefit of employment.

MCL 552.518(1). Employers must provide the information within 15 days. The circuit court may issue an order requiring the employer to appear and produce records, books, and papers if it fails to comply. MCL 552.518.

Employers may not refuse to hire a person subject to an income withholding order and may not fire someone for having income withholding. MCL 552.623.

4. Tax Offsets

§7.18 The OCS, through MiCSES, initiates tax refund intercept proceedings. Tax offset is permitted by MCL 552.624. For more detailed discussion of tax refund intercepts, see §5.46.

5. Liens and Bonds

§7.19 If an arrearage occurs, the FOC may seek a lien or bond under certain circumstances to secure payment. For a discussion of liens and bonds, see §5.44.

6. Occupational, Driver's, Recreational, and Sporting License Suspensions

§7.20 A payer's occupational, recreational, or sporting licenses or any combination of them may be suspended if the payer has a support arrearage. The arrearage must exceed two months of periodic payments. An order of income withholding must either be not available or unsuccessful in ensuring regular payments. MCL 552.628(1).

A delinquent payer's driver's license may be suspended if

1. the circumstances in MCL 552.628(1) for suspending a payer's occupational, recreational, or sporting are satisfied;
2. the court has determined that the payer has the ability to pay but refuses to make payments; and
3. the FOC has determined that suspending the payer's driver's license is the only way to ensure regular support payments and payments on the arrearage.

MCL 552.628(2). The FOC must notify the payer of the amount of the arrearage, that the payer's licenses may be suspended, and that the order will be entered and sent to the licensing agency unless the payer responds by paying the arrearage or requesting a hearing within 21 days of the mailing of the notice. MCL 552.628(3). If the payer fails to pay the arrearage, request a hearing, or attend a requested hearing, the FOC must send a notice to the Secretary of State to suspend the payer's driver's license as provided in MCL 257.321c. MCL 552.629(4). The court may also issue an order suspending the payer's occupational, recreational, or sporting licenses. MCL 552.629(5).

The FOC is required to send notice of the suspension order to the licensing agency, which must suspend the license within seven business days (or sooner if required by the act that authorizes the licensing agency to suspend the license). After suspension, if a court orders a repayment schedule, the court must enter an order rescinding the suspension that the FOC must forward to the agency within seven days of issuance. MCL 552.630.

See §5.42 for further discussion of license suspensions.

7. Consumer Reporting

§7.21 The FOC Act, MCL 552.512, grants consumer reporting agencies access to information regarding child support arrearages. The MiCSES, operated by the OCS, rather than the FOC, now initiates consumer reporting. The FOC Act requires reporting to qualifying agencies information on all payers with an arrearage equal to two or more months of past-due support, regardless of amount. *See* MCL 552.512(1). There are some restrictions. Information may not be released unless the agency provides satisfactory evidence that it is a consumer reporting agency and that it has sufficient capability to make accurate use of the information in a timely fashion. *Id.* Any errors must be corrected within 14 days of learning that the agency has received incorrect data. MCL 552.512(5).

Written agreement restricting release of information. The parties may file a written agreement with the FOC restricting the release of information until the recipient requests. Before any support information is made available, the payer is entitled to notice. A payer has the right to request a review, and the notice must include the date by which such a review must be requested. MCL 552.512(2). If such a review is requested, the information may not be reported until either (1) the payer fails to provide evidence that the information is incorrect and the time for review has passed or (2) after review, the office determines the correct support information. MCL 552.512(3). No information may be reported if the payer pays the entire past-due amount within 21 days after the notice is sent. MCL

552.512(4). The payer may also request a review if they are denied credit as a result, whether in full or in part, of the information provided by the FOC.

8. Contempt of Court

§7.22 The FOC is exempt from enforcing a child support order when (1) the payee is excused for good cause related to the safety of a payee or child under Title IV, Part D, of the Social Security Act, 42 USC 651 et seq., or (2) the case either closed or is no longer eligible for federal funding because of a party's failure or refusal to take action. MCR 3.208(D).

Either the FOC or the recipient of support may request a finding of contempt. The FOC can move the court to issue an order to show cause why a party should not be found in contempt or schedule a hearing before a judge or a referee for the court to determine whether the noncompliant party should not be held in contempt of court. The FOC may serve a notice of hearing personally, by ordinary mail at the party's last known address, or in another manner permitted by MCR 3.203. MCR 3.208(B)(2). (Under the general court rule, MCR 2.107(B)(1)(b), the notice or order initiating a contempt proceeding when a party disobeys a court order must be personally delivered to the party, unless otherwise ordered. *But see* MCR 2.107(G).) Both parties must keep the FOC apprised of their current addresses. MCL 552.603(7)(a), (8). The contempt hearing may not be held sooner than seven days after the notice is personally served or nine days after the notice is served by mail.

In many circuits, the parties meet with a representative of the FOC before the scheduled court hearing. If satisfactory arrangements are made, an order may be entered and the hearing either dismissed or adjourned. If the FOC or the payee is not satisfied with the payment plan offered, the payer appears before the court for a decision. For more discussion of contempt proceedings, see §5.43.

9. Private Enforcement

§7.23 Private collection companies may contract with FOC offices to provide collection services. Recently, private companies have aggressively promoted their services directly to custodial parents. Private collection agencies retained by custodial parents may also ask the FOC office for information or ask the FOC to take specific action on cases pursuant to a power of attorney. As a result, the SCAO issued *Guidelines for Procedures Regarding Payee Retention of Private Collection Agencies on Friend of the Court Cases*. The policy outlines steps for dealing with private collection agencies and is also designed to protect the rights of payers and payees when private collection agencies are involved.

10. Payment Plans

§7.24 Parents with child support arrearages may request that a court create a repayment plan that would discharge any past-due amounts and the surcharges on those amounts. See §5.36. If the court approves a payment plan pursuant to MCL 552.605e, any arrearage may continue to be enforced as allowed under the SPTEA, the Office of Child Support Act, and the FOC Act, except

that if the payer is complying with the plan, the enforcement shall not continue when the applicable statute permits the exercise of discretion in using the enforcement. MCL 552.605e(9).

C. Health Care Expenses

1. Health Care Coverage

§7.25 For children. If a child support order is entered, the court must require that one or both parents obtain or maintain health care coverage that is accessible to the child and is available to the parent at a reasonable cost. The court must use the Michigan Child Support Formula Guidelines to determine health care coverage that is accessible to the child and available at a reasonable cost. MCL 552.605a(2).

For detailed discussion of the criteria and steps to establish and enforce medical support obligations in child support orders in FOC cases, see SCAO Administrative Memorandum 2011-01, *Medical Policy for Friends of the Court*, available on the SCAO website.

SCAO form FOC 10 "is a qualified medical support order with immediate effect pursuant to 29 USC 1169." The qualified medical support provisions required under federal law may be satisfied by a notice to enroll. *See* MCL 552.626b; SCAO form FOC 10, paragraph 6. Either or both parents may be ordered to provide health coverage if it is available to them at a reasonable cost as a benefit of employment. However, the FOC must not petition both parents to provide health care coverage unless both previously provided coverage or both agree to provide coverage. MCL 552.517(8). Both parties must keep the FOC apprised of the availability of a health plan.

According to the MCSF, the net determinable portion of health insurance premiums paid by the parents for children eligible for support in this case should be apportioned between the parents according to their percentage share of family income. 2021 MCSF 3.05(C).

For spouse. The court may order withholding of monies to cover the cost of the health care premium for a spouse due to the broad definition of *support* as the payment of money that the circuit court orders for a child or a spouse in an interim, temporary, permanent, or modified order or judgment. Support may also include the payment of medical, dental, or other health care expenses. MCL 552.602(ii)(*i*).

Employer's obligations. Employers have specific obligations. The employer has 20 days to notify the health care provider and take any other action necessary to enroll dependent children in the health care plan when all of the following exist:

> (a) The parent is required by a court or administrative order to provide health care coverage for the parent's child.
>
> (b) The child is eligible for coverage under the plan. A child cannot be denied enrollment or coverage on the grounds that the child was born out of wedlock, is not claimed as a dependent on the parent's federal income tax return,

> does not reside with the parent or in the insurer's service area, or is eligible for or receiving medical assistance.
>
> (c) The employee applies for coverage for the child or, if the employee fails to apply, the friend of the court or child's other parent through the friend of the court applies for coverage for the child. Application by the friend of the court shall be in the form of the order for dependent health care coverage or a notice of the order for dependent health care coverage.

MCL 552.626a(1).

As long as the parent is eligible, the employer must take whatever action is necessary to enroll the children in its plan. No enrollment restrictions or "seasons" affect the ability to obtain coverage. The employer must withhold the employee's share of the premium cost. The employer may not disenroll or eliminate health care coverage for the children unless the employer has written evidence that the order is no longer in effect or that the children are enrolled in another plan or unless the employer has eliminated dependent health care coverage for all of its employees. MCL 552.626a.

The FOC must notify the employer of any changes to the order that might affect the health care coverage of the children. If the FOC becomes aware of the availability of health care coverage for a child on public assistance or Medicaid, the DHHS must be notified. MCL 552.626d.

If a parent fails to obtain or maintain health care coverage for the parent's child as ordered by the court, the FOC must petition the court for an order to show cause why the party should not be held in contempt for failure to obtain or maintain dependent health care coverage that is available at a reasonable cost, or send notice of noncompliance to the parent. MCL 552.624(4)(a)–(b). The notice must contain all of the following information:

- that the FOC will notify the parent's employer to deduct premiums for, and to notify the insurer or plan administrator to enroll the child in, dependent health care coverage unless the parent does either of the following within 21 days after mailing of the notice: submits written proof to the FOC of the child's enrollment in a health care coverage plan or requests a hearing to determine the availability or reasonable cost of the health care coverage
- that the order for dependent health care coverage will be applied to current and subsequent employers and periods of employment
- if the order for dependent health care coverage does not specify whether that coverage must be private health care coverage or public health care coverage, that the parent can obtain or maintain private health care coverage or public health care coverage

MCL 552.626(4)(b).

2. Uninsured Health Care Expenses

§7.26 According to 2021 MCSF 3.04, every support order must set a family annual ordinary health care expense amount to cover uninsured costs, premiums, and copays for children. For purposes of setting the support obligation, it

is presumed that a specified dollar amount per child per year ($454 per 2021 MCSF-S 2.02) will be spent on ordinary expenses. Amounts may be added to this presumed amount to compensate for other known or predictable expenses, such as orthodontia or special medical needs. This annual amount is apportioned according to the parents' incomes, and the payer's share is paid as part of the regular support payment. Uninsured health care expenses that the payee incurs beyond the ordinary health care expense amount and any uninsured expenses the payer incurs are extraordinary expenses, which are apportioned between the parents based on the medical percentages set in the support order. Please note that the 2021 MCSF Supplement, with the most current economic data and tables needed to calculate support, is available on the SCAO website under the Friend of the Court Bureau link.

Under MCL 552.511a, a party may submit a complaint to the FOC for enforcement of health care expenses. The complaint (see SCAO form FOC 13a, Complaint for Enforcement of Health Care Expense Payment) must show that both of the following requirements have been met:

- The parent against whom the complaint is directed is obligated to pay the child's uninsured health care expenses, a demand for payment of the uninsured portion was made to that parent within 28 days after the insurer's final payment or denial of coverage (see SCAO form FOC 13, Request for Health Care Expense Payment), and that parent did not pay the uninsured portion within 28 days after the demand.
- The health care expense is equal to or greater than any threshold established by the SCAO.
- The complaint is submitted within one year after the expense was incurred, six months after the insurer's final payment or denial of coverage for the expense, or six months after a parent defaults in paying for the health care expense as required under a written agreement signed by both parents.

MCL 552.511a(1).

If the FOC office determines that the complaint meets the criteria, it must mail the complaint to the parent who is obligated to pay. MCL 552.511a(2). That parent has 21 days to make the payment or file an objection. If a written objection is filed, the FOC sets a court hearing before either a judge or a referee to resolve the complaint. MCL 552.511a. If no payment or objection is made, the health care expense stated in the complaint becomes a support arrearage subject to enforcement. See §§7.14–7.25 and §§5.38–5.52.

D. Child Custody and Parenting Time

1. In General

§7.27 If there is an open FOC case, the FOC must initiate enforcement if it receives a written complaint that states specific facts constituting a custody or parenting time order violation. MCL 552.511b(1). A custody or parenting time violation means "an individual's act or failure to act that interferes with a parent's right to interact with his or her child in the time, place, and manner" estab-

lished in the custody or parenting time order if the individual accused of interfering is subject to the order. MCL 552.602(e). Within 14 days, the FOC must send a copy of the complaint to every party subject to the custody or parenting time order. MCL 552.511b(2). On request, the FOC must assist the parent in preparing the written complaint. MCL 552.511b(1).

If, in the opinion of the FOC, the facts stated in the complaint allege a custody or parenting time violation, under MCL 552.641(1), the FOC must do one or more of the following:

- apply a makeup parenting time policy established under MCL 552.642;
- commence civil contempt proceedings under MCL 552.644, *see also* MCR 3.208(B);
- file a motion with the court under MCL 552.517d for a modification of existing parenting time provisions to ensure parenting time, unless contrary to the best interests of the child (see §7.30 for a discussion of an FOC motion to modify a parenting time order);
- schedule alternative dispute resolution subject to MCL 552.513 (see §§7.7–7.8 for a discussion of FOC alternative dispute resolution of custody and parenting time disputes); or
- schedule a joint meeting subject to MCL 552.642a.

No enforcement action required. Under MCL 552.641(2), the FOC may decline to respond to an alleged custody or parenting time order violation under any of the following circumstances:

- The party submitting the complaint has previously submitted two or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because a complaint was found to be unwarranted, and the party has not paid those costs.
- The alleged custody or parenting time order violation occurred more than 56 days before the complaint was submitted.
- The custody or parenting time order does not include an enforceable provision that is relevant to the custody or parenting time order violation alleged in the complaint.

Sanctions for bad faith acts in parenting time dispute. If the court finds that a party to a parenting time dispute has acted in bad faith, the court must order the party to pay a sanction of not more than $250 for the first time the party is found to have acted in bad faith, not more than $500 for the second time, and not more than $1,000 for the third or a subsequent time. MCL 552.644(6). A sanction ordered under this subsection must be deposited in the FOC fund created in MCL 600.2530. MCL 552.644(6).

2. Makeup Parenting Time Policy

§7.28 Required terms of a makeup parenting time policy. MCL 552.642 requires each circuit to establish a makeup parenting time policy for wrongful denials of parenting time. Under the policy, the makeup parenting time must be of the same type and duration as the time denied, including weekend parenting time for weekend parenting time and holiday parenting time for holiday parenting time. The policy must provide that makeup parenting time be taken within one year after the wrongfully denied parenting time was to have occurred. The wrongfully denied parent must be given the right to choose the time of makeup parenting time but be required to notify the FOC and the other parent in writing not less than one week before the desired makeup parenting time for weekend or weekday parenting time and 28 days in advance for makeup holiday or summer parenting time. MCL 552.642.

Makeup parenting time is normally used as a remedy for violations that are not likely to recur. If the parenting time denial is severe, makeup parenting time is not usually a good remedy. For instance, makeup parenting time is not appropriate when the custodial parent has frequently denied parenting time and is likely to do so in the future. Using makeup parenting time in such a circumstance merely postpones the ultimate resolution of the issue. Makeup parenting time is also not a good remedy for cases involving domestic violence because it does not address the underlying dynamic of power and control.

For detailed discussion of the steps the FOC may take in enforcing custody and parenting time violations, see SCAO Administrative Memorandum 2002-11, *Guidelines for Enforcement of Custody and Parenting Time Violations,* available on the SCAO website.

Implementation of the makeup parenting time policy. If wrongfully denied parenting time is alleged and the FOC determines action is required, it shall send written notice to each party with the following language:

> FAILURE TO RESPOND IN WRITING TO THE OFFICE OF THE FRIEND OF THE COURT WITHIN 21 DAYS AFTER THIS NOTICE WAS SENT SHALL BE CONSIDERED AS AN AGREEMENT THAT PARENTING TIME WAS WRONGFULLY DENIED AND THAT THE MAKEUP PARENTING TIME POLICY ESTABLISHED BY THE COURT WILL BE APPLIED.

MCL 552.642(2).

If no objections are sent to the FOC within the 21-day period, the FOC must notify the parties that the makeup parenting time policy applies. If a party objects, the FOC must use one of the other enforcement options described in MCL 552.641(1).

3. Joint Meeting

§7.29 Another enforcement option for the FOC is a joint meeting under MCL 552.642a and MCR 3.224(H). Only a person who has undergone

the training program through the State FOC Bureau under MCL 552.519(3)(b) may conduct a joint meeting. MCL 552.642a(3).

A joint meeting may take place in person or by telecommunications equipment. MCL 552.642a(2). At the beginning of the meeting, the parties must be advised that the purpose of the meeting is to reach an accommodation and that the person conducting the meeting may recommend an order to the court to resolve the dispute. MCL 552.642a(3). At the conclusion of the joint meeting, the person conducting the meeting shall record the accommodation in writing, if one is reached, and provide a copy to each party, or submit an order to the court stating the person's recommendation for resolving the dispute if an accommodation is not reached by the parties. MCL 552.642a(4). The person conducting the meeting will submit a report within seven days. MCR 3.224(H)(1)(d). A copy of the recommended order must be sent to the parties with a notice that the court may issue the order unless a party objects within 21 days. The notice must state where and when objections must be sent and that the 21-day period may be waived by a party's returning a signed copy of the recommendation. MCL 552.642a(5); MCR 3.224(H)(1)(e). If no objections are sent, the FOC must submit the order to the court for its approval. If a party objects, the FOC must schedule a hearing before the judge or a referee to resolve the dispute. MCL 552.642a(7); MCR 3.224(H)(1)(e).

Joint meetings should be used to resolve minor parenting time complaints that are likely to recur if they are not resolved by an agreement or court order, but which may not merit a contested motion hearing to modify the order. The joint meeting is not useful if the issues are complex and are likely to require a full investigation. Joint meetings should be approached with caution in cases in which domestic violence is suspected or present. Because of the dynamic of power and control that exists in these cases, careful consideration should be given to whether a fair outcome is possible. *See* SCAO Administrative Memorandum 2002-11.

4. Civil Contempt Proceedings

§7.30 If noncourt procedures have been unsuccessful in resolving a parenting time dispute, the FOC may commence a civil contempt proceeding by scheduling a hearing before a judge or a referee for the party to show cause why the alleged violator should not be held in contempt. MCR 3.208(B)(1); *see* MCL 552.644(1); MCR 3.606.

The FOC must send notice to the parties containing "a statement of the allegations upon which the dispute is based" and of the possible sanctions and the right of the parent to request a hearing on a proposed modification of the parenting time order. MCL 552.644(1); *see also Porter v Porter*, 285 Mich App 450, 776 NW2d 377 (2009) (finding that contempt proceedings initiated by party to enforce parenting orders are civil in nature and require only "rudimentary due process").

Possible sanctions. If the court finds that a party violated the parenting time order without good cause, the court may

- require additional terms and conditions in the order;

- after notice and hearing, revise the parenting time order to meet the best interests of the child;
- order makeup parenting time;
- order a fine of not more than $100;
- commit the parent to jail or an alternative to jail with or without work release;
- condition the suspension of occupational, driver's, recreational, or sporting licenses on noncompliance with an order for makeup or ongoing parenting time;
- refer the parent to a community corrections program; or
- place the parent under the supervision of the office for a term fixed by the court with reasonable conditions, including participating in a parenting, drug or alcohol, work program, or other counseling program; seeking employment; continuing compliance with continuing support or parenting time orders; or facilitating makeup parenting time.

MCL 552.644(2). If the court does not order any of these sanctions, it must state its reasons on the record. MCL 552.644(3). See also §§4.12–4.13. The court may also enter a bench warrant for a parent who fails to appear in response to a contempt proceeding. MCL 552.644(5). If a bench warrant is issued under MCL 552.644(5), the court may enter an order permitting law enforcement to "render any vehicle owned by the payer temporarily inoperable, by booting or another similar method, subject to release on deposit of an appropriate bond." MCL 552.644(9).

VI. Review and Modification of Order

A. Parenting Time Orders

§7.31 The FOC must make available form motions, responses, and orders to be used by a party, without the assistance of legal counsel, to make or respond to a motion for the modification of parenting time, including a domicile or residence provision. It must also make available instructions for preparing and filing the forms, service of process, and scheduling a modification hearing. MCL 552.505(1)(d). See SCAO forms FOC 65–FOC 67.

If there is a postjudgment parenting time dispute in an open FOC case, the FOC may file a motion for modification of the parenting time order to ensure parenting time, unless contrary to the best interests of the child. MCL 552.641(1)(c) and .517d(1). Notice of the motion must be sent to each party with the following wording:

> A party may object to the office of the friend of the court's recommendation for modification of the parenting time order. If a party does not object to the recommendation within 21 days after this notice was sent to the party, the office of the friend of the court may submit to the court a parenting time order that incorporates the recommendation.

MCL 552.517d(1)(b).

The FOC must conduct an evaluation commensurate with the scope of the parenting time dispute and submit a written report and recommendation with the motion. MCL 552.517d(1). If no party objects within 21 days of the notice, the FOC may submit an order incorporating the recommendation for the court's adoption. If objections are filed, the motion is scheduled for hearing before a judge or referee. MCL 552.517d(3).

For a detailed discussion of the steps the FOC may take in enforcing custody and parenting time violations, see SCAO Administrative Memorandum 2002-11, *Guidelines for Enforcement of Custody and Parenting Time Violations,* available on the SCAO website.

B. Support Orders

1. Reasons for FOC Review

§7.32 Automatic review. After the final judgment is entered in an FOC case in which a child is being supported in whole or in part by public assistance, the FOC must initiate and conduct a review of the child support amount not less than once every 36 months. MCL 552.517(1)(a). If the child is receiving Medicaid, a review is required every 36 months unless (1) the support order already requires health care coverage and neither parent has requested review or (2) the DHHS notifies the FOC of the existence of good cause not to proceed with a review and neither parent has asked for review. MCL 552.517(1)(c). The DHHS has established the criteria for good-cause exemptions from the review process. In addition, when an initiating state requests a review for a recipient of Title IV-D services in that state, a review must be conducted not less than once every 36 months. MCL 552.517(1)(d).

Change in circumstances. The FOC may initiate reviews on its own if there are reasonable grounds to modify the amount of the support or if health care coverage becomes available but is not ordered already. MCL 552.517(1)(f). Reasonable grounds include

- temporary or permanent changes in physical custody of the child not ordered by the court;
- an increased or decreased need of the child;
- probable access by a parent to dependent health care coverage that is accessible to the child and available at a reasonable cost (coverage is presumed accessible to the child and presumed available at a reasonable cost if it meets guidelines provided in the MCSF);
- the recipient's or payer's changed dependent health care coverage cost from the amount used in the previous child support order;
- the recipient's or payer's changed financial conditions, including the application for or receipt of public assistance, unemployment compensation, or worker's compensation; or
- the original order was based on incorrect facts.

MCL 552.517(1)(f).

Incarcerated payer. The FOC must abate monthly support owed by an incarcerated payer under certain circumstances. MCL 552.517f. Monthly support is abated the date the payer is incarcerated for 180 consecutive days or more and does not have the ability to pay support. It is presumed that the payer does not have the ability to pay the monthly support. MCL 552.517f(1)(a). If the incarcerated payer can pay the monthly support, there is no abatement. MCL 552.517f(1)(b).

If the payer has income or assets, the FOC must initiate a review and modification according to MCL 552.517 and .517b. MCL 552.517f(2). The FOC must send notice of the abatement and its effective date to the payer and the recipient of support giving the parties a 21-day period to object in writing based on mistake of fact or mistake of identity. MCL 552.517f(3). If there is an objection, the FOC must conduct an administrative review to consider only a mistake of fact or mistake of identity. MCL 552.517f(5). If the FOC does not find a mistake of fact or mistake of identity, the FOC must notify the payer and recipient of support that support is abated. *Id.* The payer or recipient of support may object to the review determination by filing a motion in the circuit court that issued the support order within 21 days after the notice of the review determination. *Id.* If no objection is filed, the FOC must adjust the record to reflect the abatement. MCL 552.517f(6). If the FOC does find a mistake of fact or a mistake of identity, the FOC must notify the payer and recipient of support of its determination and take appropriate action. MCL 552.517f(7). Any adjustment made to the record related to abatement cannot exceed the payer's monthly support amount and past due amounts. MCL 552.517f(8).

When the payer is released from incarceration, the monthly amount of support remains abated until the order is modified. MCL 552.517f(9). See MCL 552.517f(9) for the due date of a support payment under a modified order after the payer's release from incarceration. The FOC must implement a review within 30 days of learning of the payer's release from incarceration. MCL 552.517f(10).

MCL 552.517b(9) also provides that the FOC must conduct a more frequent review on presentation by a party of evidence of a substantial change in circumstances as set forth in the child support formula guidelines.

Written request of a parent. Either or both of the parties may request a review by the FOC once every 36 months. The FOC must determine within 14 days after receipt of the review request whether the support order is due for review. The FOC is not required to investigate more than one request received from a party every 36 months. MCL 552.517(1)(b).

Order of the court. The FOC also must review the support order at the direction of the court. MCL 552.517(1)(e).

2. Process for Review and Modification

§7.33 Time for review. If a review is required under MCL 552.517(1), the review must be completed within 180 days. MCL 552.517(3). The process for completing the review is governed by MCL 552.517b.

Notice to the parties. The FOC initiates the review by sending a notice to the parties requesting information sufficient to allow it to review support. The notice must state the date by which the information is due and advise the parties how the review will be conducted. MCL 552.517b(2). The FOC may schedule a joint meeting between the parties to facilitate a resolution of any support issues. MCL 552.517b(5).

Calculation. MCL 552.517b(3) provides that the FOC must calculate the support amount not sooner than 21 days nor later than 120 days after the date the notice is sent. The amount is calculated in accordance with the child support formula. See §7.12. The FOC must determine for each parent the costs for dependent health care coverage and child care and disclose those costs in its recommendation. MCL 552.517(9).

Minimum thresholds for modification. The FOC must petition the court for modification of the support order unless the difference between existing and projected child support is within the minimum threshold for modification, see 2021 MCSF 4.05, or the court previously determined that application of the formula was unjust or inappropriate and the FOC determines that the facts and reasons for that determination have not changed. MCL 552.517(5).

If the FOC determines that no modification of the support order is warranted, either party may file written objections within 21 days after receipt of notice of that determination, and the FOC must schedule a hearing before the court. MCL 552.517(7).

Health care coverage. If a support order lacks provisions for health care coverage, the FOC must petition the court for a modification to require that one or both parents obtain or maintain health care coverage for the benefit of each child who is subject to the support order when health care coverage is accessible to the child and available at a reasonable cost. MCL 552.517(8).

Petition to modify. The petition is made by filing a notice and sending it to the parties and their attorneys stating the amount of support calculated and the proposed effective date of the support amount. The notice also must include the following statement: "Either party may object to the recommended support amount. If no objection is filed within 21 days of the date this notice was mailed, an order will be submitted to the court incorporating the new support amount." MCL 552.517b(3). The notice must also inform the parties how and where to file objections. *Id.*

If no objections are filed, the FOC must prepare an order for approval of the court. MCL 552.517b(4). If objections are filed, the FOC must set the matter for hearing before a judge or referee. Alternatively, the FOC may recalculate the support amount if it receives additional information with the objection. In that case, a new notice and opportunity to object is sent in accordance with MCL 552.517b(3). MCL 552.517b(4).

Use of recommendation. At a hearing on objections, the trier of fact may consider the FOC recommendation as evidence to prove a fact relevant to the support calculation if no other evidence is presented concerning the fact and if the parties

agree or no objection is made to its use for that purpose. MCL 552.517b(6)(c). The absence of an FOC report on a motion for the modification of child support payments is not a jurisdictional defect. *Madden v Madden*, 125 Mich App 54, 336 NW2d 231 (1983), *rev'd on other grounds,* 419 Mich 858, 345 NW2d 202 (1984). See §5.31.

Assisting *pro per* parties. The FOC must assist a party by providing forms for requesting or responding to a modification of child support without the assistance of counsel, including form motions, responses, and orders, along with instructions for preparing, filing, and serving the forms and scheduling a modification hearing. MCL 552.505(1)(d). See SCAO forms FOC 50–FOC 52. If a party files a motion to modify support, the court may only modify a child support order on finding a substantial change in circumstances, including, but not limited to, health care coverage becoming newly available to a party and a change in the support level under MCL 552.517(5)(a). MCL 552.517b(8).

Uniform orders. All child support orders must be prepared on a Uniform Support Order (SCAO form FOC 10 or SCAO form FOC 10a). MCR 3.211(D)(1).

3. Notice of Modification for Income Withholding

§7.34 If the support order has been modified in an FOC case, the FOC must provide notice of the change to the source of income. The modified amount is effective seven days after receipt of the notice. MCL 552.617.

VII. Interstate Matters

A. Uniform Interstate Family Support Act

§7.35 The UIFSA, MCL 552.2101 et seq., is intended to assist in the interstate enforcement and modification of support orders, including recognizing income withholding orders issued in other states. On request, the support enforcement agency, the prosecuting attorney (or another party permitted by statute), or the FOC must provide the following services to a petitioner proceeding under the UIFSA:

- take all steps to enable the appropriate tribunal in this state, another state, or a foreign country to obtain jurisdiction over the respondent
- request a hearing date before an appropriate tribunal
- make a reasonable effort to obtain all relevant information, including information as to the parties' income and property
- send a copy of the notice to the petitioner within five weekdays (excluding legal holidays) after receipt of the notice from an initiating, responding, or registering tribunal
- send a copy of a written communication from the respondent or the respondent's attorney to the petitioner within five weekdays (excluding legal holidays) after receipt of the communication
- notify the petitioner if jurisdiction over the respondent cannot be obtained

MCL 552.2307(1)–(2).

A party seeking to enforce a support order or an income withholding order issued in one state may send the documents necessary to register the order to the support enforcement agency in another state. Before registering the order, the support enforcement agency may use an administrative procedure authorized by that state's law to enforce a support order or an income withholding order, or both. If the payer does not contest administrative enforcement, the order does not need to be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency must register the order. MCL 552.2507.

A support enforcement agency or a party seeking to modify or modify and enforce a support order issued by one state in another state must first register the order as provided under the UIFSA. MCL 552.2601. See §§5.53–5.67 for a discussion of the UIFSA.

B. Interstate Income Withholding Act

§7.36 Support orders entered under the IIWA are enforceable in the same manner as Michigan orders. MCL 552.606. Liens that arise in another state for past-due support are also enforceable in Michigan. MCL 552.625a. The IIWA is rarely used because of the UIFSA's superior provisions.

See §5.68 for a further discussion of the IIWA.

C. FOC Review of Child Support Orders in or from Another State

§7.37 If Michigan is the responding state in an interstate registration and modification case, the FOC must determine whether a support review is necessary using the criteria for in-state cases found at MCL 552.517. If a review is necessary, the FOC must request any needed information and begin the review within 14 days of receiving it.

VIII. Complaints Concerning the FOC

§7.38 Each year the chief judge must review the performance of the FOC and provide notice to the public so that members of the public can submit written comments. The chief judge must also provide a written evaluation to the FOC Bureau and the FOC. The written evaluation must include a summary of public comments, any advisory board report or recommendation, and any written response the court and county board may have to the recommendations of the advisory board. MCL 552.524. The chief judge may remove the FOC from office with or without cause.

Two methods of grievance exist for parties who feel they have not been properly served by the office of the FOC. The FOC Act includes a grievance procedure. The aggrieved party files a written grievance with the office, which investigates as soon as possible. A response must be given within 30 days. If the aggrieved party is not satisfied with the response of the office, the party may file a second written grievance with the chief judge, who must have it investigated and provide a response within 30 days. MCL 552.526. Each office must maintain a

record of all grievances and must transmit the record annually to the FOC Bureau. MCL 552.526. The purpose of the procedure is to provide a forum for airing complaints about office procedure, policies, or employee conduct rather than for disagreements with a specific recommendation. The grievance procedure has been held to bar an action for monetary damages due to violation of statutory duty. *Dryden v Coulon*, 145 Mich App 610, 378 NW2d 767 (1985).

In addition, each county may establish a citizen advisory committee empowered to review and investigate written grievances. The advisory committee exists to advise the court and county commissioners on the FOC's performance. The members must be county residents and must include a noncustodial parent, a custodial parent, a family law attorney, the county sheriff or a designee, the prosecuting attorney or a designee, the director of the DHHS or a designee, a family mental health counselor, and two members of the general public. MCL 552.504. The advisory committee may also advise the chief judge on criteria for the annual performance review. MCL 552.524.

8
Property Division

ICLE wishes to thank Nancy Keppelman and Diana Raimi for their review of and assistance in the preparation of this chapter.

Summary of Property Division

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Is there an antenuptial agreement? §8.4.

If yes, is it enforceable? Validity factors include

- the full disclosure of material facts before contract
- no fraud, duress, mistake, or misrepresentation
- not unconscionable when signed

- facts and circumstances must not have changed since execution so as to make enforcement unfair and unreasonable

For postnuptial agreements, see §8.5.

Identify marital property or the property that generally is divisible. §8.12.

Generally, marital property includes the following:

- Property "accumulated through the joint efforts of the parties during their marriage."
- An increase in value of marital property.
- An increase in value of separate property during the marriage *if the increase reflects active involvement by one of the spouses,* rather than purely passive appreciation.
- Assets earned up to the date of judgment (even if received after judgment).

Identify separate property. §8.13.

Separate property often includes the following:

- premarital property
- passive appreciation of separate property
- gifts given to one party alone
- assets inherited by one party alone

However, when the parties' subsequent acts manifest an intent to treat separate property as joint property, they may be treated as marital. Remember that even separate property may be subject to division if the statutory conditions are met.

Identify the particular assets that are part of the marital estate. §§8.14–8.28.

- Earnings or replacements for earnings—yes, if derived from earnings or efforts of spouses during the marriage, even if received after divorce. §8.14.
- Worker's compensation and Social Security disability awards—generally yes, or at least divisible separate property. §8.15.
- Causes of action and injury awards—generally yes, except for awards for pain and suffering, but those may be divisible separate property. §8.16.
- Stock options and employee stock ownership plans (ESOPs)—yes. §8.17.
- Vacation and sick time—yes, if it can be banked in exchange for cash payment. §8.18.
- Job seniority—no. §8.19.
- Professional degrees—no; but if the degree is the product of a "concerted family effort," the court should grant restitution to the nondegreed spouse for the value of any disproportionate contributions/sacrifices. §8.20.
- Undergraduate degrees—no. §8.21.
- Permanent resident alien status—no. §8.22.

- Dependency tax exemptions—yes, but may be allocated either as property or part of support award. §8.23.
- Retirement benefits accrued during marriage—yes; vested benefits must be included, unvested benefits may be. §8.24, §§8.53–8.77.
- Premarital property—no, unless committed to the marital estate expressly or by implication. However, such property may be awarded under one of the two statutory exceptions. §8.25, §§8.50–8.52.
- Property inherited or gifted during marriage—generally no, unless committed to the marital estate expressly or by implication. However, such property may be awarded under one of the two statutory exceptions. §8.26.
- Appreciation or income traceable to separate property—yes, if parties' direct or indirect efforts during marriage increased the asset's income or value ("active appreciation") but not if increase is due solely to inflation, market increases, etc. ("passive appreciation"). However, passive appreciation may be awarded under one of the two statutory exceptions. §8.27, §§8.50–8.52.
- Property concealed or placed outside the marital estate. §8.28.
    - property held jointly with another—yes
    - property in child's name—yes, depending on circumstances of the case
    - dissipated assets—yes, if dissipation is not fault of other spouse
- Property in the name of a third party—no, unless it was transferred in order to avoid fair distribution or unless that party conspired to conceal it or deprive the innocent spouse of a rightful share. §8.28

Identify and allocate debts. §8.29.

Property settlements must allocate debts as well as assets. Debts assumed by a party are treated as negative assets that reduce the net value of the award.

- Most debts incurred during marriage are presumed to be joint absent special circumstances.
- Some debts may be considered separate, e.g., debts incurred as result of extramarital affairs, criminal restitution debts, and student loans to the extent they paid only for education (and not general family use). These debts are not counted to reduce the value of the property settlement award of the party who assumes them.
- Generally, the party who takes an asset assumes the associated debt. Exception: home equity loans used for purposes unrelated to the home.

The valuation of property. §§8.30–8.40.

- The court may award property or "the value thereof."
- If an asset can be divided "in kind" between the parties, the court need not determine a value, except in the case of a business or other venture where an in-kind split would require a divorcing couple to stay in business together.

- Party seeking to include a property interest in the marital estate bears burden of proving a reasonably ascertainable value.
- Valuation date: the court may (1) value an asset as of the date of separation, trial, judgment, or a more appropriate date such as when the parties separated their finances and support payments started and (2) take into account changes in the value of property that occur during the pendency of the divorce.

Guidelines for dividing marital property. §8.43.

Generally, the division must be equitable, just, and reasonable; fair under the circumstances; and "roughly congruent." This generally means a 50-50 split. Any significant departure from "congruence" must be clearly explained.

The following factors should be considered, but not all apply to a case, and all need not be given equal weight:

- the duration of the marriage
- the parties' contributions to the marital estate
- the parties' ages
- the parties' health
- the parties' life status
- the parties' necessities and circumstances
- the parties' earning abilities
- the parties' past relations and conduct
- general principles of equity

Guidelines for dividing separate property. §§8.49–8.52.

Is there a separate property claim (asset or debt)? If yes:

- The court must make a finding on whether the property is separate or marital.
- The burden of proof is on the party claiming it is separate to show it is separate.
- The burden of proof is on the party seeking to share in the other's separate property to show that it meets one of the statutory grounds to share it.

Separate property is not divisible on divorce unless there are special circumstances. Separate property can be divided if either

1. the marital estate is insufficient for the "suitable support" of the nonowner spouse and children or
2. the nonowner spouse contributed (directly or indirectly) to the acquisition, improvement, or accumulation of the property.

Dividing pension and retirement benefits. §§8.53–8.77.

Every judgment of divorce or separate maintenance must determine all rights the spouses have in any pension, annuity, or retirement benefits; any accumulated contri-

butions in any pension, annuity, or retirement system; and any right or contingent right in and to unvested pension, annuity, or retirement benefits.

If a retirement benefit accrued during the marriage, it *must* be considered part of the marital estate if it is a vested benefit or an accumulated contribution, or it *may* be considered part of the marital estate if it is an unvested or contingent benefit and it appears equitable to include it. Retirement benefits accruing before or even after the marriage *may* be awarded under some circumstances.

Methods of division. §§8.55–8.57.

Defined contribution plans (such as 401(k)s or IRAs) may be divided in kind by splitting the accounts or by offsetting their value against other assets (the offset method). For pensions, there are two methods for dividing benefits: the offset method (which gives the nonemployee spouse nonretirement assets equivalent in value to an interest in the pension) or the deferred division method (which gives the nonemployee spouse an interest in the employee spouse's pension). The better method depends on the facts of the case.

Qualified domestic relations orders (QDROs). §§8.59–8.68.

A state court order that meets the requirements of a QDRO must be honored by retirement plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC). A plan that is subject to a QDRO may be a defined contribution plan or a defined benefit plan.

Amount or percentage to be paid. §8.61.

In a defined contribution plan, the interest assigned to an alternate payee is generally stated as a percentage or dollar amount of the participant's vested account balance as of a particular date (e.g., the date of the divorce). Any dollar amount assigned should specify whether it varies with market changes.

In a defined benefit plan, the alternate payee's interest is commonly defined as a percentage or dollar amount of the participant's vested monthly accrued normal retirement benefit as of a certain date. If the period of marriage is less than the period of participation in the plan, the alternate payee's award may be limited to the benefit that accrued during the marital period. This can be accomplished by determining the actual benefit accrued during the marital period or by using a coverture fraction.

Method of payment. §8.63.

Typical payment forms include (1) a joint and survivor annuity with the participant, (2) a single life annuity over the participant's or alternate payee's lifetime, and (3) a lump-sum distribution (usually only available in defined contribution plans). Defined benefit plans usually state benefits in the form of either a single life annuity over the participant's lifetime or an annuity over the joint lives of the spouses starting at normal retirement age (usually 65 for private employers' plans).

Timing of payment. §8.64.

Generally, the alternate payee may begin receiving an interest under the retirement plan when the employee spouse begins receiving benefits under the plan. Typically this means on retirement or, under some plans, on termination of employment or dis-

ability. However, a QDRO may allow an alternate payee to draw benefits after the participant reaches the earliest retirement age even if the participant has not yet retired. In some plans if the alternate payee begins drawing benefits early, this may decrease the participant's benefits

Survivor benefits and defined benefit plans. §§8.65–8.68.

The Retirement Equity Act of 1984 requires retirement plans to provide for pre- and postretirement survivor benefits (with exceptions for certain employee stock option, profit-sharing, and stock bonus plans). A former spouse, as the alternate payee, may be designated as a surviving spouse under a QDRO for these survivor benefits. Unless otherwise specified, a judgment awarding a retirement benefit includes an award of a "proportionate share" of survivor benefits.

Eligible domestic relations orders (EDROS). §§8.69–8.73.

When the retirement plan covers a state or local government employee, deferred division of the plan benefits is made through an EDRO.

An alternate payee may begin receiving a benefit under an EDRO when the participant begins receiving benefits or at the participant's earliest retirement date. In some plans if the alternate payee begins drawing benefits early, this may decrease the participant's benefits.

The alternate payee may receive the benefit as (1) a single life annuity over the alternate payee's life; (2) a single life annuity over the participant's life; or (3) a joint and survivor annuity over their joint lives, with a survivor annuity payable to the survivor. A lump-sum payment is not a form permitted by the EDRO Act, with the result that an EDRO does not really fit for most defined contribution plans.

Federal retirement plans. §§8.74–8.77.

State courts do not have the authority to dispose of Social Security benefits in divorce proceedings. However, where spouses' Social Security awards are unequal, courts may address this differential through spousal support or awards of other property.

Special rules apply to division of railroad, military, and federal civil services retirement benefits.

Bankruptcy. §§8.78–8.83.

Under the new Bankruptcy Reform Act (for bankruptcies filed on or after October 17, 2005), support and property settlement debts are all nondischargeable. However, support debts receive considerably more favored treatment, so the distinction between support and property debts is still significant. In addition, a debt is not dischargeable if it was incurred by false pretenses, false representations, or fraud.

Filing for bankruptcy triggers an automatic stay that can affect divorce proceedings.

Enforcement. §§8.84–8.92.

Once a divorce has been reduced to judgment, the divorce court has jurisdiction to make any order proper to fully effectuate its judgment. A divorce judgment is enforce-

able as soon as the automatic stay period (time for appeal) expires. Injunctions in final judgments may be enforced immediately.

Enforcement measures may include execution on real or personal property, appointment of a receiver, contempt proceedings, and interest on judgments and awards.

I. General Principles

A. Presumptions

§8.1 In general, property and debts accumulated through the direct or indirect efforts of the parties during the marriage are marital. Neither party is inherently entitled to a greater share of the marital assets or responsible for a greater share of the marital debts. Separate property should be awarded to the owner spouse. These presumptions may be rebutted.

B. Mandatory Judgment Provisions

§8.2 Property division must be discussed in the judgment of divorce in a separate paragraph prefaced by an appropriate heading. MCR 3.211(A). The judgment must address these property interests:

- *Property division.* A division of the real and personal property brought to and acquired during the marriage as well as the parties' debts. MCL 552.19, .23, .101, .103, .401; MCR 3.211(B)(3); *Yeo v Yeo*, 214 Mich App 598, 543 NW2d 62 (1995).
- *Insurance.* A statement confirming that the divorce judgment terminates each spouse's interest as a beneficiary in life insurance on the other spouse's life or providing otherwise. MCL 552.101(2)–(3); MCR 3.211(B)(1).
- *Pension, annuity, and retirement benefits.* A determination of the rights of both spouses in pension, annuity, or retirement benefits. MCL 552.101(3); MCR 3.211(B)(2).

A consent judgment of divorce provision releasing each party's rights to the life insurance proceeds of the other party waives a party's right to a late former spouse's life insurance proceeds. *Sweebe v Sweebe*, 474 Mich 151, 712 NW2d 708 (2006); *MacInnes v MacInnes*, 260 Mich App 280, 677 NW2d 889 (2004). *But see Lett v Henson (In re Estate of Lett)*, 314 Mich App 587, 887 NW2d 807 (2016). In *Lett,* the ex-spouse was entitled to the proceeds of the decedent's postdivorce designation of her as the beneficiary of a life insurance policy on the decedent's life. This was despite the provision in the judgment of divorce waiving the ex-spouse's right to insurance proceeds. The waiver only canceled interests the ex-spouse had in insurance on the decedent's life when the judgment was entered. The fact that the decedent took out the life insurance policy to secure a debt owed under the judgment of divorce and that the debt had been satisfied did not alter the result.

A divorce or an annulment revokes a will provision naming the former spouse as a beneficiary unless the will specifically provides otherwise. MCL 700.2806–.2809.

Practice Tip

- *When one of the parties is unrepresented, the following are some suggested guidelines:*
  - *Be sure the unrepresented party understands what is going on.*
  - *Remind the party that the other spouse's attorney represents only that spouse.*

- *Watch for a misallocation of assets and for fairness issues (e.g., is the unrepresented spouse giving up pension benefits without any alternative source of support?).*
- *Ask if there are any questions about what the unrepresented spouse has signed.*
- *Make a clear record that there was an opportunity to voice concerns and ask for counsel.*
- *Have proposed judgments submitted under the seven-day rule, MCR 2.602(B)(3).*

C. Powers of the Court

§8.3 Broad discretion. A trial court has broad discretion to fashion property settlements that are fair under all the circumstances. The court's disposition will not be overturned unless the appellate court is left with a firm impression that the distribution was inequitable. *Sparks v Sparks*, 440 Mich 141, 151–152, 485 NW2d 893 (1992).

Payment to a trust. The court may order property awards to be paid to a trust for the benefit of a party or the children. MCL 552.20–.21.

Mandatory disclosure. The court may require the disclosure of property interests under oath. MCL 552.22.

Practice Tip

- *Groundwork for settling property disputes can be laid at an early pretrial conference, see §1.29. Some tips for pretrial conferences:*
  - *Have the parties disclose all assets and debts and identify what property is in dispute.*
  - *Establish a presumptive valuation date (which could be a date certain or the trial date), see §8.31.*
  - *Have the parties agree to binding or nonbinding evaluations of one appraiser. If the parties cannot agree on an appraiser, they could submit a list and let the judge pick. In some circuits, it may also be feasible for the court to have a list and let the parties choose. A single appraiser can be a cost saver for the parties, can help the parties more clearly focus on valuation, and can help avoid the perception that a decision was based on credibility or presentation.*
  - *For the valuation of a business, the parties may not be able to agree on an appraiser. In these cases, the court should encourage the attorneys to agree on a common approach or to setting ground rules for the appraisal in advance.*
  - *Let the parties know that judicial resources are reserved for resolving property disputes involving significant legal issues. Tell the parties if the court has a policy for resolving less significant disputes, which typically involve personal property, through other approaches, such as auctions, choosing items by lot, or choosing items in turn.*
  - *Some courts require mediation on all property issues. Note that there is nothing in the Friend of the Court Act indicating that the mediation expertise of*

the Friend of the Court cannot be used for nonstatutory or "informal" mediation of property issues.

- *Keep in mind that accelerated caseflow management guidelines (see AO 2011-3) put the less sophisticated or knowledgeable spouse at a serious disadvantage, requiring greater assistance from the court in enforcing discovery.*

II. Effect of Agreements Concerning Property

A. Antenuptial Agreements

§8.4 An antenuptial (or "prenuptial") agreement is a contract made in contemplation of marriage by parties who wish to vary or relinquish rights that they would have otherwise acquired through marriage. *See* MCL 557.28. These contracts are authorized by statute, at least as they relate to property, if they are in writing and signed after full disclosure. MCL 700.2205. Note, *Allard v Allard (On Remand)*, 318 Mich App 583, 899 NW2d 420 (2017), placed new restrictions on the effectiveness of prenuptial agreements, finding that parties cannot waive the court's equitable power to invade separate property in cases of contribution or need. "Parties to a divorce cannot, through antenuptial agreement, compel a court of equity to order a property settlement that is inequitable" and "to the extent that parties attempt, by contract, to bind the equitable authority granted to a circuit court under MCL 552.23(1)[, MCL 557.28,] and MCL 552.401, any such agreement is necessarily void as [it is] against both statute and the public policy." *Allard,* 318 Mich App at 601.

To be enforceable, an antenuptial agreement must

- be in writing and signed by the parties, MCL 566.132(1)(c);
- be entered into voluntarily; without fraud, mistake, or duress; and with full disclosure; and
- be fair and not unconscionable when executed, and circumstances must not have changed so much by the time of enforcement that its later enforcement would be unconscionable.

Rinvelt v Rinvelt, 190 Mich App 372, 475 NW2d 478 (1991) (adopting *Brooks v Brooks*, 733 P2d 1044 (Alaska 1987)); *see also Allard v Allard*, 308 Mich App 536, 867 NW2d 866 (2014), *rev'd in part and vacated in part,* 499 Mich 932, 878 NW2d 888 (2016). To justify voiding a prenuptial agreement, a change in circumstance must be unforeseeable. *Reed v Reed*, 265 Mich App 131, 693 NW2d 825 (2005); *Allard,* 318 Mich App 583.

To prevail on a duress claim, a party must prove the party was "*illegally* compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Allard,* 308 Mich App at 551 (citation omitted; emphasis added) (executing antenuptial agreement on day of wedding rehearsal dinner not duress because no unlawful coercion occurred). For an agreement or provision to be unconscionable, there must be procedural unconscionability, meaning the "weaker party had no realistic alternative to acceptance of the term," and substantive unconscionability, meaning the term or agreement was substantively unreasonable. *Id.* at 553.

The long length of a marriage is not in itself an unforeseeable change of circumstances that would void an antenuptial agreement. *Reed.* If the clear language of the agreement envisioned that the parties would acquire substantial separate assets during the marriage, the fact that one party's assets grew significantly more than the other party's was thus not a change in circumstances requiring the court to void the agreement. *Id.*

A party's "fault" in a divorce is not an "unforseen change in circumstances" when "the parties implicitly agreed in their antenuptial agreement that fault would not be a factor" in determining spousal support and property division. *Allard,* 308 Mich App at 549. Further, the changes of circumstances that may void an antenuptial agreement "must relate *to the issues addressed in the antenuptial agreement.*" *Id.* (emphasis in original) (domestic violence claim insufficient to void parties' antenuptial agreement because agreement focused on spousal support and asset division).

The marriage itself is sufficient consideration for the contract. *Kennett v McKay*, 336 Mich 28, 57 NW2d 316 (1953).

General contract principles are used to interpret the agreement. *In re Hepinstall's Estate*, 323 Mich 322, 35 NW2d 276 (1948).

B. Postnuptial Agreements

§8.5 Postnuptial agreements have the same general purposes as prenuptial agreements but are made after the parties have entered into marriage. There are two types of postnuptial agreements: those where the parties intend to continue living as spouses and those (often called separation agreements) that are intended to settle the terms of a separation or divorce. Separation agreements are valid and, in fact, are favored as a way to resolve disputes. They are subject to general contract principles and are enforced absent fraud, duress, or mutual mistake. *Lentz v Lentz*, 271 Mich App 465, 721 NW2d 861 (2006). Significantly, separation agreements are not subject to court review for fairness. *Id.* In contrast, postnuptial agreements made between spouses *who intend to remain married* are subject to more constraints. Where they attempt to dictate property disposition in the event of the *death* of a spouse, they must be fair and equitable and they must be supported by sufficient consideration. *Rockwell v Estate of Rockwell*, 24 Mich App 593, 180 NW2d 498 (1970). Where they are intended to dictate terms in the event of a *divorce,* some cases have held that they are unenforceable as against public policy because they are said to promote divorce. *Ransford v Yens*, 374 Mich 110, 132 NW2d 150 (1965); *Wright v Wright*, 279 Mich App 291, 761 NW2d 443 (2008), *rev'd on other grounds,* No 314022 (Mich Ct App Oct 15, 2013) (unpublished) (postnuptial agreement, which was entered into after parties had been married for several years and shortly before husband filed for divorce, was void as against public policy because it contemplated and encouraged separation and divorce of married couple). However, at least when signed as part of a reconciliation, a postnuptial agreement is enforceable where it would not leave one spouse in a highly favored position in a divorce because such an agreement does not encourage divorce. *Hodge v Parks*, 303 Mich App 552, 844 NW2d 189 (2014)

(parties' postnuptial agreement establishing sailboat purchased by husband as marital property was enforceable).

C. Mediation

§8.6 There are two types of mediation applicable to property division issues: the procedures directed by the domestic relations court rule, MCR 3.216, and private mediation. Friend of the Court alternative dispute resolution does not apply to property division issues. *See* MCL 552.513(1). See §§1.37–1.43 for further discussion of mediation.

Court rule mediation. Under MCR 3.216(C)(1), a case may be referred to mediation in one of three ways: (1) on the parties' written stipulation, (2) on a party's written motion, or (3) on the judge's initiative. A party may object to an order of mediation. MCR 3.216(D)(1).

Domestic relations mediation is a "nonbinding process in which a neutral third party facilitates communication between parties to promote settlement." MCR 3.216(A)(2). Under facilitative mediation, the mediator assists the parties in appreciating their risks at trial, exploring settlement options, or communicating better. Facilitative mediators generally do not make recommendations. The mediator may also provide a written recommendation for settlement of any issues that remain unresolved at the conclusion of a mediation proceeding if the parties so request and the mediator agrees to do so. This procedure is known as *evaluative mediation*. MCR 3.216(A)(2), (I). The settlement agreement must be put in writing, signed by the parties and their attorneys, or "acknowledged by the parties on an audio or video recording." MCR 3.216(H)(7). *See Vittiglio v Vittiglio*, 297 Mich App 391, 824 NW2d 591 (2012) (settlement agreement affecting real property that is audio recorded under MCR 3.216(H)(7) satisfies statute of frauds). The agreement must then be acknowledged by the parties at the eventual hearing for the entry of a judgment of divorce. MCR 3.216(H)(7). Mediation is not binding; the parties may accept or reject all or part of the mediator's recommendation.

The court may not read the mediator's report and recommendation or admit it into evidence without the parties' consent. MCR 3.216(I)(6); *see also* MCR 2.412. There are no sanctions for rejecting the report. MCR 3.216(I)(5). The court may not question the mediator about what happened during mediation. The court is entitled to know only the date of completion of mediation, who participated in the mediation, whether a settlement was reached, and whether further alternative dispute resolution proceedings are contemplated. MCR 3.216(H)(6).

Each party must agree in writing to pay one-half of the mediator's fee. Timing of the payment is set out in MCR 3.216(J). The court may order a different allocation or a different arrangement for payment. *Id.*

Private mediation. On the parties' stipulation, private mediation may be used. *See* MCR 3.216(A)(4). Parties who agree to mediation without a court order must ensure that the mediation proceedings do not interfere with the court's scheduling order.

Confidentiality. With limited exceptions, statements and disclosures made during mediation are confidential. *See* MCR 3.216(H)(8) (court rule mediation) and MCL 691.1557 (Community Dispute Resolution Act mediation). Effective September 1, 2011, new MCR 2.412 replaces MCR 3.216(H)(8) and governs confidentiality in mediation. Private mediations are typically also confidential under the terms of the mediation contracts.

D. Arbitration

§8.7 The parties may stipulate to binding arbitration, pursuant to the Domestic Relations Arbitration Act (DRAA), MCL 600.5070 et seq., and MCR 3.602. Among other domestic relations issues, the following may be resolved by arbitration: real and personal property division, costs and fees, enforceability of prenuptial and antenuptial agreements, and allocation of marital debt. MCL 600.5071.

A court may not order a party to participate in arbitration unless the parties have acknowledged, in writing or on the record, that each has been provided with information, in plain language, about arbitration. *See* MCL 600.5072(1).

The DRAA requires a written arbitration agreement setting out the subject of the arbitration and the arbitrator's powers. As long as the parties agree to some document that meets the minimal requirements of MCL 600.5071 and .5072(1)(e), the agreement is sufficient. No written agreement beyond the order for binding arbitration is required (1) if the parties stipulate to entry of the order and the order meets the criteria of MCL 600.5071 and .5072(1)(e), and (2) if the parties satisfy MCL 600.5072(1)(a)–(d) on the record. *See Miller v Miller*, 474 Mich 27, 707 NW2d 341 (2005).

The award and any other orders issued by the arbitrator are enforceable in circuit court in the same manner as if the court had issued them. MCL 600.5079(1).

Where spouses entered into an arbitrated agreement before one spouse died, the agreement could not be confirmed by the court and reduced to judgment. *Tokar v Estate of Tokar*, 258 Mich App 350, 671 NW2d 139 (2003). When one spouse dies before the entry of a judgment of divorce, the court loses jurisdiction over the matter.

For standards for vacating or modifying an arbitration award, see §1.45.

Practice Tip

- *If the parties agree to arbitrate, be sure to make a record of their agreement to the required criteria under the DRAA and state clearly the subjects to be arbitrated. This will avoid later disputes over enforceability of the arbitration award.*

E. Settlement Agreements and Consent Judgments

1. In General

§8.8 Courts are bound by property settlements reached through negotiation and agreement absent fraud, duress, or mutual mistake. *Lett v Henson (In re Estate of Lett)*, 314 Mich App 587, 887 NW2d 807 (2016); *Lentz v Lentz*, 271 Mich App 465, 721 NW2d 861 (2006); *Keyser v Keyser*, 182 Mich App 268,

451 NW2d 587 (1990); *see also Calo v Calo*, 143 Mich App 749, 373 NW2d 207 (1985) (failure to comply with statutory six-month waiting period required setting aside judgment, but not property settlement agreement).

In reviewing a settlement agreement, the court considers only whether it was entered into and signed freely, voluntarily, and understandingly, not whether the settlement is equitable. *Lett; Lentz; Keyser* (signed agreement); *Hilley v Hilley*, 140 Mich App 581, 364 NW2d 750 (1985) (oral statement on record).

The court can approve a negotiated property settlement agreement that contains provisions it has no authority to order. *See, e.g., Massachusetts Indem & Life Ins Co v Thomas*, 206 Mich App 265, 520 NW2d 708 (1994).

If the trial court does not approve the proposed settlement, the parties must have an opportunity to present proofs before judgment can be entered. *Jones v Jones*, 132 Mich App 497, 347 NW2d 756 (1984); *see also Watson v Watson*, 204 Mich App 318, 322, 514 NW2d 533 (1994).

Practice Tip

- *The court's involvement in settlement conferences can play a major role in the parties reaching an enforceable agreement. Some suggestions:*
  - *When parties are having problems reaching an agreement, try to determine what the real issue is. For example, there may be unstated fears about paying expenses and attorney fees that may be keeping a party from reaching an agreement on other issues. It may help to bring this issue out in the open and, if there are liquid assets, agree on a method of payment.*
  - *It may help if the court stresses to the parties that a resolution now can avoid further delay, a potentially lengthy trial, and further costs.*
  - *Schedule a mandatory settlement conference 30 days before the trial date. Be prepared to go from that settlement conference to the courtroom to get proofs and to put the agreement on the record if a settlement is reached. Proofs can be taken subject to the submission of the written judgment and can include proofs needed for granting the divorce.*
  - *When parties are putting a settlement on the record, try to assess whether they are actually agreeing. Is there something impractical or unfeasible in the agreement? Is there a way to implement the agreement to limit further court involvement? While the court does not want to get in the way of parties who agree, clarifying the settlement now may avoid future implementation or enforcement problems.*
  - *Be sure the parties understand what their attorneys are putting on the record. Be sure that both attorneys and both parties state their agreement to the settlement on the record.*

2. Entry of the Judgment

§8.9 A judgment based on a settlement is entered the same as any divorce judgment. The written judgment must accurately reflect the terms stipulated by the parties. *See McBride v Foutch*, 140 Mich App 837, 366 NW2d 58

(1985) (when written clause did not agree with terms stated in open court, court found agreement effective as of date it was put on record at earlier hearing rather than date of entry of judgment).

3. Enforceability of Settlement Agreements

§8.10 Once a property settlement agreement is merged into a judgment of divorce, it becomes the order of the court. *Gramer v Gramer*, 207 Mich App 123, 523 NW2d 861 (1994); *Marshall v Marshall*, 135 Mich App 702, 708 n2, 355 NW2d 661 (1984); *see also Peabody v DiMeglio (In re DiMeglio Estate)*, 306 Mich App 397, 856 NW2d 245 (2014) (discussing *Marshall*). It is enforced by the usual methods for enforcing ordinary judgments, including execution, attachment, and garnishment. *See Landy v Landy*, 131 Mich App 519, 345 NW2d 720 (1984). The agreement must be reduced to writing and signed by the parties or their attorneys or must be made in open court. *Fear v Rogers*, 207 Mich App 642, 526 NW2d 197 (1994) (agreement made during settlement conference in chambers not enforced).

If an agreement is not specifically merged into the judgment of divorce, it is a freestanding contract. *Marshall,* 135 Mich App at 712–713; *see also Grace v Grace*, 253 Mich App 357, 655 NW2d 595 (2002). In *Grace,* the court upheld an ex-wife's judgment of over $3 million against her ex-husband for fraudulently concealing marital assets and failing to disclose the true value of other disclosed assets. Had the action been pursued as an attack on the divorce judgment, the ex-wife's action would have been barred under *Nederlander v Nederlander*, 205 Mich App 123, 517 NW2d 768 (1994). However, because her action was based on fraud in connection with the nonmerged settlement agreement, it was upheld. Moreover, the ex-wife was afforded numerous contract remedies that would not traditionally have been awarded in a divorce case, including a jury trial, judgment interest, and loss of investment opportunities.

In *Peabody,* the court of appeals identified a third enforcement option: an "incorporated but not merged" agreement that is enforceable "both as a court order and as an ordinary contract." 306 Mich App at 406–407. Under *Peabody,* parties no longer have to choose between contract and judgment remedies as *Marshall* had suggested. Although *Peabody's* holding concerned the statute of limitations to enforce a settlement agreement, its broad statements about the meaning of "incorporation" language will undoubtedly affect future rulings on other aspects of enforcement. It remains to be seen how courts will apply *Peabody* in the context of fraud or other contract-based claims. *See* MCR 2.612; *Foreman v Foreman*, 266 Mich App 132, 701 NW2d 167 (2005); *Grace; Nederlander.*

Except for the important distinction between merged and nonmerged settlement agreements, most of the attributes of a settlement agreement apply equally to consent judgments and vice versa. *See Thornton v Thornton*, 277 Mich App 453, 746 NW2d 627 (2007) (consent judgment is contract and will be enforced absent factors such as fraud or duress).

A court can enforce divorce judgment provisions the parties have consented to, even if the court lacks authority to unilaterally order the provisions. *Kasper v*

Metropolitan Life Ins Co, 412 Mich 232, 313 NW2d 904 (1981); *Merchant v Merchant*, 130 Mich App 566, 343 NW2d 620 (1983).

Practice Tip

- *If a party files a separate civil action to enforce a nonmerged agreement, the action may be consolidated with the divorce case and decided by the same judge who would have authority to enforce the judgment. See MCR 2.505.*

4. Setting Aside a Consent Judgment

§8.11 Once a negotiated property settlement has been placed in a judgment of divorce, a court will uphold it in the absence of fraud, duress, or mutual mistake. *Bers v Bers*, 161 Mich App 457, 411 NW2d 732 (1987); *Hall v Hall*, 157 Mich App 239, 403 NW2d 530 (1987).

Fraud. When a party sets in motion an "unconscionable scheme calculated to interfere" with impartial adjudication, a court may set aside a consent judgment for fraud on the court. *Kiefer v Kiefer*, 212 Mich App 176, 183, 536 NW2d 873 (1995). Consent judgments may be subject to attack by bankruptcy trustees if the terms of the settlement fulfill the definition of a fraudulent conveyance or preferential transfer. *Corzin v Fordu (In re Fordu)*, 201 F3d 693 (6th Cir 1999). Consent judgments are also subject to collateral attack under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act, renamed under 2016 PA 552, effective April 10, 2017) if they wrongfully deprive creditors of assets that are otherwise legally attachable. *Estes v Titus*, 481 Mich 573, 751 NW2d 493 (2008).

Duress. Where the claim is that consent was influenced by severe stress, the circumstances must be so severe that the party actually lacked legal capacity to contract or had no reasonable perception of the nature or terms of the agreement. *Van Wagoner v Van Wagoner*, 131 Mich App 204, 346 NW2d 77 (1983). When a party seeks to set aside a consent judgment by arguing that "consent was achieved through duress or coercion practiced by [his or] her attorney," the party must show "that the other party participated in the duress or coercion." *Vittiglio v Vittiglio*, 297 Mich App 391, 401–402, 824 NW2d 591 (2012). Further, the duress must be an illegal act causing "fear of serious injury to their persons, reputations, or fortunes." *Allard v Allard*, 308 Mich App 536, 551, 867 NW2d 866 (2014), *affirmed in part, vacated and reversed in part on other grounds,* 497 Mich 1040, 864 NW2d 143 (2015).

Mistake. The mistake must be mutual; a unilateral mistake is not sufficient. *Hilley v Hilley*, 140 Mich App 581, 364 NW2d 750 (1985). A mutual mistake means the parties had a common intention but a common error produced an inconsistent result. Counsel's ill-advised or careless decisions are not enough. *Id.; Villadsen v Villadsen*, 123 Mich App 472, 477, 333 NW2d 311 (1983). "[A] post-divorce fluctuation in value … falls outside the parameters of mutual mistake." *Kaftan v Kaftan*, 300 Mich App 661, 666, 834 NW2d 657 (2013); *see Smith v Smith*, 292 Mich App 699, 823 NW2d 114 (2011) (court rejected wife's request to modify settlement agreement after value of IRA assigned to her husband under settlement agreement increased substantially); *Marshall v Marshall*, 135 Mich

App 702, 355 NW2d 661 (1984) (court rejected husband's request to modify property settlement agreement after stocks he received in agreement later sold for less than he expected). In *Kaftan,* the husband sought to modify or rescind a settlement agreement's property division that turned out to be very one sided due to the reliance on a real estate valuation that he discovered was wrong because of a business partner's fraud. The court found there was no mutual mistake where the settlement agreement did not expressly state an intent to divide the assets equally, did not provide for any modifications absent fraud by one of the parties, and contained numerous disclaimers and assertions of finality. 300 Mich App at 666–668. *But see Wolf v Mahar*, 308 Mich App 120, 862 NW2d 668 (2014) (mutual mistake about recoupment attaching to plaintiff's pension; parties intended to each receive 50 percent of other's pension, but provision permitting them to draw benefits at party's earliest retirement age provided defendant with substantially higher amount).

III. Distinguishing Marital and Separate Property

A. *Marital Property* Defined

§8.12 Marital property is property "accumulated through the joint efforts of the parties during their marriage." *Leverich v Leverich*, 340 Mich 133, 137, 64 NW2d 567 (1954). It generally includes "any increase in net worth that may have occurred between the beginning and the end of the marriage." *Bone v Bone*, 148 Mich App 834, 838, 385 NW2d 706 (1986). Where an asset is the separate property of one spouse, an increase in its value that occurred during the marriage is marital property if the increase reflects active involvement by one of the spouses, rather than its being purely passive appreciation. *Reeves v Reeves*, 226 Mich App 490, 493, 575 NW2d 1 (1997) (wholly passive appreciation, i.e., increase due solely to inflation, market appreciation, or accumulation of interest, in premarital real estate investment was not marital property).

Generally, marital property includes any assets earned up to the date of judgment (even if received after judgment). *Byington v Byington*, 224 Mich App 103, 114 n4, 568 NW2d 141 (1997) (rejecting language in *Wilson v Wilson*, 179 Mich App 519, 523, 446 NW2d 496 (1989), that held cutoff date could be whenever parties gave some "external public manifestation" of intent to lead separate lives). However, a spouse's lack of contribution to postseparation earnings could result in a decision that the claimant has no right to share in those earnings. *Byington,* 224 Mich App at 112. Employment bonuses not earned during the marriage and based solely on the potential occurrence of future events unrelated to the marriage are not marital property. *Skelly v Skelly*, 286 Mich App 578, 780 NW2d 368 (2009).

Assets accumulated during a period of cohabitation before the marriage are not marital property. *Reeves.*

B. *Separate Property* Defined

§8.13 Separate property is property that is not divisible on divorce absent special circumstances. See §§8.50–8.52 for a discussion of those special circumstances. Separate property typically includes the following:

- Premarital property—property owned or earned before the marriage. *Dart v Dart*, 460 Mich 573, 597 NW2d 82 (1999), *cert denied,* 529 US 1018 (2000) (income from trust established before marriage); *Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997) (real estate equity accumulated before marriage was husband's property even though property was titled in both parties' names); *Booth v Booth*, 194 Mich App 284, 486 NW2d 116 (1992) (premarital accumulations of retirement benefits).
- Passive appreciation of separate property. *Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997).
- Assets gifted to or inherited by one party during the marriage—where the asset was given to one party alone and was not treated as a marital asset. *See Dart* (income from trust established before marriage); *Van Tine v Van Tine*, 348 Mich 189, 82 NW2d 486 (1957) (inheritance); *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995) (gift); *Groteluesche*n *v Groteluesche*n, 113 Mich App 395, 318 NW2d 227 (1982) (inheritance). See also cases regarding property inherited or gifted after filing. *E.g., Polate v Polate*, 331 Mich 652, 50 NW2d 190 (1951); *Davey v Davey*, 106 Mich App 579, 308 NW2d 468 (1981).
- Pain and suffering awards. *See Lee v Lee*, 191 Mich App 73, 477 NW2d 429 (1991) (award for pain and suffering in accident settlement).

IV. Specific Types of Property: Marital or Separate

A. Earnings or Replacements for Earnings

§8.14 Marital property includes the following:

- Property derived from the earnings or efforts of spouses during the marriage. *Byington v Byington*, 224 Mich App 103, 568 NW2d 141 (1997); *Vollmer v Vollmer*, 187 Mich App 688, 468 NW2d 236 (1990).
- Property earned during the marriage even if it is received after the divorce, such as bonuses payable in the future or stock purchased through payroll deduction. *See Byington; Darwish v Darwish*, 100 Mich App 758, 300 NW2d 399 (1980). However, a retention bonus paid by an employer is not marital property even if paid during the marriage if it is subject to divestment because it is not really earned until after the divorce. *Skelly v Skelly*, 286 Mich App 578, 780 NW2d 368 (2009).
- Compensation that is a substitute for cash earnings. *Boyd v Boyd*, 116 Mich App 774, 323 NW2d 553 (1982) (pension benefits); *Evans v Evans*, 98 Mich App 328, 296 NW2d 248 (1980) (disability benefits intended as replacement for income spouse would have earned); *Miller v Miller*, 83 Mich

App 672, 269 NW2d 264 (1978) (vested pension account, funded in part by deductions from one spouse's paycheck).

Note that the Michigan Supreme Court upheld the constitutionality of the Married Women's Property Act, MCL 557.21(1), providing that a married woman's earnings are no longer automatically her husband's property. *North Ottawa Cmty Hosp v Kieft*, 457 Mich 394, 578 NW2d 267 (1998).

B. Worker's Compensation and Social Security Disability Awards

§8.15 Because worker's compensation and Social Security disability awards, when received during a marriage, are for the benefit of the worker and dependents, they are part of the marital estate. *Smith v Smith*, 113 Mich App 148, 317 NW2d 324 (1982); *Evans v Evans*, 98 Mich App 328, 296 NW2d 248 (1980). In *Cunningham v Cunningham*, 289 Mich App 195, 795 NW2d 826 (2010), the court held that worker's compensation benefits received during a marriage are marital property only to the extent that they compensate for wages lost during the marriage. However, the court also noted that a portion of a retroactive award of worker's compensation benefits derived from litigation predating the parties' marriage, which is traceable as defendant's separate property, loses its character as separate property when it is deposited in a joint account and used, along with other marital funds, to purchase the marital home.

While worker's compensation payments are generally exempt from assignment, attachment, or garnishment, the exemption does not apply when a spouse is trying to enforce an award ordered in a judgment of divorce. *Hagen v Hagen*, 202 Mich App 254, 508 NW2d 196 (1993) (lien on worker's compensation benefits was proper).

Even when an award is held to be a party's separate property, it may still be divided under the general principles applicable to the division of separate property. *See Lee v Lee*, 191 Mich App 73, 79, 477 NW2d 429 (1991).

C. Causes of Action and Injury Awards

§8.16 A cause of action may be part of the marital estate. *Postill v Postill*, 116 Mich App 578, 323 NW2d 491 (1982) (cause of action for libel); *Heilman v Heilman*, 95 Mich App 728, 291 NW2d 183 (1980) (cause of action for personal injuries); *see also Colestock v Colestock*, 135 Mich App 393, 354 NW2d 354 (1984) (implied that cause of action in tort is marital asset).

Generally, an award for pain and suffering is separate property, but it may be divisible as separate property on a proper showing of need or contribution. *Lee v Lee*, 191 Mich App 73, 477 NW2d 429 (1991) (accident settlement); *see also Wilson v Wilson*, 179 Mich App 519, 446 NW2d 496 (1989). However, a recipient could be ordered to pay spousal support based on an enhanced estate or income from investing an award for pain and suffering. *Bywater v Bywater*, 128 Mich App 396, 340 NW2d 102 (1983).

Stoudemire v Stoudemire, 248 Mich App 325, 639 NW2d 274 (2001), upheld the trial court's finding that injured plaintiff's pain and suffering award was his

separate property, and that the lost wage portion of his award was marital property to be divided 50-50. The court relied on expert testimony to calculate what portion of the award was truly for economic damages.

D. Stock Options and Stock Plans

§8.17 An employee stock ownership plan (ESOP) is a form of retirement plan; see §8.39 for further information. A stock bonus plan may be a retirement plan or it may be only a form of annual bonus payable before retirement or other termination of employment.

ESOPs are divisible marital assets. *Everett v Everett*, 195 Mich App 50, 489 NW2d 111 (1992); *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 471 NW2d 631 (1991); *see also Applekamp v Applekamp*, 195 Mich App 656, 491 NW2d 644 (1992). Even unvested rights are divisible. *Vollmer v Vollmer*, 187 Mich App 688, 468 NW2d 236 (1990) (unvested stock bonus's annual vesting feature brought it within definition of annuity divisible under MCL 552.18(2)). But this may not be the rule for some benefits that do not follow an annuity-like vesting schedule. *See Skelly v Skelly*, 286 Mich App 578, 780 NW2d 368 (2009) (retention bonus awarded as result of postdivorce continuation of employment, rather than as result of efforts during marriage, was not marital property).

E. Vacation and Sick Time

§8.18 If vacation and sick time can be banked in exchange for a cash payment, these benefits (reduced by taxes that will be payable on their receipt) are divisible assets. *Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990).

F. Job Seniority

§8.19 Job seniority per se is not a marital asset arising out of the nonemployee's contributions to the marriage. *Boyd v Boyd*, 116 Mich App 774, 323 NW2d 553 (1982).

G. Professional Degrees

§8.20 Professional degrees are not considered property and are not divisible on divorce. However, where a degree is the product of a "concerted family effort" and the nondegreed spouse made a disproportionate contribution or sacrifice toward the degree, they are entitled to compensation for those sacrifices. This award is in the nature of restitution. *Postema v Postema*, 189 Mich App 89, 100, 471 NW2d 912 (1991).

Compensable sacrifices may be economic (such as forgone educational or job opportunities) or noneconomic (such as shared stress or the subordination of personal goals). Compensation may be a money award or, when appropriate, a requirement that the nondegreed spouse be supported through an educational program of their own.

This property claim is not for a share in the lifetime investment value of the degree, *Postema,* although any resulting enhanced earning capacity may be relevant

to a spousal support award. *See Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990); *Krause v Krause*, 177 Mich App 184, 441 NW2d 66 (1989).

The following factors are relevant to determining "concerted family effort":

- a mutual plan to sacrifice for a degree and to share in its later benefits
- a mutual decision for one spouse to pursue the degree
- relocation to pursue the degree
- a decline in the couple's standard of living
- the parties' respective financial contributions to the educational and household expenses
- a career setback or postponed education resulting in past or future financial losses to the nondegreed spouse
- the emotional price paid by sharing in the stress of professional school plus carrying the burdens of maintaining a household

See Scott Bassett, *Solving the* Postema *Puzzle,* Mich Fam LJ, Feb 1992, at 6; King & Bossenbrook, *Alternative Methods for Valuing Advanced Degrees in Divorce,* Mich Fam LJ, May 1990, at 21; Gary Rogow, *The Postema Divorce—Valuing Unrewarded Sacrifice, Effort and Contribution,* Mich Fam LJ, Nov 1991, at 26.

H. Undergraduate Degrees

§8.21 Undergraduate degrees are not marital assets subject to division, nor are they necessarily factors in awarding spousal support. *Sullivan v Sullivan*, 175 Mich App 508, 438 NW2d 309 (1989).

I. Permanent Resident Alien Status

§8.22 A spouse's permanent resident alien status, acquired through marriage, is not a marital asset because it can be revoked if based on a fraudulent marriage or for some other violation of immigration law. *Gubin v Lodisev*, 197 Mich App 84, 494 NW2d 782 (1992).

However, in *Gubin,* the husband's fraudulent behavior in marrying the wife (who apparently acted in good faith) simply to get green-card status could be considered in fashioning a property or spousal support award to compensate for losses resulting from his fraud. *Id.*

J. Dependency Tax Exemptions

§8.23 Income tax dependency exemptions may be allocated as part of a property settlement or as part of a support provision. *Fear v Rogers*, 207 Mich App 642, 526 NW2d 197 (1994).

K. Retirement Benefits

§8.24 Pensions, whether vested or unvested and whether accrued before, during, or even after a divorce, are divisible in a property settlement. *Booth*

v Booth, 194 Mich App 284, 486 NW2d 116 (1992); *Chisnell v Chisnell*, 99 Mich App 311, 297 NW2d 909 (1980).

See §§8.53–8.77 for a further discussion of retirement benefits.

L. Premarital Property

§8.25 Property owned by a spouse before the marriage is generally considered to be separate property. *Charlton v Charlton*, 397 Mich 84, 243 NW2d 261 (1976); *Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003); *Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997); *Bone v Bone*, 148 Mich App 834, 837, 385 NW2d 706 (1986). Similarly, passive appreciation in premarital property is considered separate. See §8.27. However, separate property may still be distributed if a party meets one of the two statutory exceptions. See §§8.50–8.52. Note, also, that premarital property may be transformed into marital property if it is commingled or otherwise committed to the marital estate. *McNamara v Horner*, 249 Mich App 177, 642 NW2d 385 (2002), *aff'd on remand,* 255 Mich App 667, 662 NW2d 436 (2003).

M. Property Inherited or Gifted During the Marriage

§8.26 Property inherited by one spouse during the marriage is generally considered separate property not subject to division. *Dart v Dart*, 460 Mich 573, 597 NW2d 82 (1999), *cert denied,* 529 US 1018 (2000); *Van Tine v Van Tine*, 348 Mich 189, 82 NW2d 486 (1957); *Deyo v Deyo*, 474 Mich 952, 707 NW2d 339 (2005); *Lee v Lee*, 191 Mich App 73, 477 NW2d 429 (1991); *Grotelueschen v Grotelueschen*, 113 Mich App 395, 318 NW2d 227 (1982). A gift to one spouse may also retain its separate character. *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995); *Hostetler v Hostetler*, 46 Mich App 724, 208 NW2d 596 (1973). However, if it has been commingled or otherwise intentionally committed to the marital estate, courts may probably consider it to be marital under the reasoning of *McNamara v Horner*, 249 Mich App 177, 642 NW2d 385 (2002), *aff'd on remand,* 255 Mich App 667, 662 NW2d 436 (2003) (dealing with premarital property).

Even if property is found to be separate, courts may hold that it is subject to division under the statutory exceptions. *Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997); *Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992).

Factors relevant to determining if the property is marital or separate property include the following:

- *The length of the marriage.* Generally, the longer the marriage, the more likely the courts will consider the property as part of the marital estate. *See Charlton v Charlton*, 397 Mich 84, 243 NW2d 261 (1976); *Ross v Ross*, 24 Mich App 19, 179 NW2d 703 (1979).
- *How the parties treated the asset.* When parties have commingled the gift or inheritance with marital property, placed it in their joint names, used it for joint purposes, or relied on it for their future needs, that may indicate an

intent to treat it as marital property. *See Polate v Polate*, 331 Mich 652, 50 NW2d 190 (1951); *McNamara; Ross.*

Factors relevant to determining the parties' intent include

- how the gift or inheritance was treated (e.g., deposited in a joint bank account, spent for joint purposes);
- whether the parties jointly paid income tax on its earnings or appreciation; and
- whether the parties let pass other opportunities to accumulate savings because they were relying on the gifted or inherited asset to be there in the future.

The intent of the donor. Gifts have been treated as the donee spouse's separate property. *Brookhouse v Brookhouse*, 286 Mich 151, 281 NW 573 (1938). However, when the facts indicate they were intended for both parties, gifts have been treated as marital property. *Darwish v Darwish*, 100 Mich App 758, 300 NW2d 399 (1980) (unless specifically earmarked for one spouse, wedding gifts are presumed to be owned by both); *see also Heike v Heike*, 198 Mich App 289, 497 NW2d 220 (1993) (money given to parties during marriage was gift to both parties equally).

Factors relevant in determining the donor's intent include

- the payee shown on a gifted check,
- any correspondence accompanying a gift,
- whether gift-tax exclusions were claimed for one donee or two donees, and
- credible testimony of the donor, if available.

N. Appreciation or Income Traceable to Separate Property

§8.27 Active appreciation. When the parties' direct or indirect efforts contribute to an increase in an asset's value, that "active" appreciation may be divisible as marital property. *See Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997); *Byington v Byington*, 224 Mich App 103, 568 NW2d 141 (1997); *see also Bone v Bone*, 148 Mich App 834, 837, 385 NW2d 706 (1986) (any increase in net worth of parties' separate assets was treated as marital property; to do otherwise would deny marriage's existence).

Cases awarding a share of appreciation or income realized from a separate asset have done so by recognizing the other spouse's contributions during the marriage. *McDougal v McDougal*, 451 Mich 80, 545 NW2d 357 (1996) (wife's running of household freed husband to license and enforce his patents; wife entitled to "substantial" award out of income derived from patents); *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995) (wife's efforts as homemaker and child-raiser made it possible for husband to build his family's business; wife awarded share of business's appreciation). In *McNamara v Horner*, 249 Mich App 177, 642 NW2d 385 (2002), *aff'd on remand,* 255 Mich App 667, 662 NW2d 436 (2003), the court held that the entire appreciation of the parties' respective retire-

ment funds and tax deferred annuities were part of the marital estate because the funds had appreciated by additional contributions, not solely by passive investment, and it could not be distinguished which was which. The nonowner spouse must contribute "significantly." *Reeves v Reeves*, 226 Mich App 490, 495, 575 NW2d 1 (1997).

Passive appreciation. When an increase in value is due solely to inflation, market appreciation, or the accumulation of interest, independent of any effort or involvement by either spouse (passive appreciation), the appreciation is treated as separate property. *Reeves.*

O. Property Concealed or Placed Outside the Marital Estate

§8.28 Property held jointly with another. When it appears that property held jointly with a third party is really the spouse's own property, the asset (or its value) will be included in the marital estate. In *Donahue v Donahue*, 134 Mich App 696, 352 NW2d 705 (1984), a joint bank account held by the husband and his father was included in the marital estate; the account had the husband's Social Security number, the interest was paid to him, and he declared it on his income tax return.

Property in a child's name. A Clifford trust set up for the children was not included in the marital estate because the reversionary interest was in the children, not in the parties to the divorce. *Kowalesky v Kowalesky*, 148 Mich App 151, 384 NW2d 112 (1986). In *Watling v Watling*, 127 Mich App 624, 339 NW2d 505 (1983), bank accounts in the children's names were not included in the marital estate because both parties agreed that the accounts had been set up as gifts to lessen the parents' tax burdens. In deciding whether a bank account held in trust for a daughter's education was part of the marital estate, the test in *McLain v McLain*, 108 Mich App 166, 176–177, 310 NW2d 316 (1981), was whether the grantor parent had relinquished dominion over the account and the daughter would have had a cause of action to enforce her rights to the funds.

Where a spouse establishes an irrevocable trust for the benefit of the parties' child to put the assets beyond the reach of the divorce court, the assets are part of the marital estate. *Thames v Thames*, 191 Mich App 299, 477 NW2d 496 (1991).

Dissipated assets. When a party has dissipated marital assets without the fault of the other spouse, the value of the dissipated assets may be included in the marital estate. *Everett v Everett*, 195 Mich App 50, 489 NW2d 111 (1992) (wife should not be penalized for husband's bad investment decision); *Zamfir v Zamfir*, 92 Mich App 170, 284 NW2d 517 (1979) (husband concealed and then spent marital assets while divorce was pending; the dissipated amount was treated as part of marital estate).

Conspiracy to deprive. While a divorce court generally does not act to determine the interests of third parties, when a third party conspires with a spouse to deprive the other spouse of property, the court will act. *See Brown v Brown*, 335 Mich 511, 56 NW2d 367 (1953); *Cassidy v Cassidy*, 318 Mich App 463, 899 NW2d 65 (2017) (money husband had given to new girlfriend was included in marital estate and wife had Uniform Voidable Transactions Act (formerly the

Uniform Fraudulent Transfer Act, renamed under 2016 PA 552, effective April 10, 2017) claim against girlfriend that was incidental to divorce proceeding and not separate cause of action against third party); *Wiand v Wiand*, 178 Mich App 137, 443 NW2d 464 (1989) (asset that husband claimed belonged to his brother was included in marital estate).

Claim of wrongdoing. Where a spouse's attempts to conceal assets are persistent and repeatedly in contempt of court, it is "an abuse of discretion for the trial court not to have taken some sort of punitive action." *Sands v Sands*, 192 Mich App 698, 704, 482 NW2d 203 (1992), *aff'd,* 442 Mich 30, 497 NW2d 493 (1993). On remand, the *Sands* court was to award full ownership to the wife of the assets the husband had attempted to conceal before splitting the remainder of the property equally. 192 Mich App at 704. This is not an automatic rule of forfeiture, but one way of achieving an "equitable division" on the facts of the case. 442 Mich at 36.

Independent action for fraud. In *Nederlander v Nederlander*, 205 Mich App 123, 517 NW2d 768 (1994), the court held that a party who believes the other has committed fraud during the divorce proceedings may seek relief from judgment under MCR 2.612(C)(1)(c), but may not pursue a separate cause of action for fraud. The court of appeals distinguished *Nederlander* in an important ruling in *Grace v Grace*, 253 Mich App 357, 655 NW2d 595 (2002). In *Grace,* the ex-wife's claim was based on a settlement agreement that had been incorporated, but not merged, into the judgment. In a lawsuit based on this free-standing contract, the court upheld a judgment against the husband for fraudulent concealment and nondisclosure. The court held that even though *Nederlander* limits a party's right to set aside a divorce decree for fraud, the same limits do not apply to a claim for fraud based on a separate and independent settlement agreement.

P. Debts

§8.29 Property settlements must allocate debts as well as assets. There is little caselaw on this topic, but there are some general, practical considerations. Regular household debts incurred during the marriage are generally assumed to be joint debts regardless of who signed any particular credit card slip or loan agreement. Marital debts are treated as negative assets in calculating the value of each party's share of the property settlement and allocated according to the same equitable principles that govern property divisions in general.

If a debt was plainly incurred for separate purposes and not for the good of the household, without the express or implied consent of the nondebtor spouse, it may be considered a party's separate debt. Examples are unconsented drug or gambling debts, criminal restitution, or debts incurred to conduct an extramarital affair. In such cases, the debtor spouse receives no credit for assuming the debt in a property settlement.

Student loans are sometimes considered separate if they were incurred solely for one spouse's education. However, if the borrowings went to support the household, they will often be treated as joint.

Parties can be ordered to assume any debts that go along with specific property awarded to them. A divorce court does not have jurisdiction to adjudicate disputed debts owed to a third person or to compel a party to convey property to a third person. *Hoffman v Hoffman*, 125 Mich App 488, 490, 336 NW2d 34 (1983). Thus, although a court may allocate debts (even disputed debts) between the parties, it may not compel one of them to pay the debt to a third party.

The Michigan Supreme Court upheld the Married Women's Property Act, MCL 557.21(1) (providing that a married woman's earnings are no longer automatically her husband's property), and abrogated the common-law necessaries doctrine, with the result now that neither a husband nor a wife is liable, absent express agreement, for necessaries supplied to the other. *North Ottawa Cmty Hosp v Kieft*, 457 Mich 394, 578 NW2d 267 (1998) (wife not automatically liable for husband's hospital bills).

If a party assumes a debt that carries onerous payments, this may be a consideration in awarding or reducing spousal support.

Tax debts. Generally if parties shared in the income, they should share in the tax on that income. A charge that the other spouse is responsible for the liability usually loses. However, an "innocent spouse" can be relieved of liability under certain circumstances. *See* 26 USC 6015(b); *Greer v Commissioner of Internal Revenue*, 595 F3d 338 (6th Cir 2010), adopting the test of *Price v Commissioner*, 887 F2d 959, 965 (9th Cir 1989).

Home equity loans. If a home equity loan is used for purposes unrelated to the real estate (e.g., consolidation of other debts, major purchases, or other family needs), it may not be equitable for the spouse who is awarded the marital home to also be assigned the entire mortgage payment.

Practice Tip

- *Note that awarding a joint debt to one spouse does not relieve the other spouse of liability vis-à-vis the creditor. In allocating debt, try to assign debts to the party whose name is on the debt; avoid allocating debt to one party where the other's credit rating will suffer if the debt is not paid. Remember that in addition to affecting the value of property awards, debts have cash-flow implications. When making a support award, consider any payment obligations that a spouse will have as the result of assuming a debt. Assumption of joint debt may be a factor justifying deviation from the child support formula.*

V. Valuation

A. In General

§8.30 The court may award property or "the value thereof." MCL 552.19. The party seeking to include a property interest in the marital estate bears the burden of proving a reasonably ascertainable value. *Wiand v Wiand*, 178 Mich App 137, 443 NW2d 464 (1989).

If the value of property is in dispute, the court is obligated to assign a value to the property and may not simply leave the parties to settle the value between themselves after the judgment and findings are entered. *Olson v Olson*, 256 Mich

App 619, 671 NW2d 64, *leave denied,* 469 Mich 912, 670 NW2d 219 (2003). In *Olson,* the trial court improperly awarded the wife one-half of the stock of a closely held corporation of which the husband was the majority shareholder rather than placing a value on the corporation and awarding the wife one-half of its value. *Id.*

The trial court did not err in setting the value of a house at zero where the house was titled in the names of the divorcing couple but the husband's brother and sister-in-law lived in the house and had made all mortgage payments. *Gates v Gates*, 256 Mich App 420, 664 NW2d 231 (2003).

B. Date of Valuation

1. The Court's Discretion

§8.31 The court may value an asset as of the date of trial, the date of judgment, or a more appropriate date. *Byington v Byington*, 224 Mich App 103, 114 n4, 568 NW2d 141 (1997). *See Applekamp v Applekamp*, 195 Mich App 656, 491 NW2d 644 (1992) (ESOP valued when option was exercised, several years after divorce); *Thompson v Thompson*, 189 Mich App 197, 472 NW2d 51 (1991) (value of pension as of date of filing; trial court specifically found that objects of matrimony had been irreconcilably destroyed by that date (note that *Byington* calls this reasoning into question although the holding may still be sound)); *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 471 NW2d 631 (1991) (court used date of only statement presented, which was one year after separation and several months after complaint was filed).

2. Scheduling the Valuation Date

§8.32 The court in *Byington v Byington*, 224 Mich App 103, 568 NW2d 141 (1997), suggested that "to forestall efforts by any party to use time for economic gamesmanship or leverage," courts should schedule firm valuation and trial dates early in a case, pursuant to MCR 2.401(B)(1)(b) and 3.210(A)(2), (3), and hold to that valuation date even if the trial date is postponed. *Byington,* 224 Mich App at 114 n4.

3. Changes in Value While the Case Is Pending

§8.33 A court may take into account changes in the value of property that occur during the pendency of the divorce. *Schamber v Schamber*, 41 Mich App 589, 593, 200 NW2d 454 (1972). However, it need not do so when an alleged decline in value was due to one party's unilateral bad investment decisions. *Everett v Everett*, 195 Mich App 50, 489 NW2d 111 (1992); *see also Dougherty v Dougherty*, 48 Mich App 154, 161, 210 NW2d 151 (1973) (trial court placed onus of "business's deteriorating financial condition" on defendant, who was operating business by himself pending divorce).

A trial court is not required to take updated testimony on the value of a home, despite a long delay between trial and rendering an opinion, where the party seeking to update the value has contributed to the delay. *Curylo v Curylo*, 104 Mich

App 340, 351, 304 NW2d 575 (1981) (14-month delay between trial and opinion).

Practice Tip

- *Put counsel on notice if the court expects to use values as of the date of trial, or the date of separation, or some other date, so that all parties are prepared to provide consistent information to the court.*

C. Methods of Establishing Value

§8.34 Divisible assets. If an asset can be divided between the parties, the court need not determine a value. *Maake v Maake*, 200 Mich App 184, 503 NW2d 664 (1993) (court recommended that, on remand, trial court consider adopting parties' preference to split assets equally, avoiding valuation issue). However, a court may not force divorcing parties to continue as coshareholders of a closely held corporation by refusing to value the business and awarding stock to each. *Olson v Olson*, 256 Mich App 619, 671 NW2d 64, *leave denied,* 469 Mich 912, 670 NW2d 219 (2003) (where value of stock in closely held corporation was in dispute, trial court was obligated to assign value to stock rather than leaving valuation to parties to settle after judgment was entered). As the Michigan Supreme Court observed in *McDougal v McDougal*, 451 Mich 80, 91 n9, 545 NW2d 357 (1996), "it would be a rare divorcing couple who would benefit from a judgment that requires them to maintain an ongoing business relationship."

Use of expert testimony. The court may base its findings of value on expert testimony. *Young v Young*, 354 Mich 254, 92 NW2d 328 (1958); *Czernecki v Czernecki*, 325 Mich 634, 39 NW2d 208 (1949); *Ferguson v Ferguson*, 147 Mich 673, 111 NW 175 (1907). However, expert testimony is not required. *Lee v Lee*, 191 Mich App 73, 76, 477 NW2d 429 (1991) (error to refuse to accept lay testimony on state equalized value of parties' home and to threaten to sell house unless there was expert testimony or stipulation as to value).

Parties' testimony and stipulations. It is not error to set the value based on the parties' testimony. *Sullivan v Sullivan*, 175 Mich App 508, 438 NW2d 309 (1989). The parties' stipulation as to value is a sufficient basis for a court's finding. *Beckett v Beckett*, 186 Mich App 151, 463 NW2d 211 (1990).

Judicial notice. A court may take judicial notice of matters necessary to permit the calculation of values. *See Gibbons v Gibbons*, 105 Mich App 400, 306 NW2d 528 (1981) (judicial notice of mortality tables in valuation of pension).

Rejecting the parties' evidence. When parties present competing evidence of value, the court may reject the testimony of both parties' experts and make its own findings. *Pelton v Pelton*, 167 Mich App 22, 421 NW2d 560 (1988) (trial court set its own value of closely held corporation at a figure somewhere between values of parties' experts); *accord Jansen v Jansen*, 205 Mich App 169, 517 NW2d 275 (1994). Similarly, in *Rickel v Rickel*, 177 Mich App 647, 442 NW2d 735 (1989), the trial court did not err by valuing plaintiff's law practice at a price within the range testified to by the expert witnesses.

Insufficient testimony. If the court finds that it does not have sufficient testimony on which to base a finding of value, it may appoint its own disinterested appraiser. *Steckley v Steckley*, 185 Mich App 19, 23, 460 NW2d 255 (1990); *Sullivan. Compare Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996), where the court stated that if a party presents no evidence to prove the reasonably ascertainable value of a pension, it should not be considered an asset subject to distribution.

Value and best use. Value is a factual issue to be based on the best reasonable use of the property. *Czernecki* (court valued land on its development potential—its highest and best use—rejecting argument that a farm must be valued as a farm).

D. Valuing Specific Types of Property

1. Closely Held Business Interests

§8.35 Valuing a closely held business is a difficult task. *Pelton v Pelton*, 167 Mich App 22, 421 NW2d 560 (1988) (valuation of close corporation); *see also Maake v Maake*, 200 Mich App 184, 503 NW2d 664 (1993) (error to value partnerships on basis of amount invested rather than current value). While both parties may present appraisals, the value assigned is up to the court.

Much of present-day valuation theory has evolved from Rev Rul 59-60, which outlines and reviews the general approach to be used in valuing the stock of closely held corporations for estate and gift tax purposes. The ruling refers to the following factors, which might not be exhaustive but are necessary considerations at a minimum:

> (a) The nature of the business and the history of the enterprise from its inception.
>
> (b) The economic outlook in general and the condition and outlook of the specific industry in particular.
>
> (c) The book value of the stock and the financial condition of the business.
>
> (d) The earning capacity of the company.
>
> (e) The dividend-paying capacity.
>
> (f) Whether or not the enterprise has goodwill or other intangible value.
>
> (g) Sales of the stock and the size of the block of stock to be valued.
>
> (h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

Id.

The leading Michigan case on the valuation of closely held businesses held that courts may use Rev Rul 59-60 if they find it helpful, but they are not required to use that ruling or any other one specific method. *Kowalesky v Kowalesky*, 148 Mich App 151, 156 n1, 384 NW2d 112 (1986). IRS guidelines for valuing closely held businesses list the same factors as Rev Rul 59-60 and add, helpfully, "[o]ther relevant information." IRS Business Valuation guidelines, Internal Revenue Manual #394412 (July 2006).

Unless there is evidence to the contrary, a business should be valued as an ongoing business—as if it were going to continue in the hands of its present owner. This implicitly rejects an appraisal's discount for lack of marketability as well as discounts for lack of continuity of management or loss of goodwill. *See Kowalesky,* 148 Mich App at 156 n1. In *Kowalesky,* the court rejected applying a discount that would have applied at a distress sale to the goodwill of the husband's dental practice. Since it appeared that the business was not going to be sold, the valuation was the value to the husband-dentist as a going concern. *Id.* at 157. The case was also remanded because the trial court had not included accounts receivable in the valuation and had improperly considered the husband's payment of temporary support during the pendency of the divorce, a factor irrelevant to valuing the dental practice. *Id.* at 158.

While the trial court has broad discretion in valuations, the court of appeals has scrutinized findings regarding a closely held business and remanded upon finding significant errors in findings on such factors as the length of time the business had existed, its income, and the owner's compensation. *See Maake.*

When valuing a business based on its future income stream, courts should be alert to the potential of a double dip resulting from awarding part of the same future income stream both as property and as support. *See Loutts v Loutts*, 309 Mich App 203, 871 NW2d 298 (2015).

2. Professional Practices

§8.36 A professional practice should be valued at its in-place or going-concern value. This assumes that the owner will continue to run the business unless evidence indicating an intention to discontinue the business. *Kowalesky v Kowalesky*, 148 Mich App 151, 384 NW2d 112 (1986). It is error for a court to fail to find the value of a professional practice. *McNamara v McNamara*, 178 Mich App 382, 443 NW2d 511 (1989), *modified,* 436 Mich 862, 460 NW2d 222 (1990) (law practice).

This is different from placing a value on a professional degree or license in itself, independent of any business goodwill or other business asset. See §8.20 for professional degrees and compensation.

3. Retirement Benefits

§8.37 No one pension valuation method is required. *Heike v Heike*, 198 Mich App 289, 497 NW2d 220 (1993). See §§8.53–8.77.

4. Stock Options

§8.38 Stock options are valued by using three steps:

1. Determine the difference between the stock trading price at the time of trial and the cost to the optionee to exercise this option.
2. If the option is unmatured (unvested), further reduce the value by the probability that it will not vest.

3. Reduce the value by the amount of income taxes payable as a result of exercising the option.

Everett v Everett, 195 Mich App 50, 489 NW2d 111 (1992).

Alternatively, a court may divide the proceeds of options if and when they are exercised. *See Applekamp v Applekamp*, 195 Mich App 656, 491 NW2d 644 (1992). Note that some unvested options may be subject to the argument that they are not divisible at all under the reasoning of *Skelly v Skelly*, 286 Mich App 578, 780 NW2d 368 (2009) (retention bonus awarded as result of postdivorce continuation of employment, rather than as result of efforts during marriage, was not marital property).

Practice Tip

- *Some practitioners value unvested benefits by using a "coverture fraction" similar to that used with pensions. For example, if an option vests over five years, of which two have passed during the marriage, then 2/5 of the option's value, when exercised, might be treated as marital property.*

5. Employee Stock Ownership Plans

§8.39 Generally the proper method to value an ESOP is to multiply the number of shares accrued in the plan by the price per share at the time of the divorce and by the percent vested. *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 471 NW2d 631 (1991). In *Burkey,* the court used the only statement that had been presented to the court, which was dated a year after separation and some five months after the complaint was filed.

Federal law requires the stock held by an ESOP of a privately held company to be appraised by an independent appraiser once per year. This appraisal may be the best valuation available without incurring the cost of a separate, mid-year appraisal.

In *Applekamp v Applekamp*, 195 Mich App 656, 491 NW2d 644 (1992), the court valued an ESOP based on the value of the stock several years after the divorce, when the ESOP was terminated. Because *Applekamp* was a default judgment, defendant was bound by the terms of the judgment and postjudgment proceedings were limited to interpreting the language of the judgment, which referred to "anticipated" disbursements.

As with all retirement assets, the court need not find that an interest is vested in order to divide it. Unvested assets are also divisible. *See Burkey.* However, the right to the unvested asset must have been earned during the marriage even if the award may not mature until after the divorce. *Skelly v Skelly*, 286 Mich App 578, 780 NW2d 368 (2009) (retention bonus awarded as result of postdivorce continuation of employment, rather than as result of efforts during marriage, was not marital property).

E. Tax Effects, Transaction Costs, and Valuation

§8.40 The court may consider inchoate expenses—such as the effects of taxation or stock brokerage and realtor fees—as long as there is evidence that

the cost is likely to occur and what the cost will be. *See Nalevayko v Nalevayko*, 198 Mich App 163, 164, 497 NW2d 533 (1993). This is consistent with the general principle of property settlement that courts should not speculate on future contingencies that might or might not occur. *See Sparks v Sparks*, 440 Mich 141, 485 NW2d 893 (1992); *Applekamp v Applekamp*, 195 Mich App 656, 491 NW2d 644 (1992).

A failure to consider tax consequences in a property settlement is not a per se abuse of discretion. *Nalevayko.* It is not error for each party to bear the tax burden of their own award. *Reigle v Reigle*, 189 Mich App 386, 474 NW2d 297 (1991).

The value of banked vacation and sick pay must be adjusted by the income taxes that the employee would have to pay on those funds. *Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990).

A future income stream is properly reduced by income taxes. *Wiand v Wiand*, 178 Mich App 137, 151, 443 NW2d 464 (1989) (valuation of a professional degree under an approach no longer followed; see §8.20).

Taxes that would be due on sale should not be reduced if no sale or other taxable event is contemplated. *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995).

In keeping with the court's ability to consider tax consequences, courts also have the authority, in appropriate cases, to order parties to file joint tax returns. *Butler v Simmons-Butler*, 308 Mich App 195, 863 NW2d 677 (2014). Because filing joint returns exposes parties to possible joint and several liability to the IRS, a court should only make such an order when it is in the best interests of the marital estate and (1) the court cannot compensate for the difference in tax liability through property allocation; (2) the requesting spouse has no history of tax problems; (3) the parties routinely filed joint tax returns during the marriage; and (4) the court orders, or the parties agree, that the requesting spouse must indemnify the reluctant spouse for any resulting tax liability. *Id.*

VI. Standards for Distributing Marital Property

A. In General

§8.41 The division of marital property is only one part of property distribution. Separate property can also be divided between the parties where the claimant spouse can show contribution to the asset or need. See §§8.50–8.52. In addition to or instead of dividing separate property, a court may award spousal support. The factors for determining suitable support are similar to those considered in property distribution. See chapter 6.

B. Equitable Distribution Required

§8.42 Generally, the division of marital property must be equitable, just, and reasonable. *See* MCL 552.19, .23, .27, .401. Courts have broad discretion in dividing the marital estate. *Kendall v Kendall*, 106 Mich App 240, 307 NW2d 457 (1981). There is no set formula or rigid mathematical rule. Rather, the court's

duty is to reach a decision that is fair and equitable. *Sparks v Sparks*, 440 Mich 141, 485 NW2d 893 (1992).

An equitable division is one that is "roughly congruent." *Jansen v Jansen*, 205 Mich App 169, 171, 517 NW2d 275 (1994). It need not be mathematically equal, but it must be fair under all the circumstances. *Sparks; Nalevayko v Nalevayko*, 198 Mich App 163, 497 NW2d 533 (1993).

Any significant departure from "congruence" must be clearly explained. *Jansen; Knowles v Knowles*, 185 Mich App 497, 462 NW2d 777 (1990); *see also Byington v Byington*, 224 Mich App 103, 115, 568 NW2d 141 (1997) ("presumption of congruence").

C. Guidelines for What Is Equitable

§8.43 There is no one list of factors for determining an equitable distribution. The descriptions of the factors tend to expand or condense depending on the individual facts of the case. One list frequently cited appears in *Sparks v Sparks*, 440 Mich 141, 159–160, 485 NW2d 893 (1992). That list includes

- the duration of the marriage,
- contributions of the parties to the marital estate,
- the age of the parties,
- the health of the parties,
- life status of the parties,
- necessities and circumstances of the parties,
- earning abilities of the parties,
- past relations and conduct of the parties, and
- general principles of equity.

Not all of the factors will apply to any given case, nor does the court have to give equal weight to each factor. *Sparks; Byington v Byington*, 224 Mich App 103, 115, 568 NW2d 141 (1997). Nonetheless, where any of these factors are relevant to the value of the property or to the needs of the parties, the trial court must make specific findings of fact regarding those factors. *Sparks* at 158. In *McNamara v Horner*, 249 Mich App 177, 642 NW2d 385 (2002), *aff'd on remand,* 255 Mich App 667, 662 NW2d 436 (2003), the trial court clearly erred by failing to make specific findings of fact on relevant property division factors when it determined that a 50-50 division of the marital assets was an appropriate distribution.

The factors listed are not exhaustive. *See Sparks,* 440 Mich at 160 ("the court may choose to consider the interruption of the personal career or education of either party"); *Gottschalk v Gottschalk*, 107 Mich App 716, 718, 309 NW2d 711 (1981) (severely depressed spouse was awarded marital home in part because of its psychological significance to her).

D. Contribution

§8.44 The court does not look at who contributed any specific asset, but rather, looks to the parties' contributions to the marriage as a whole. *Jansen v Jansen*, 205 Mich App 169, 171, 517 NW2d 275 (1994) (rejecting award to husband of more than 75 percent of assets). A partnership theory was expressly adopted in *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995), where the wife was awarded a share of the value of the husband's family business, which had substantially appreciated during the parties' 24-year marriage. *See also McDougal v McDougal*, 451 Mich 80, 545 NW2d 357 (1996) (substantial award to wife, who had maintained household for eight years, making it possible for husband to enforce and market his patents).

Even in short-term marriages where the bulk of the property may be premarital property, the court may divide any increase in net worth occurring during the marriage. *See Raymond v Raymond*, 345 Mich 563, 76 NW2d 810 (1956); *Bone v Bone*, 148 Mich App 834, 838, 385 NW2d 706 (1986); *see also Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997) (court distinguished divisible active appreciation from nondivisible passive appreciation).

E. Necessities and Circumstances

§8.45 The necessities and circumstances factor may include the consideration that one spouse has primary custody of the children. In *Zimmers v Zimmers*, 346 Mich 28, 77 NW2d 267 (1956), the wife was awarded 90 percent of the assets based on a support theory that took into account the source of the property, the contribution toward its acquisition, the length of the marriage, the needs of the parties, the earning abilities of the parties, the cause for the divorce, and the needs of the children. Similarly in *Fansler v Fansler*, 344 Mich 569, 75 NW2d 1 (1956), the court sustained an award to the wife of well over half of the net assets where (1) the property awarded to the husband was income-producing, but the property awarded to the wife was not and (2) the wife was awarded custody of the parties' child.

F. Earning Abilities of the Parties

§8.46 Disparate earning capacity can result in more than half of the marital estate's being awarded to one party. In *Carlson v Carlson*, 139 Mich App 299, 362 NW2d 258 (1984), the equitable factors justifying an award of more than half the marital estate to the wife were that

1. both parties had contributed to the marital estate during the 11-year marriage,
2. the wife would probably have more job seniority and skills if not for the marriage, and
3. the husband's earning capacity was greater than the wife's.

See also Kendall v Kendall, 106 Mich App 240, 307 NW2d 457 (1981).

G. Life Status

§8.47 An established standard of living is a relevant consideration. In *DeMay v DeMay*, 326 Mich 72, 39 NW2d 248 (1949), a divorce ending a 27-year marriage, the court held that it would "provide a property settlement and alimony allowance so that the plaintiff can live under the conditions that they had hoped would exist when they came to the later years of their married life." *Id.* at 76. *See Tomlinson v Tomlinson*, 338 Mich 274, 281, 61 NW2d 102 (1953) (directing support to maintain wife "in her accustomed station in life"). Note that these cases may give some insight into what "suitable support" means when analyzing whether to invade separate property under MCL 552.23.

H. Past Conduct of the Parties; Fault

§8.48 Although Michigan has a no-fault divorce law, fault is still a factor to be considered when dividing property. *McDougal v McDougal*, 451 Mich 80, 545 NW2d 357 (1996); *Navarre v Navarre*, 191 Mich App 395, 479 NW2d 357 (1991). Fault considers the parties' conduct leading up to the separation rather than who left whom. *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986); *see also Knowles v Knowles*, 185 Mich App 497, 462 NW2d 777 (1990) (marital misconduct *after* date of filing for divorce did not justify a 70-30 property division). In determining marital fault, the court must examine the parties' conduct, not the parties' intent. In *Welling v Welling*, 233 Mich App 708, 592 NW2d 822 (1999), defendant's conduct when he drank alcohol contributed to the breakdown of the marriage, even if it was not "intentional" or "wrongful."

Fault is only one factor and it should not be given undue emphasis. *Sparks v Sparks*, 440 Mich 141, 485 NW2d 893 (1992). "[F]ault is an element in the search for an *equitable* division—it is not a punitive basis for an inequitable division." *McDougal,* 451 Mich at 90 (emphasis supplied by the court). *See also Berger v Berger*, 277 Mich App 700, 747 NW2d 336 (2008) (property award remanded for "more congruent" division where trial court's 70/30 property division based primarily on intent to punish husband for extramarital affair); *Vance v Vance*, 159 Mich App 381, 406 NW2d 497 (1987) (abuse of discretion to base property division solely on issue of fault).

VII. Separate Property

A. Returning Separate Property to One Spouse

§8.49 In general, a court must "weed out" the separate assets and return them to the owner spouse in the absence of one of the two statutory exceptions. *Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997) (error to refuse to give husband credit for his premarital down payment and premarital appreciation, even where asset was placed in joint names); *see also* MCL 552.19 (court may restore to party property owned before marriage); *Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003).

In short-term, childless marriages with few economic consequences, premarital property has typically been returned to the parties and only the assets accumulated during the marriage are divided. *See Bone v Bone*, 148 Mich App 834, 837,

385 NW2d 706 (1986) (short-term, childless marriage; appreciation in separate assets treated as marital property); *Stathas v Stathas*, 1 Mich App 510, 136 NW2d 713 (1965) (18-month, childless marriage; previously owned property returned to each party); *see also McDougal v McDougal*, 451 Mich 80, 545 NW2d 357 (1996) (eight-year, childless marriage; husband's premarital patents his separate property, but wife awarded substantial share of income earned from patents during and after marriage based on her contributions as homemaker).

B. Distributing Separate Property

1. In General

§8.50 For separate property to be distributed to the nonowner spouse, that spouse must show need or contribution as defined in the statutes:

- the marital estate is insufficient for the "suitable support" of the nonowner spouse and children, MCL 552.23, or
- the nonowner spouse contributed (directly or indirectly) to the acquisition, improvement, or accumulation of the property, MCL 552.401.

Charlton v Charlton, 397 Mich 84, 243 NW2d 261 (1976); *Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003); *Reeves v Reeves*, 226 Mich App 490, 575 NW2d 1 (1997); *Booth v Booth*, 194 Mich App 284, 486 NW2d 116 (1992); *Grotelueschen v Grotelueschen*, 113 Mich App 395, 318 NW2d 227 (1982). There must be a specific finding that the claimant meets one of these two statutory exceptions. *Reeves,* 226 Mich App at 497–498. An older line of cases did not require specific showings of need or contribution, but looked to general equitable factors to justify awards of separate property. These older cases have been overruled by implication by *Reeves*.

A nonowner spouse's claims should first be satisfied out of marital property before invading the separate property. *See Hanaway v Hanaway*, 208 Mich App 278, 295, 527 NW2d 792 (1995); *see also Davey v Davey*, 106 Mich App 579, 308 NW2d 468 (1981) (husband should have been given more than 50 percent of marital property without invading wife's separate property).

2. Need

§8.51 A "just and reasonable" share of one spouse's separate property may be awarded "for the suitable support" of the other spouse and any children in their custody. MCL 552.23. This requires a determination that the other available assets are insufficient for the claimant spouse's support. *See Charlton v Charlton*, 397 Mich 84, 243 NW2d 261 (1976) (division of wife's inheritance); *Lee v Lee*, 191 Mich App 73, 79, 477 NW2d 429 (1991); *see also Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992) (postfiling inheritance included); *Booth v Booth*, 194 Mich App 284, 486 NW2d 116 (1992) (premarital pension necessary for wife's support); *Davey v Davey*, 106 Mich App 579, 308 NW2d 468 (1981) (wife's postfiling inheritance not divided where court not persuaded that half of marital property was insufficient for husband's support).

3. Contribution

§8.52 Separate property may be awarded to the other spouse if it appears "equitable under all the circumstances of the case" and the claiming spouse contributed to its "acquisition, improvement, or accumulation." MCL 552.401; *see Korth v Korth*, 256 Mich App 286, 662 NW2d 111 (2003); *Reeves v Reeves*, 226 Mich App 490, 493, 575 NW2d 1 (1997). The court may look at the spouse's contribution to the marital effort as a whole rather than a specific contribution to a particular asset. *McDougal v McDougal*, 451 Mich 80, 545 NW2d 357 (1996) (wife's contribution as homemaker considered); *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995) (wife's household and family services made it possible for husband's family business to prosper, justifying award). The contribution must be significant. *Reeves; Grotelueschen v Grotelueschen*, 113 Mich App 395, 318 NW2d 227 (1982). The award should be commensurate with the level of contribution. *Gregg v Gregg*, 133 Mich App 23, 29–30, 348 NW2d 295 (1984).

VIII. Dividing Pension and Retirement Benefits

A. Statutory Requirements

§8.53 Every judgment of divorce or separate maintenance must determine all rights the husband and wife have in

- any pension, annuity, or retirement benefits;
- any accumulated contributions in any pension, annuity, or retirement system;
- any right or contingent right in and to unvested pension, annuity, or retirement benefits.

MCL 552.101(3). This statute does not yet contain language making it specifically applicable to divorces sought by individuals in same-sex marriage. *See Obergefell v Hodges*, 576 US 644 (2015) (legalizing same-sex marriage nationwide).) *See Dorko v Dorko*, 504 Mich 68, 934 NW2d 644 (2019) (request for entry of QDRO simply implements provision of divorce judgment; it is not "action" to which 10-year limitations period would apply); *Neville v Neville*, 295 Mich App 460, 812 NW2d 816 (2012) (trial court should have treated QDRO as part of property settlement in divorce judgment where entry of QDRO was explicitly required by terms of divorce judgment); *Mixon v Mixon*, 237 Mich App 159, 602 NW2d 406 (1999) (trial court erred in failing to include EDRO in divorce judgment when requested by party).

The trial court erred in finding that the terms of the divorce judgment were controlling over the terms of the QDRO where the terms of the divorce judgment requiring the entry of a QDRO showed that the divorce judgment did not conclusively establish the terms of the property division and the parties were free to modify the terms of their property settlement when approving the QDRO. *Neville*.

B. Retirement Benefits Includable in the Marital Estate

§8.54 The portion of retirement benefits includable in the marital estate is outlined in MCL 552.18, which provides that if a retirement benefit accrued during the marriage,

- it *must* be considered part of the marital estate if it is a vested benefit or an accumulated contribution, or
- it *may* be considered part of the marital estate if it is an unvested or contingent benefit and it appears equitable to include it.

A court also has broad discretion to award premarriage pension accruals if it appears reasonable under all the circumstances. *Booth v Booth*, 194 Mich App 284, 486 NW2d 116 (1992); *see also* MCL 552.23(1); *McMichael v McMichael*, 217 Mich App 723, 730, 552 NW2d 688 (1996) (if just and reasonable). Divorce courts may also award postdivorce accruals. *Boonstra v Boonstra*, 209 Mich App 558, 531 NW2d 777 (1995).

C. Methods of Division

1. In General

§8.55 Defined contribution plans (such as 401(k)s or IRAs) may be divided in kind by splitting the accounts or by offsetting their value against other assets (the offset method). For pensions, there are two methods for dividing benefits: the offset method (which gives the nonemployee spouse nonretirement assets equivalent in value to an interest in the pension) or the deferred division method (which gives the nonemployee spouse an interest in the employee spouse's pension). The better method depends on the facts of the case.

2. The Offset Method

§8.56 When using the offset method, the court takes the following steps:

1. Determines the present value of the pension benefits includable in the marital estate.
2. Determines the nonemployee spouse's interest in the pension.
3. Awards other marital assets of equal value to the nonemployee spouse as an offset.

The employee spouse retains the entire pension interest and the other spouse gets assets of comparable value. *Important:* When using the offset method, the value of the retirement (which is in pretax dollars) must be adjusted for income taxes before offsetting it against after-tax values of other assets.

For a **defined contribution plan** (i.e., an account balance plan), the present value is the participant's account balance in the plan on a given date. *Bolt v Bolt*, 113 Mich App 298, 317 NW2d 601 (1982). (But note that the value should be adjusted for taxes if it is to be offset against after-tax assets.)

In a **defined benefit plan,** the participant has a right to a future monthly benefit beginning at an early or normal retirement. To determine the present value of this stream of future payments, an actuary or accountant must discount these payments to their present-day value. *See Boyd v Boyd*, 116 Mich App 774, 323 NW2d 553 (1982).

Practice Tip

- *When offsetting the values of defined contribution plans, the parties should consider whether statements or other documentation can be obtained showing the account balance on the selected valuation date (e.g., date of divorce). IRA custodians, for example, will generally provide only monthly or quarterly statements.*

The computation of the present value of a defined benefit plan requires an accountant or actuary to make assumptions on the following factors:

1. *Retirement age.* With *Heike v Heike*, 198 Mich App 289, 497 NW2d 220 (1993), Michigan apparently returned to determining the retirement age based on the facts and circumstances of each case. This replaces the test set forth in *Kilbride v Kilbride*, 172 Mich App 421, 432 NW2d 324 (1988), that the courts should always value pensions using the earliest possible retirement date.
2. *Discount rate.* The court of appeals has approved the use of the same Pension Benefit Guaranty Corporation (PBGC) methodology that was developed to determine the value of future retirement benefits in terminated pension plans. *Kilbride,* 172 Mich App at 440. As a result of changes in federal pension law, the PBGC interest and mortality factors are generally no longer used for this purpose and instead the IRC 417(e)(3) factors are used. These include the mortality tables specified by IRS Publication 590-B Appendix B (tables for 2023; to be updated annually) and the minimum present value segment rates specified by the IRS from month to month. See the Pension Protection Act of 2006, Pub L No 109-280, 120 Stat 780.
3. *Mortality tables.* No specific table is required. The State of Michigan statutory mortality table has been used. *Boyd* (expressly recognizing other nonstatutory mortality tables). The PBGC mortality tables have also been approved. *Kilbride.*
4. *Annuity method.* The annuity method determines the period over which a retirement benefit is projected to be paid to a participant. This stream of payments is then reduced to a present value. Either the annuity certain (life expectancy) method or the life annuity method may be used. *See Kurz v Kurz*, 178 Mich App 284, 292, 443 NW2d 782 (1989).

   Annuity certain method. This assumes that the retirement benefit will be paid for a known, set period. In computing a pension value, the period certain is determined using a mortality table.

   Life annuity method. This method uses a factor for the probability of survival in each year to the end of the mortality table. Thus, a retirement benefit is assumed to continue until the end of the mortality table (approximately

age 120), and then each year of projected benefits is reduced for the probability that the participant will not survive to that year.

5. *Income tax liability.* This reduces the present value by an assumed marginal tax rate, requiring some assumptions about future income tax rates and the participant's future taxable income.

Note that the present value of a defined benefit may be very small for a relatively young and/or short-service participant. A QDRO that divides the benefit at retirement can be expensive and may result in the alternate payee receiving a very small pension payment many years in the future. In that case, it may be better to use the offset method rather than dividing the pension.

3. The Deferred Division Method

§8.57 In deferred division, the nonemployee spouse takes an actual interest in the employee spouse's pension. Payment of that interest generally is deferred until the benefit is payable under the terms of the retirement plan. All plans subject to ERISA, 29 USC 1001 et seq., and most other plans have spendthrift or antialienation provisions that prohibit the nonemployee spouse from taking an interest in the employee's pension plan. A QDRO, discussed in §§8.59–8.68, or an EDRO, for state plans, creates an exception to these provisions and allows the plan to be divided between the employee and the spouse.

D. Other Retirement-Related Benefits

§8.58 A retirement plan may provide other benefits beside pension payments that can be addressed, such as

- early retirement,
- survivor benefits,
- cost-of-living increases, and
- retiree medical benefits.

Several of these are further explained below. Any distribution should be clearly stated. See, e.g., cases cited in §8.68. If a judgment or an order does not specify otherwise, an award of retirement benefits carries with it a "proportionate share" of collateral benefits, including survivor benefits, early retirement benefits, and postretirement increases. MCL 552.101(4).

E. Qualified Domestic Relations Orders and Deferred Division

1. In General

§8.59 A state court order that meets the requirements of a QDRO under IRC 414(p) must be honored by retirement plans governed by ERISA and the IRC. A plan that is subject to a QDRO may be a defined contribution plan or a defined benefit plan.

QDROs do not cover

1. church plans,

2. government plans,
3. excess benefit plans,
4. deferred compensation plans,
5. individual retirement accounts (IRAs), or
6. welfare benefits plans.

See *Michigan Family Law* exhibit 18.1 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for a list of legislation that allows deferred division for many non–ERISA retirement plans.

2. Meaning of *Qualified Domestic Relations Order*

§8.60 IRC 414(p) defines *domestic relations order* as any judgment, decree, or order (including approval of a property settlement agreement) relating to the provision of child or spousal support or the property rights of a spouse, a former spouse, a child, or another dependent of a plan participant and is made pursuant to a state or tribal domestic relations law, including a community property law.

A domestic relations order is *qualified* if it clearly specifies

- the name and last known mailing address of the participant and each alternate payee (i.e., the ex-spouse, child, or dependent who is recognized by the order as having a right to benefits),
- the amount or percentage of the participant's benefit to be paid to each alternate payee or how it is to be determined,
- the number of payments or the period to which the order applies, and
- each plan to which the order applies.

A domestic relations order is *not qualified* if it requires the plan to

- provide any type or form of benefit or any option not otherwise provided by the plan,
- provide increased benefits (determined on the basis of actuarial value), or
- pay benefits to an alternate payee that the plan is required to pay to another alternate payee under a previous qualified order.

See *Michigan Family Law* forms 18.1–18.7 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for sample language for the judgment of divorce and sample QDROs. Some plans have their own models for assuring compliance with the plan's provisions. QDROs provided by plans typically contain terms favorable to the employee spouse.

3. The Amount or Percentage to Be Paid

§8.61 In a **defined contribution plan,** the interest assigned to an alternate payee is generally stated as a percentage or dollar amount of the participant's vested account balance as of a particular date (e.g., the date of the divorce). It is important to specify whether the award "rides with the market," i.e., includes

market earnings and appreciation/decline from the specified date to the date of distribution, or whether it is intended as a set dollar amount to be awarded regardless of changes in investment value. When assigning a *percentage* of a defined contribution plan, the judgment should also specify whether any outstanding loan against the account on the valuation date (e.g., the date of the divorce) is to be included or excluded when determining the balance being divided. The participant's obligation to repay a loan cannot be transferred to the alternate payee. If the loan balance is *included* in the amount divided, the alternate payee's share will be unaffected by the loan (i.e., treated as if the loan was fully repaid on the valuation date). If the loan balance is *excluded* from the amount to be divided, the alternate payee's share will be reduced by a proportionate share of the loan balance. Loans are typically included when taken for the sole benefit of the participant and excluded when taken for joint marital purposes. Note that 403(b) (tax-sheltered) annuities are a form of defined contribution plan, as are ESOPs, profit-sharing plans, money purchase pension plans, and 401(k) plans.

In a **defined benefit plan,** the alternate payee's interest is commonly defined as a percentage or dollar amount of the participant's vested monthly accrued normal retirement benefit as of a certain date. If the employee's participation in the plan lasts longer than the marriage (because of eligible employment before the marriage or continuing after the divorce), the alternate payee's award may be limited to the benefit that accrued during the marriage. This can be accomplished by determining the actual benefit accrued during the marital period or by using a coverture fraction. *See Vander Veen v Vander Veen*, 229 Mich App 108, 580 NW2d 924 (1998); *Kilbride v Kilbride*, 172 Mich App 421, 432 NW2d 324 (1988). A sample coverture fraction follows:

Coverture Fraction:

> It is the parties' intention and the order of this court that the alternate payee receive a monthly benefit from the plan of ___ percent of the participant's monthly normal benefit under the plan that has accrued as of the date of division (defined below) multiplied by the following fraction:

$$\frac{\text{participant's years of credited service from the date of marriage to the date of division}}{\text{participant's total years of credited service under the plan to the date of division}}$$

The "date of division" could be the date of divorce, the date of the order, or some other agreed on date. Note that the same "date of division" should be used to identify the benefits that are multiplied by the fraction as the date that is used to identify the ending date of service in the denominator of the fraction to avoid an inconsistent direction to the plan and therefore an unqualified order. The coverture fraction ensures that the alternate payee receives only the portion of those benefits attributable to the period of the marriage.

Instead of dividing benefits with a cutoff date at the time of divorce, some practitioners use a "prospective coverture fraction" that awards a fraction of the benefits paid *at the time of retirement*. This is often a fairer way to guarantee a

spouse in a long-term marriage a share of the pension that reflects the contribution to the employed spouse's seniority while still limiting the award to the portion of benefits attributable to the period of the marriage. *See* Paul R. Commerford, *Valuation of Pension and Retirement Rights,* Mich Fam LJ, June–July 1990, at 10. See *Michigan Family Law* §18.4 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for a sample formula for this provision. Using the prospective coverture fraction allows the nonemployee spouse to share in those postdivorce increases the plan provides on benefits earned during the marriage.

The prospective coverture award would be as follows:

Coverture Fraction:

It is the parties' intention and the order of this court that the alternate payee receive a monthly benefit from the plan of ___ percent of the participant's monthly normal benefit under the plan that has accrued as of the date of division (defined below) multiplied by the following fraction:

$$\frac{\text{participant's years of credited service during the marriage}}{\text{participant's total years of credited service under the plan as of the date of division}}$$

(where the date of division is the earlier of the date the alternate payee's benefits commence or the date the participant's benefits commence).

A defined benefit plan can provide for an early retirement subsidy (the amount a participant receives at early retirement above and beyond the actuarial equivalent of a normal retirement benefit). While this benefit is not vested, unvested retirement benefits may be considered part of the marital estate "where just and equitable." MCL 552.18(2). The alternate payee can only receive the early retirement subsidy if the participant actually retires early (otherwise there is no subsidy). Some companies increase the early retirement subsidy as part of an early retirement incentive or "window." If the participant's employer could offer such an incentive in the future, it is advisable to provide in the QDRO whether this extra subsidy is also to be divided. Unless otherwise stated, a judgment award is presumed to include a proportionate share of the early retirement subsidy. MCL 552.101(4), reversing the effect of *Quade v Quade*, 238 Mich App 222, 604 NW2d 778 (1999). However, even if this is presumed in the judgment as a result of MCL 552.101(4), the language of the QDRO must specify this award in order for the alternate payee to receive it.

In *Smith v Smith*, 292 Mich App 699, 823 NW2d 114 (2011), the trial court correctly found that plaintiff was not entitled to a share in the increase in defendant's IRA account between the time of the settlement agreement and the entering of the judgment of divorce where the parties negotiated the agreement, established the value of all accounts, and gave no indication that the parties intended to take into account market fluctuations in dividing the accounts.

In *Hein v Hein*, 337 Mich App 109, 972 NW2d 337 (2021), the court analyzed how MCL 552.101(4) relates to 5 CFR 838.101 et seq. 5 CFR 838.101 et

seq. "generally controls how the relevant federal administrative agencies handle state domestic-relations orders affecting federal pensions." *Hein,* 337 Mich App at 118. At issue was the meaning of "divided equally" in the parties' consent judgment of divorce. Plaintiff's interpretation of "divided equally" relied on 5 CFR 838.237, while defendant's construction relied on MCL 552.101(4). The court of appeals found that "divided equally" was ambiguous and that "both parties had good reason to assume that 'divided equally' would, in the absence of further specification, support their own construction of how to divide the pension after defendant's death." 337 Mich App at 121–122. Although plaintiff did not clearly request an *evidentiary* hearing, the court of appeals concluded that "the trial court should have held an evidentiary hearing to determine the intent and understanding of the parties regarding the meaning of 'divided equally' in the consent judgment." *Id.* at 124.

Practice Tips

- *Encourage parties and counsel to agree on the language of a QDRO before the judgment is entered to avoid later disputes.*
- *Be sure parties specify whether a share of a defined contribution plan (such as a 401(k)) includes, or does not include, changes in market value that occur between the valuation date (e.g., date of divorce) and the date that the plan implements the QDRO and transfers the funds to the alternate payee.*
- *When assigning a percentage of a defined contribution plan, be sure to specify whether outstanding loans, if any, are to be included or excluded when determining the account balance being divided.*

4. Cost-of-Living Increases

§8.62 Some defined benefit plans have automatic or ad hoc cost-of-living increases. Unless otherwise stated, a judgment award is presumed to include a proportionate share of this ancillary benefit. MCL 552.101(4), reversing the effect of *Quade v Quade*, 238 Mich App 222, 604 NW2d 778 (1999). However, as noted above, even if this presumption is part of the judgment, it must still be stated expressly in the QDRO.

5. Method of Payment

§8.63 The alternate payee may receive an interest in any form or option provided by the plan. IRC 414(p)(3)(A). Typical payment forms include (1) a joint and survivor annuity with the participant, (2) a single life annuity over the participant's or alternate payee's lifetime, and (3) a lump-sum distribution (usually only available in defined contribution plans). Defined benefit plans usually state benefits in the form of a single life annuity over the participant's lifetime starting at normal retirement age (usually 65 for private employers' plans). Benefits paid in another form or at a different time usually reduce the monthly amount payable. Usually the alternate payee "pays" the cost of this adjustment, but the order should specify whose benefits will be adjusted. Where a participant controls the plan, such as a doctor's profit-sharing plan for their own medical practice,

QDROs sometimes require the participant to amend the plan to provide for an immediate lump-sum distribution method if the plan does not already do so.

6. Timing of Payment

§8.64 In a defined contribution plan, the alternate payee may usually begin receiving an interest on the plan's qualification of the QDRO. Generally, the alternate payee may begin receiving an interest under a defined benefit retirement plan when the employee spouse begins receiving benefits under the plan. Typically, this means upon retirement or, under some plans, on termination of employment or disability.

Exception. A QDRO may allow an alternate payee to draw benefits after the participant reaches the earliest retirement age even while the participant remains employed. IRC 414(p)(4)(A). Under IRC 414(p)(4)(B), a participant's earliest retirement age is the *earlier* of

> (i) the date on which the participant is entitled to a distribution under the plan, or
>
> (ii) the later of—
>
> (I) the date the participant attains age 50, or
>
> (II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

A defined benefit plan is not likely to permit an alternate payee to receive benefits before the participant reaches age 50 or, if later, the plan's earliest retirement age. Note, however, that some plans penalize the participant if the alternate payee begins drawing benefits before the time the participant retires or reaches a specified age, such as most plans divided under Michigan's Eligible Domestic Relations Order Act, MCL 38.1701 et seq. Before passage of the American Miners Act of 2019, defined benefit plans and money purchase pension plans could not pay a distribution to a participant who still worked for the plan sponsor until the participant reached normal retirement age (or age 62 if the plan so provided). Under the American Miners Act, these plans may be amended to allow distributions to a participant who is still working for the plan sponsor (an "in-service" distribution) beginning at age 59 ½. This may make benefits under these plans available to the parties without need for a QDRO or may allow an earlier payment to an alternate payee pursuant to a QDRO if the relevant plan has been amended to allow in-service distributions.

If an alternate payee elects to draw benefits under a QDRO under this exception, the alternate payee is only entitled to the actuarial equivalent of their portion of the participant's benefit at a normal retirement. IRC 414(p)(4)(A)(ii). The alternate payee would not share in any early retirement subsidy unless the QDRO specifically requires that if the participant takes an early retirement after the alternate payee's benefit commences, the alternate payee's benefit must be recalculated to include a share of any early retirement subsidy.

Also, a plan may provide for payment to an alternate payee *before* the earliest retirement age if the plan provides for such a distribution. See the Tax Reform Act

of 1986 §1898(c)(6) amending IRC 414(p)(10); Priv Ltr Ruls 8837013 (June 7, 1988), 8935041 (June 7, 1989).

7. Survivor Benefits and Defined Benefit Plans

a. In General

§8.65 The Retirement Equity Act of 1984 requires retirement plans to provide for pre- and postretirement survivor benefits (with exceptions for certain employee stock option, profit-sharing, and stock bonus plans). IRC 401(a)(11). A former spouse, as the alternate payee, may be designated as a surviving spouse under a QDRO for these survivor benefits. IRC 414(p)(5). *See Champnella v Champnella*, No 139969 (Mich Ct App Apr 28, 1994) (unpublished) (printed in Mich Fam LJ, June–July 1994, at 50) (trial court's omission of survivor benefits for wife was "shocking").

The two survivor benefits discussed below relate only to defined benefit plans; with a defined contribution plan, the alternate payee receives a share of the account balance that is generally not forfeited even if the participant predeceases the alternate payee.

Unless otherwise stated, a judgment award is presumed to include a proportionate share of survivor benefits. MCL 552.101(5) (reversing the effect of *Quade v Quade*, 238 Mich App 222, 604 NW2d 778 (1999)).

b. Qualified Preretirement Survivor Annuities

§8.66 A qualified preretirement survivor annuity (QPSA) provides an annuity to a surviving spouse if the participant dies before retirement. Note that the QPSA is usually 50 percent of the participant's monthly pension, though some plans provide for a higher percentage. If an alternate payee is not designated as the surviving spouse under a plan's preretirement survivor annuity and the participant dies before retirement and before the alternate payee's benefit has commenced, the alternate payee's entire interest may be forfeited, depending on whether the plan has a preretirement death benefit other than the QPSA, or does not require a QPSA to preserve the alternate payee's assigned benefit.

Practice Tip

- *It is important to make sure that the alternate payee either is named as a surviving spouse of adequate retirement survivor benefits or is awarded life insurance to protect the interest if the employee spouse dies before retirement.*

c. Postretirement Qualified Joint and Survivor Annuities

§8.67 A qualified joint and survivor annuity (QJSA) provides both an annuity during the joint lives of the participant and the spouse and a survivor annuity for the life of the participant's surviving spouse. A QDRO can require a plan to pay the benefits accrued during the marriage as a QJSA, split between the parties. A plan will usually allow the participant to elect another form of payment for benefits accrued after the divorce. A QDRO can also require the payment of only the alternate payee's share as a QJSA.

Splitting the QPSA and the QJSA between former and current spouses. Survivor benefits may be split between a former spouse and a current spouse. *See* Treas Reg 1.401(a)-13(g). There may also be plan provisions governing the split. Note, however, that military survivor benefits cannot be split. An award of military survivor benefits to a named spouse or former spouse, regardless of the level of benefit, will preclude the award of any survivor benefits to another spouse or former spouse.

Sharing the cost of the QJSA. Plans may impose costs for funding survivor annuity protection. The QDRO can provide that the parties share equally in the cost of funding the survivor annuity if allowed by the plan.

d. Failing to Address Survivor Benefits

§8.68 When the judgment of divorce and the QDRO are silent or ambiguous on the issue of survivor or other collateral benefits, problems can arise. MCL 552.101(4) provides that a proportionate share of all collateral benefits passes to the alternate payee unless the judgment or order specifically excludes them. Nevertheless, it is good practice to always address survivor benefits in the judgment of divorce, especially when dividing military and federal civilian plans.

A pension benefits waiver in a default judgment may still be valid and enforceable. *Estate of Reed v Reed*, 293 Mich App 168, 810 NW2d 248 (2011). In *Reed,* a pension benefits waiver in a default judgment of divorce prevented the ex-wife from retaining the ex-husband's pension proceeds when the ex-husband died before changing his beneficiary designation and the pension proceeds were paid to the ex-wife. Note that the pension plan correctly paid the ex-wife under ERISA (because the ex-husband failed to change his beneficiary after the divorce), but the ex-wife was forced, under Michigan law, to repay the distribution to the ex-husband's estate. Some plans void the designation of the spouse as a beneficiary after a divorce, unless the parties enter a QDRO or the participant redesignates the ex-spouse after the divorce. *See also Estate of Kensinger v URL Pharma, Inc*, 674 F3d 131 (3d Cir 2012).

In *Baker v Baker*, 268 Mich App 578, 710 NW2d 555 (2005), where a divorced participant in a public employees' retirement plan purchased additional service credit to qualify for early payment of full pension benefits, the alternate payee under a previously entered EDRO was entitled to share in the early payments, even though the alternate payee did not agree or contribute to the purchase of the additional service credit. This was because the EDRO clearly specified that the alternate payee's benefits would commence when the participant began to receive his benefits. The rationale of this case applies equally to QDROs, although purchasing additional service credit is not typically available in the private sector.

Practice Tip

- *Unrepresented parties should be reminded that even if a judgment of divorce purportedly terminates a spouse's beneficiary interests, the judgment does NOT automatically change the beneficiary designations on employer-provided retirement benefits or life insurance governed by ERISA. The parties themselves must follow*

the plan's specific procedures for changing beneficiaries after the divorce. See Egelhoff v Egelhoff, 532 US 141 (2001); see alsoHillman v Maretta, 569 US 483 (2013) (federal law preempts state law that would have revoked beneficiary designation of ex-spouse after divorce; under 5 USC 8701 et seq., deceased employee's designation controls); Kennedy v Plan Adm'r for DuPont Sav & Inv Plan, 555 US 285 (2009) (finding that waiver of benefits in divorce decree could be valid, but further finding that plan administrator properly paid benefits to former spouse pursuant to terms of predivorce designation of beneficiary as required by plan document); Sweebe v Sweebe, 474 Mich 151, 712 NW2d 708 (2006).

F. Eligible Domestic Relations Orders and Deferred Division

1. In General

§8.69 Under the Eligible Domestic Relations Order Act, MCL 38.1701 et seq., when the retirement plan covers a state or local government employee, deferred division of the plan benefits is made through an EDRO. The EDRO Act applies to all Michigan local ordinance or chartered retirement plans (e.g., those of a city, township, or county) as well as to state-chartered plans. *See* MCL 38.1702(i); *Mixon v Mixon*, 237 Mich App 159, 602 NW2d 406 (1999) (trial court erred in failing to include EDRO in divorce judgment when requested by a party).

Michigan law explicitly provides that benefits under a Michigan public employee retirement system are not subject to execution, garnishment, attachment, or bankruptcy proceedings, and may not be assigned. See the Public Employee Retirement Benefit Protection Act, MCL 38.1681 et seq. According to section 4 of the act, MCL 38.1684, such benefits remain subject to forfeiture under the Public Employee Retirement Benefits Forfeiture Act, and to an award by a court during divorce proceedings, under an EDRO, or under any other domestic relations order pertaining to alimony or child support.

2. Requirements

§8.70 Michigan's Office of Retirement Services publishes *Eligible Domestic Relations Orders*, a booklet available at its website or by calling 800-381-5111 or 517-284-4400, that includes sample EDROs for each of the State of Michigan's four public retirement systems: the Michigan Judges Retirement System, the Michigan Public School Employees Retirement System (MPSERS), the Michigan State Employees Retirement System, and the Michigan State Police Retirement System. These forms may also be used as a starting point for EDROs for other state and local retirement plans as well. An EDRO must meet the following minimum requirements:

1. It must state the name and last known address of the participant and the alternate payee. Pursuant to 2008 PA 348, the Social Security numbers of the participant and the alternate payee are no longer required to be included in the order but must be sent to the plan administrator in an attachment to the order. This attachment will not be filed with the court.

2. It must state the amount or percentage of the benefit to be paid to an alternate payee or the manner under which the retirement system is to determine the amount or percentage.
3. It must state that it applies to the retirement system and that the retirement system will make payments to the alternate payee as required under the EDRO and the EDRO Act.
4. It may not require the retirement system to provide a type or form of benefit not provided by the retirement system or a form of payment not provided by the EDRO Act.
5. It may not require the retirement system to provide an increased benefit determined on the basis of actuarial value. Note that where a participant continues to work beyond the plan's normal retirement age (60), the plan must deduct a larger dollar amount from the participant's monthly pension than the monthly amount it may be paying to the alternate payee to recoup from the participant the amount paid to the alternate payee over a shorter time (from a participant's late retirement date until death, rather than from normal retirement until death). To avoid or reduce this "penalty," the parties may need to agree on the date the alternate payee will start benefits.
6. It may not require the payment of a benefit to an alternate payee that is required to be paid to another alternate payee under a previously filed EDRO.
7. It must be filed with the retirement system before the earlier of participant's retirement allowance effective date or participant's death. This means an EDRO may not be used for a participant who is already receiving a pension. However, a domestic relations order (other than an EDRO) may be used to divide benefits in pay status under the Public Employee Retirement Benefit Protection Act, MCL 38.1681 et seq. Michigan's Office of Retirement Services publishes *Domestic Relations Orders*, a booklet available at its website or by calling 800-381-5111 or 517-284-4400, that includes sample domestic relations orders for each of the State of Michigan's four public retirement systems: the Michigan Judges Retirement System, the MPSERS, the Michigan State Employees Retirement System, and the Michigan State Police Retirement System. These forms are appropriate to divide benefits that are already being paid.

MCL 38.1702(e).

3. Timing of EDRO Filing and Receipt of Benefits

§8.71 A valid EDRO must be entered with the court and filed with the retirement system before the earlier of a participant's death or retirement allowance effective date. MCL 38.1702(e)(viii). An EDRO is not filed until the retirement system concludes it is "acceptable as an EDRO." MCL 38.1702(f).

A participant's retirement allowance effective date is stayed once the retirement system receives a domestic relations order. MCL 38.1710(2). If the retirement system accepts the domestic relations order as an EDRO, the "retirement

allowance effective date will occur as if [it] had not been stayed." MCL 38.1710(2)(a). If the retirement system rejects the domestic relations order as an EDRO, the retirement allowance effective date will be stayed for 60 days beginning on the date the retirement system notifies the participant and alternate payee that it rejected the domestic relations order. MCL 38.1710(2)(b). See MCL 38.1710(3) and (5) for notice requirements. The parties may submit an amended domestic relations order during this time, but if the retirement system rejects it, no additional 60-day stay will apply. MCL 38.1710(2)(b). A qualifying EDRO must be filed before the participant dies or the 60-day period expires; otherwise, no EDRO will be accepted for that participant. If the parties submit an amended domestic relations order during the 60-day period that is accepted as an EDRO after the period expires, the stay will be extended to the acceptance date. *Id.*

Parties may apply to amend an existing EDRO on file with the retirement system, but the retirement allowance effective date will not be stayed. MCL 38.1710(4). If the retirement system does not accept the amended EDRO before the earlier of the retirement allowance effective date or the participant's death, the last EDRO filed controls. The EDRO is unmodifiable if the participant has died or the first payment under the EDRO was made. *Id.*

An alternate payee may begin receiving a benefit under an EDRO when the participant begins receiving benefits or at the participant's earliest retirement date. *Earliest retirement date* is "the earliest date on which a participant meets all of the requirements for retirement under a retirement system except for termination of employment." MCL 38.1702(d).

Practice Tip

- *Caution: In the four retirement systems administered through the Michigan Office of Retirement Services, allowing an alternate payee to begin drawing benefits before the participant actually retires, if the participant will not retire at age 60, can significantly erode the benefit payable to the participant. See discussion of recoupment in the state Office of Retirement Systems booklet, Eligible Domestic Relations Orders, available at its website or by calling 800-381-5111 or 517-284-4400.*

4. Form of Benefit

§8.72 The alternate payee may receive the benefit as (1) a single life annuity over the alternate payee's life; (2) a single life annuity over the participant's life; or (3) a joint and survivor annuity over their joint lives, with a survivor annuity payable to the surviving spouse. *See Hudson v Hudson*, 314 Mich App 28, 885 NW2d 652 (2016). In *Hudson,* defendant chose option (1), that is, to receive his benefit as an annuity based on his life. Plaintiff objected to this election because she did not have a similar option in defendant's federal pension. The court of appeals rejected plaintiff's argument holding that the judgment of divorce did not specifically preclude defendant from electing to receive an annuity based on his life.

Note that a lump-sum payment is not a form permitted by the EDRO Act, with the result that an EDRO does not really fit for most defined contribution plans.

Practice Tip

- *For a Michigan governmental defined contribution plan in which benefits are not payable as an annuity, you may need to call the order a domestic relations order and use the Public Employee Retirement Benefit Protection Act, MCL 38.1681 et seq., as the authority for dividing the benefits.*

5. Early Retirement Age Distributions, Survivor Benefits, and Cost-of-Living Increases

§8.73 Compared with the federal QDRO provisions, the EDRO Act provides some simplification with regard to the earliest retirement age distribution option and allows the alternate payee the flexibility of electing a single life annuity for their lifetime. *But see Wolf v Mahar*, 308 Mich App 120, 862 NW2d 668 (2014) (trial court erroneously failed to reform parties' consent judgment and EDRO due to parties' mutual mistake regarding state's recoupment policy under which participant is charged for alternate payee's election to receive pension benefits before participant retires). An alternate payee may be designated a surviving spouse in an EDRO for the purpose of a plan's survivor benefits. It allows survivor benefits to be split between an ex-spouse and a current spouse. An EDRO may provide that an alternate payee share in a retirement plan's postretirement cost-of-living increases.

G. Federal Retirement Plans

1. Social Security

§8.74 State courts do not have the authority to dispose of Social Security benefits in divorce proceedings. However, where spouses' Social Security awards are unequal, courts may address this differential through spousal support or awards of other property. Employees of public (governmental) employers may not have Social Security benefits, especially police officers and firefighters who can opt out of Social Security. This should be considered in comparing the parties' retirement benefits. Note that a former spouse who was married to someone paying into Social Security for at least 10 years will be eligible for Social Security spouse benefits even after a divorce. However, the ex-spouse's benefits will only be half the amount of the employed spouse's.

An agreement in a judgment's property provisions to "equalize" Social Security benefits is preempted by the Social Security Act's antialienation provisions and is therefore unenforceable. 42 USC 407(a); *Biondo v Biondo*, 291 Mich App 720, 809 NW2d 397 (2011). However, a court may "take into account, in a general sense, the extent to which social security benefits received by the parties affect the [*Sparks v Sparks*, 440 Mich 141, 485 NW2d 893 (1992)] factors." 291 Mich App at 731. Further, there is an exception in the antialienation provisions in the case of child or spousal support. 42 USC 659(a). Therefore, a court may divide Social Security payments as spousal support, *In re Marriage of Hulstrom*, 342 Ill

App 3d 262, 794 NE2d 980 (2d Dist 2003), and presumably child support as well.

2. Railroad

§8.75 The Railroad Retirement Act of 1974, 45 USC 231m, provides for two types of benefits. The act does not prohibit upper-tier benefits (those based on earnings and career service rather than those corresponding to Social Security benefits) being treated as property subject to equitable distribution under a decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement. These are annuity benefits. The order distributing the upper-tier benefits must qualify under the act. A former spouse is not eligible to receive surviving spouse benefits based on upper-tier benefits, but the order can provide that benefits will continue until the former spouse's death.

Lower-tier (Social Security–type) benefits are provided under the act for certain divorced spouses of participants in the system outside of any order or settlement.

3. Military

§8.76 An order to divide military retired pay is different from a QDRO. Robert Treat, *The Procedural and Substantive Aspects of Dividing Military Retired Pay by Court Order,* Mich Fam LJ, Nov 2004, at 13. Because military retired pay is a federal government benefit, ERISA does not apply. *Id.* Further, the order is not a called a QDRO but an Order to Divide Military Retired Pay or a Qualifying Military Order. *Id.* Most importantly, the division of military retirement pay is governed by the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408.

The USFSPA, 10 USC 1408, 1447, 1448, 1450, provides procedures for treating military retirement pay as a marital asset for purposes of property division or to provide spousal or child support. *See Keen v Keen*, 145 Mich App 824, 378 NW2d 612 (1985). No more than 50 percent of the retirement benefits may be awarded to the nonemployee spouse; the maximum is set at 65 percent if the benefits are also used to pay child or spousal support. 10 USC 1408(e). A service member may designate a former spouse to receive an annuity under the military Survivor Benefit Plan. 10 USC 1448. The annuity can be done pursuant to a voluntary property settlement agreement or by court order. 10 USC 1450(f)(4); *cf. Keen.*

If a service member retires or leaves the service before retirement eligibility and takes a position with the federal government, there are ramifications regarding waiver of military retirement pay or credits toward the civil service retirement plan, which can be dealt with in the judgment of divorce.

Congress enacted the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub L No 114-328, 130 Stat 2000 (2016), which contained a major revision to the USFSPA that applies to the division of military pensions pursuant to divorce judgments entered after December 23, 2016. The revision in the NDAA 2017 limits the share of military retired pay that can be paid to the

former spouse by the retired pay center. The NDAA 2017 modifies the division of retirement pay for a former spouse in the divorce decree and requires, for a servicemember who is not yet retired, use of the member's pay grade and years of service at the time of the divorce, adjusted by the annual retired pay cost-of-living adjustments between the date of the divorce decree and the date of retirement. *Id.* at §641.

With very limited exception, disability benefits are exempt from spousal claims and cannot be divided in a divorce. A state court cannot offset the loss of a former spouse's portion of a servicemember's retirement benefits when the servicemember waives retirement pay in favor of disability pay at any time during the divorce proceeding or after. Federal law preempts the states from treating waived military retirement pay as divisible community property. *Howell v Howell*, 581 US 214 (2017); *Mansell v Mansell*, 490 US 581 (1989). For more on division of military retirement benefits, see *Michigan Family Law* ch 27 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed).

4. Civil Service

§8.77 A former spouse is entitled to a portion of the retirement benefits of a civil service employee, a member of Congress, or a retiree if a qualifying court order expressly provides for the division of the retirement benefits. To qualify under 5 CFR 838.1004, the order must (1) divide the employee's retirement benefits, (2) award a payment from the benefits, and/or (3) award a former spouse survivor annuity.

If the order divides the employee's benefits, it must clearly state the former spouse's share as a fixed amount, a percentage, or a fraction of an annuity. It may also be stated using a formula, if the formula contains only values that can be readily ascertained either from the face of the order or from the Office of Personnel Management files.

A court order can call for payments to be made directly to the former spouse.

A court order may award the former spouse a former spouse survivor annuity (as defined in 5 CFR 831.603) if the spouse was married to the employee for at least 9 months and the employee performed at least 18 months of creditable service in a position covered by the Civil Service Retirement System.

IX. Bankruptcy

A. In General

§8.78 Under the Bankruptcy Reform Act, 11 USC 101 et seq., bankruptcy does *not* discharge debts for support or for property settlement. Support debts receive particularly favored treatment. See §§8.80–8.81. Property settlement debts may include

- the bankrupt spouse's obligation to pay property settlement payments to the nondebtor spouse,
- obligations to pay third parties (such as assuming credit card debt or paying house payments),

- obligations to hold the nondebtor spouse harmless if the spouse ends up having to pay debts that the bankrupt spouse should have paid, and
- certain liens on property, possibly affecting a spousal debt if secured by a lien.

The Bankruptcy Reform Act placed new restrictions on who may file for bankruptcy and made a number of changes that affect divorcing parties. See §§8.79–8.83.

Michigan law explicitly provides that benefits under a Michigan public employee retirement system are not subject to execution, garnishment, attachment, or bankruptcy proceedings, and may not be assigned, except in an EDRO or any other domestic relations order pertaining to alimony or child support. *See* MCL 38.1681 et seq., .1684.

B. Automatic Stay

§8.79 Filing for bankruptcy triggers an automatic stay that can affect divorce proceedings. The automatic stay

- prohibits a state court from making any property division, *In re Blatz*, 37 BR 401 (Bankr ED Wis 1984); *Rogers v Rogers*, 671 P2d 160 (Utah 1983);
- virtually stays attempts to collect a debt or property from the debtor or to enforce claims against the debtor, 11 USC 362(a).

However, under the Bankruptcy Reform Act, proceedings to establish or enforce support obligations, domestic violence proceedings, paternity proceedings, and a number of other proceedings are exempt from the stay and may continue even if there is a bankruptcy. 11 USC 362(b)(1) and (2).

Acts taken in violation of the automatic stay are void. *Scrima v John DeVries Agency*, 103 BR 128 (Bankr WD Mich 1989), *further proceedings,* 116 BR 951, 119 BR 539 (Bankr WD Mich 1990).

On the request of a creditor, a bankruptcy court may lift an automatic stay for cause. 11 USC 362(d)(1). The stay has been lifted to permit state courts to proceed with property division. *In re White*, 851 F2d 170 (6th Cir 1988); *In re Palmer*, 78 BR 402 (Bankr EDNY 1987); *Rauer v McFee*, 802 P2d 155 (Wyo 1990).

C. Debts That Can Be Enforced

1. Domestic Support Obligations

§8.80 Under both the old and the new acts, debts for support obligations are nondischargeable. 11 USC 362(a)(5). Under the new act, *domestic support obligation* is broadly defined to include debts in the nature of alimony, maintenance, or support of a variety of people including a spouse, former spouse, or child of the debtor, or such child's parent, 11 USC 101(14A), thus acknowledging support obligations in situations in which the parents of a child were never married. Further, support obligations receive a particularly high priority status. 11 USC 507(a)(1). State courts and bankruptcy courts have concurrent jurisdiction to determine whether a debt is dischargeable under 11 USC 523(a)(5). *See* 2 *Collier*

Bankruptcy Manual ¶523.02 (3d ed rev 1998). Whichever court makes the determination, it must apply federal law. *In re Calhoun*, 715 F2d 1103 (6th Cir 1983), *clarified and limited by Fitzgerald v Fitzgerald (In re Fitzgerald)*, 9 F3d 517 (6th Cir 1993). The spouse objecting to a discharge has the burden of proving that it is nondischargeable. *Calhoun,* 715 F2d at 1111 n15; *Karpinski v Karpinski*, 144 BR 356 (Bankr ED Mich 1992).

Practice Tip

- *Where a debt (such as a spouse's obligation to pay attorney fees to the other spouse or a hold-harmless obligation) is necessary for the support of the payee spouse, it is helpful to make a record that it is intended as support, so as to ensure that it receives the high priority afforded to domestic support obligations.*

2. Property Settlement Debts

§8.81 Under the old act, property settlement debts were dischargeable unless they met a balancing test that was cumbersome and unpredictable under former 11 USC 523(a)(15). One of the Bankruptcy Reform Act's most significant changes with regard to domestic relations cases is the elimination of this balancing test; now, if a debt arises out of a divorce action and is owed to a spouse, former spouse, or child, it is nondischargeable. 11 USC 523(a)(15). However, property settlement debts still receive less favored treatment in comparison to domestic support obligations, so it is still important to distinguish whether a debt is intended to be a property debt or a debt in the nature of support.

3. Fraudulent or "Bad Acts" Debts

§8.82 The Bankruptcy Code makes a debt not dischargeable if it was incurred by false pretenses, false representations, or fraud. 11 USC 523(a)(2), (4), (6). As with a qualifying property settlement debt, the federal court has exclusive jurisdiction if this argument is raised. 2 *Collier Bankruptcy Manual* ¶523.02 (3d ed rev 1998). A *constructive trust* (see *Michigan Family Law* §17.55 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed)) apparently falls within the "defalcation in a fiduciary capacity" exception, which comes under these same Code provisions and the exclusive jurisdiction of the federal court. *Collier Bankruptcy Manual* ¶523.09; *In re Sommerville*, 122 BR 446 (Bankr MD Ala 1990).

In *Corzin v Fordu (In re Fordu)*, 201 F3d 693 (6th Cir 1999), a bankruptcy trustee was allowed to attack a divorce settlement agreement on the grounds that it qualified as a fraudulent conveyance under Ohio law. There, the husband had given up rights in a home and lottery winnings at a time when he was about to embark on a business venture that later failed. Almost two years after the divorce settlement, when the husband declared bankruptcy, his trustee sought to recover these transfers from the ex-wife. Even though the state court had approved the settlement, the bankruptcy court was not bound to accept the state court's implicit finding that the settlement was "fair." Rather, the bankruptcy court was free to make its own determination of whether the debtor husband had received fair value for the interests he gave away in the divorce.

4. Avoidance of Liens

§8.83 Any lien granted or imposed by court order in the context of divorce proceedings that is not perfected as of the bankruptcy filing date can be avoided by the debtor or the bankruptcy trustee. If the underlying debt is nondischargeable, the debtor remains obligated to pay it even after the lien securing its payment is avoided in bankruptcy. 11 USC 522(f)(1)(A) permits a debtor to avoid a judicial lien on property that the debtor wishes to exempt, but a debtor cannot avoid a judicial lien that secures payment of a domestic support obligation. See *Michigan Family Law* §§19.22–19.23 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed).

In addition, a judicial lien may be avoided in bankruptcy if the lien attached to a *preexisting* property interest, such as a property interest that was created before the court's order created the lien. *See* 11 USC 522(f)(1); *Farrey v Sanderfoot*, 500 US 291 (1991). In *Farrey,* the judgment of divorce created a new fee title interest in the husband when it severed the couple's previous joint tenancy interest in the marital home. Since the bankrupt husband's fee title interest did not preexist the lien, the wife could enforce the lien. What property interests the parties have and when is a matter of state law. Michigan has not applied *Farrey.*

X. Enforcement Measures

A. In General

§8.84 Once a divorce has been reduced to judgment, the divorce court has jurisdiction to make any order proper to fully effectuate its judgment. MCL 600.611. Courts may order enforcement devices even if the parties have not agreed on them. *Carlson v Carlson*, 139 Mich App 299, 362 NW2d 258 (1984) (property settlement remanded to include some method of securing installment obligation).

An independent action is not required to enforce a judgment's property settlement provision. *Landy v Landy*, 131 Mich App 519, 345 NW2d 720 (1984). Provisions regarding property distribution may be enforced by filing a motion in the trial court. *See, e.g., Rotzell v Rotzell*, 241 Mich 122, 216 NW 400 (1927); *Lawrence v Lawrence*, 150 Mich App 29, 388 NW2d 291 (1986). Courts have broad powers to fashion the remedies needed to afford complete equity and conclude the controversy. *Walworth v Wimmer*, 200 Mich App 562, 504 NW2d 708 (1993) (shorter redemption period imposed for mortgage foreclosure); *Cohen v Cohen*, 125 Mich App 206, 211, 335 NW2d 661 (1983).

In *Peabody v DiMeglio (In re DiMeglio Estate)*, 306 Mich App 397, 406–407, 856 NW2d 245 (2014), the court of appeals observed that there are three enforcement options for property settlement agreements: (1) a "merged" agreement that is enforceable only as a judgment, not as a contract; (2) a "nonmerged" agreement (without any language of "incorporation") that is enforceable only as a contract; and (3) an "incorporated but not merged" agreement that is enforceable "both as a court order and as an ordinary contract."

Enforcement in supplemental proceedings is covered by MCR 2.621. That court rule includes the provisions discussed below.

B. When the Judgment Is Enforceable

§8.85 A divorce judgment is enforceable 21 days after a final judgment is entered in the action. MCR 2.614(A)(1); *see* MCR 7.202(6) (defining *final judgment*). However, injunctions in final judgments may be enforced immediately. MCR 2.614(A)(2)(c). After the time to appeal has expired, a judgment has to be specifically stayed to avoid enforcement. *See* MCR 7.101(H). Stays of proceedings are governed by MCR 7.108.

Interlocutory orders of the court concerning management of property are immediately enforceable on entry. MCR 2.614(A)(2)(e); *see Lyons v Lyons*, 125 Mich App 626, 336 NW2d 844, *appeal after remand,* 128 Mich App 203, 339 NW2d 875 (1983).

Consent judgments that provide that all terms are final and enforceable immediately on entry arguably do not come under the stay. *See* 3 James A. Martin et al, *Michigan Court Rules Practice* 639 n1 (3d ed 1986).

The 10-year statute of limitations period in MCL 600.5809(3) applies when a property settlement agreement is incorporated by reference into the divorce judgment, regardless of whether the term *incorporated* is accompanied by "nonmerger" language. *Peabody v DiMeglio (In re DiMeglio Estate)*, 306 Mich App 397, 407, 856 NW2d 245 (2014); *cf. Dorko v Dorko*, 504 Mich 68, 934 NW2d 644 (2019) (request for entry of QDRO implements provision of divorce judgment and therefore 10-year limitations period does not apply). A debtor spouse's obligations continue to be enforceable against the estate after death. *Allen v Allen*, 341 Mich 543, 67 NW2d 805 (1954); *Listh v Listh*, 329 Mich 579, 46 NW2d 385 (1951).

However, when a judgment of divorce provides for an action at a future point, the statute of limitations under MCL 600.5809(3) only begins to run when the action required comes due. *O'Leary v O'Leary*, 321 Mich App 647, 909 NW2d 518 (2017).

Note: a mortgage entered into after a vendee has already taken possession and equitable title to a land contract property is not a purchase money mortgage. Therefore, the mortgage is not entitled to priority over earlier recorded interests, including a judgment lien arising from a divorce. *Graves v American Acceptance Mortg Corp*, 469 Mich 608, 677 NW2d 829 (2004).

C. Execution

§8.86 Executions on real or personal property are governed by MCL 600.6001 et seq. The right to execute need not be stated in the judgment; it is implicit in any judgment for money, including a divorce judgment. A separate action for a money judgment is not required. *Landy v Landy*, 131 Mich App 519, 345 NW2d 720 (1984); *see also Winter v Winter*, 270 Mich 707, 260 NW 97 (1935).

Exempt property. Generally, tax-deductible portions of IRA contributions (but not any excess voluntary contribution) are exempt from execution, as are all contributions to qualified pension, profit-sharing, stock bonus, or other similar

plans. MCL 600.6023(1)(j), (k). This does not apply if the IRA or qualified plan is subject to a divorce judgment that permits their distribution or invasion. *Id.*

Generally, trusts are exempt from collection for property settlement debts. *See Coverston v Kellogg*, 136 Mich App 504, 357 NW2d 705 (1984); *Hurley v Hurley*, 107 Mich App 249, 309 NW2d 225 (1981).

D. Receivers

§8.87 A receiver may be appointed to take control of contested property, to preserve the property, to deliver it to the party entitled to it, or otherwise to effect the court's judgment. MCL 600.2926, .6104(4); MCR 2.622; *see Hagen v Hagen*, 202 Mich App 254, 508 NW2d 196 (1993) (Friend of the Court appointed as receiver to collect and disburse worker's compensation benefits); *Cohen v Cohen*, 125 Mich App 206, 335 NW2d 661 (1983) (receiver appointed to recover fixtures taken from marital home or collect damages); *see also Shouneyia v Shouneyia*, 291 Mich App 318, 807 NW2d 48 (2011)(trial court has authority to appoint receiver to preserve property that could satisfy debt to creditor spouse; note that in this case it was error to appoint receiver of corporation without joining corporation as party to the lawsuit). Note that MCR 2.622 has specific requirements for receiverships, including who may serve and the terms of orders appointing receivers.

E. Contempt

§8.88 Since a 2005 amendment to the statute, contempt is available as a remedy for violation of any order to pay money. MCL 600.1701(e). Even before the statute was amended, some courts applied the contempt remedy in exceptional circumstances. *Carnahan v Carnahan*, 143 Mich 390, 107 NW 73 (1906) (failing to convey a Canadian bank account that was beyond the court's jurisdiction); *Chisnell v Chisnell*, 99 Mich App 311, 320, 297 NW2d 909 (1980) (contempt citation for husband failing to present himself to court when ordered to do so, although not for nonpayment of his property settlement debt); *Schaheen v Schaheen*, 17 Mich App 147, 169 NW2d 117 (1969) (refusing in open court to convey title to real estate located in Lebanon).

Under MCL 600.1715, contempt is punishable by, among other remedies, a 93-day incarceration or a fine of up to $7,500.

Contempt proceedings for disobeying or refusing to comply with a court order are criminal in nature. *In re Contempt of Rochlin*, 186 Mich App 639, 465 NW2d 388 (1990); *see* MCL 600.1701(g). Because jail time is a possible result, the spouse in contempt has a right to counsel. *See Argersinger v Hamlin*, 407 US 25 (1972) (general right to counsel when jail time is possible).

F. Awarding Interest on Judgments and Awards

1. In General

§8.89 The award of interest on property settlements is within the court's equitable and discretionary powers. *See Reigle v Reigle*, 189 Mich App 386,

474 NW2d 297 (1991); *Thomas v Thomas (On Remand)*, 176 Mich App 90, 439 NW2d 270 (1989).

Five percent is the maximum allowable rate absent a written agreement. MCL 438.31. Seven percent per year is generally the limit if an interest rate is specified in the settlement agreement. *Id.*

Where there is a settlement agreement that has not been merged with the judgment, a separate contract enforcement action may entitle the enforcing party to pre- and postjudgment interest, and even damages for loss of investment income. *See Grace v Grace*, 253 Mich App 357, 655 NW2d 595 (2002).

2. Usury Limits

§8.90 The usury laws apply to property settlement debts created in a judgment of divorce. *Clifford v Clifford*, 434 Mich 480, 481, 453 NW2d 675 (1990); *Norman v Norman*, 201 Mich App 182, 506 NW2d 254 (1993). A creditor who seeks to collect interest greater than that permitted under the usury law is barred from collecting *any* interest and is liable for the debtor's attorney fees and court costs. MCL 438.32; *see Farley v Fischer*, 137 Mich App 668, 358 NW2d 34 (1984) (creditor husband barred from collecting any interest specified in property settlement); *cf. Clifford* (court amended usurious consent judgment to provide for legal rate of seven percent rather than bar all interest).

A divorce judgment's "lien interest" in the marital home does not make the lien a "mortgage" that is exempt from the usury limits. *Farley,* 137 Mich App at 671.

3. Simple Versus Compound Interest

§8.91 Simple interest is applied on a property settlement in the absence of a statute or an express agreement providing for compounding. *Norman v Norman*, 201 Mich App 182, 506 NW2d 254 (1993) (judgment silent on question of compounding). A court could compound interest on equitable grounds, such as a particularly egregious default or an established past course of dealing. *Id.* at 187–188.

4. Judgment Interest

§8.92 A divorce judgment is not a money judgment within the meaning of the judgment interest statute and therefore does not normally carry judgment interest. *Reigle v Reigle*, 189 Mich App 386, 474 NW2d 297 (1991); *but see Farley v Fischer*, 137 Mich App 668, 358 NW2d 34 (1984) (judgment interest awarded where husband filed separate collection action based on debt in earlier divorce judgment).

9
Tax Considerations in Divorce

Summary of Tax Considerations in Divorce

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Spousal support and Section 71 payments. §9.1.

The 2017 Tax Cuts and Jobs Act (2017 Tax Act) amended IRC 71 to eliminate taxable/deductible alimony and spousal support effective for divorce and separation judgments and decrees entered after December 31, 2018.

Spousal support payments provided for in judgments entered before December 31, 2018, are grandfathered and will remain taxable to the payee and deductible by the payer beyond 2018.

The following presents the rules of and planning opportunities under Section 71 as it applies to divorce judgments entered before December 31, 2018.

To qualify as taxable/deductible under Section 71, payments must

- be paid in cash;
- terminate on the death of the payee, pursuant to express terms in the governing document;
- not be designated as child support; and
- generally, if over $15,000 annually, not decline during the first three years following divorce.

Flexible uses.

Payments do not have to satisfy the payer's obligation to support the payee, nor do they need to extend for any minimum term of years.

- Section 71 payments could be used to pay a property settlement or legal fees on a taxable/deductible basis, which can be advantageous if the parties are in different tax brackets.

Property settlements and taxes affecting marital property. §9.2.

Nontaxable—Transfers between spouses pursuant to divorce are nontaxable.

Carryover basis—The transferee spouse takes property with a carryover tax basis and all tax attributes.

- A negative tax attribute—a low basis relative to value—means the asset is burdened with a built-in tax.
- Most retirement assets such as pensions, IRAs, 401(k)s, etc., have *no* tax basis—that is, they are 100 percent pretax dollars.

Taking future taxes into account—It is generally advisable to identify the tax characteristics (e.g., a low basis relative to value) of each marital asset and to take them into account in the property settlement.

- This may be done by "tax affecting" marital assets, that is, by reducing value by a credit for future tax.
- It may also be done by an approximately even division of future tax liability.

Dependency exemptions for children of divorced or separated parents. §9.3.

The 2017 Tax Act eliminated dependency exemptions effective January 1, 2018. Thus, there is no longer a deduction from federal taxable income for dependency exemptions, but families with eligible dependents may still qualify for certain credits.

However, the Child Tax Credit (CTC) was increased under the 2017 Tax Act from $1,000 per qualifying child to $2,000 limiting the refundable amount to $1,400 per qualifying child. 26 USC 24. The CTC provision of the 2017 Tax Act expires on December 31, 2025.

In 2021, the American Rescue Plan Act temporarily expanded the CTC from $2,000 to $3,600 per child under age 6 and $3,000 per child up to age 17 (rather than the previous limit of age 16). The credit amount gradually diminishes for single filers earning more than $75,000 per year, head of household filers earning more than $112,500, and married couples earning more than $150,000 a year. The 2021 act temporarily made the tax credit fully refundable and paid out half of the total credit in monthly payments for the first six months, rather than once per year. From July to December 2021, families with children received half of their total credit in monthly advance payments. Eligible families who filed taxes in 2019 or 2020 qualified for automatic monthly payments. Families not required to file taxes based on income level can still receive the tax credit through a nonfiler process but were required to enroll by November 15, 2021. If the deadline was missed, families can claim the tax

credit when filing their 2021 income tax return. In 2022, the CTC reverted back to $2,000 per qualifying child limiting the maximum refundable amount to $4,500 adjusted for inflation each year through 2025. 26 USC 24(h). For 2022, the maximum refundable amount was $1,500 and for 2023 it was $1,600. The CTC starts phasing out for single and head of household filers earning more than $200,000 per year and married couples earning more than $400,000 a year. *Id.*

Michigan dependency exemptions remain in effect and increased to $5,400 in 2023 and to $5,600 in 2024. The federal rules applicable to dependents still apply for both the CTC and the Michigan exemption.

Custodial parent entitled—The parent with physical custody for more than half the year is automatically entitled to claim the exemption for a child.

Release to the noncustodial parent—The custodial parent may release the exemption to the noncustodial parent by executing IRS Form 8332.

State court authority—Michigan state courts have authority to award the exemption.

Avoid exemption phaseout—The value of credits and tax savings for a dependent are phased out for high-income taxpayers.

Tax treatment of divorce-related legal and accounting fees. §9.4.

The 2017 Tax Act eliminates miscellaneous itemized deductions effective January 1, 2018. Thus, legal and accounting fees for divorce-related services are not deductible.

However, fees relating to the property settlement may still be added to the tax basis of assets received or retained (hence, reducing gain on a future sale).

Qualified Domestic Relations Orders (QDROs) and Eligible Domestic Relations Orders (EDROs). §9.5.

Common checkpoints—It is generally advisable to specifically provide in the judgment or settlement agreement whether the alternate payee is entitled to

- receive presurvivor and postsurvivorship benefits
- receive a death benefit if the plan contains one
- proportionately share in cost-of-living and other plan enhancements
- draw benefits at the earliest time permitted by the law and the plan

Postjudgment uses—QDROs and EDROs can be used after judgment to access funds when necessary to cure a default on spousal support, child support, or property settlement payments.

Filing status and related matters. §9.6.

Single status—If parties are legally divorced or separated at year-end, they are single for tax filing purposes.

Married status—If the parties are still married on December 31, they must generally file jointly or as married taxpayers filing separately.

Tax planning—It may be advantageous to plan what year the divorce will be entered, if it could be done in either of two years.

Collateral matters—Items of value that are frequently overlooked in property settlements include tax refunds, overpayments from prior years, estimated payments made in the year of divorce, and various loss carryovers.

Sale of the marital residence. §9.7.

The exclusion of gain on the sale of a principal residence is up to $250,000 for qualifying single taxpayers and $500,000 for qualifying married taxpayers filing a joint tax return.

- To qualify, a single taxpayer must own and live in the home as a principal residence for two of the five years preceding the sale. For a married couple, one spouse must satisfy the two-out-of-five-years ownership requirement, but both must have lived there for two of the five years preceding the sale.
- A taxpayer may use the exclusion each time a home is sold, provided two years have lapsed since the last sale.

For this purpose, when an interest (e.g., 50 percent) in the marital residence is transferred from one spouse to the other pursuant to the divorce, the transferor's period of ownership passes with the property to the transferee.

If it is expressly provided that one spouse is entitled to remain in the home until it is sold (often when the youngest child is emancipated), that spouse's use is attributed to the other (who is usually out of the house and would not otherwise qualify).

I. Spousal Support and Section 71 Payments

§9.1 The 2017 Tax Act amended IRC 71 to eliminate taxable/deductible alimony and spousal support effective for divorce and separation judgments and decrees entered after December 31, 2018.

Spousal support provided in judgments entered before December 31, 2018, are grandfathered and will remain taxable to the payee and deductible by the payer.

The following presents the rules of and planning opportunities under Section 71 as it applies to divorce judgments entered before December 31, 2018.

Spousal support payments are taxable under IRC 71 and deductible under IRC 215 if certain requirements are satisfied.

Statutory requirements. The following are the more significant statutory requirements for taxable/deductible treatment:

- **Cash payments.** Payments must be in cash (the use of a residence, i.e., imputed rent, does not qualify).
- **Termination on the payee's death.** The payer's obligation to make the payments must terminate when the payee dies; furthermore, there must be no obligation for the payer to make any payment as a substitute after the payee's death (such as a continuation of payments to the payee's estate or to children of the marriage).
- **Not designated as child support.** The payments must not be designated as child support (although "unallocated family support" payments—constituting both spousal support and child support—may qualify if certain requirements are satisfied).

Spousal support recapture. Qualifying payments that are disproportionately skewed or bunched in the first couple of years after settlement may be subject to recapture. The recapture rule applies during the three calendar years beginning with the first year payments are made.

When there is excess front-loading, recapture means that a portion of payments deducted by the payer and taxed to the payee will flip, that is, become taxable to the payer and deductible by the payee.

The purpose of recapture is to discourage labeling property settlement payments as spousal support to obtain a tax deduction. Property is likely to be paid in a lump sum at or near settlement; spousal support is more likely to be paid in level annual payments over time.

Recapture will not occur unless:

- **$15,000 threshold.** Annual spousal support payments exceed the $15,000 statutory allowance.
- **Decline of payments during the first three years.** Annual payments decline from one year to the next by more than $10,000 either from the first calendar year in which payments are made to the second or from the second calendar

year to the third. Thus, a decline in spousal support payments after the third calendar year will not result in recapture.

The following are exceptions to these requirements:

- **Death or remarriage.** Recapture will not result if a decline in or termination of spousal support is incident to the death of either party or the remarriage of the payee spouse.
- **Fluctuating income.** This exception applies if payments drop by more than $10,000 from one year to the next during the three-year measuring period due to a decline in income (e.g., an annual bonus or incentive pay award) to which the payee spouse is entitled to a certain percentage.

No support requirement/flexible uses of Section 71 payments. Taxable/deductible payments under Section 71 do not have to satisfy the payer's obligation to support the payee. Thus, provided other requirements are met—including termination on the payee's death—property settlement payments and attorney fees can be structured as taxable/deductible. This can be advantageous when the payer is in a significantly higher tax bracket than the payee. Such payments are frequently called Section 71 payments because, although they are taxable/deductible, they are not spousal support payments as such under state law.

Payments designated nontaxable/nondeductible. IRC 71 also provided that payments that might otherwise qualify as taxable/deductible could be expressly designated nontaxable/nondeductible. This designation could be useful when payments were not intended to be taxable/deductible but either they were or it is uncertain whether they were. The designation was often used to ensure that lump-sum payments such as insurance death benefit proceeds (or a lump sum resulting from acceleration on default) are nontaxable. A potential lump sum may be expressly designated as nontaxable/nondeductible even when normal monthly payments qualify and are treated as taxable/deductible.

This provision remains relevant post–2018 because such lump sums may be received in 2019 or thereafter.

II. Property Settlements and Taxes Affecting Marital Property

§9.2 The general rule of IRC 1041 is that transfers of property between spouses or former spouses incident to divorce are not taxable. This provision applies not only to transfers at divorce but after as well, provided the transfers are incident to the divorce.

- **Six-year presumption.** Transfers made pursuant to divorce documents within six years of divorce are presumed incident to divorce.
- **After six years.** The reverse presumption—that transfers after six years are not incident to divorce—may be rebutted by presenting evidence to the contrary.

The nontaxable treatment applies to transfers of cash or property, the surrender of marital property rights, and the assumption of liabilities. It does not apply to assignments of income such as an accrued bonus or a right to income from

rental property (unless ownership of the rental property itself is also transferred). This is the reason QDROs and EDROs are necessary to transfer pensions tax free.

Carryover basis to the transferee. As a corollary to the nontaxable treatment of divorce transfers, the transferee spouse takes property with a carryover tax basis, that is, with the same basis the property had in the hands of the transferor. This is a potential trap since negative tax attributes transfer with property.

The most common negative tax attribute—a low basis relative to value—is illustrated by the following:

	Value	Tax Basis	Potential Gain
Stock	$25,000	$5,000	$20,000
Money Market	25,000	25,000	0

To treat these two items of property as equal in value is improper since one carries a tax load while the other does not. Taking property in divorce is like taking a pig in a poke; hence, it is important to identify tax characteristics of property and then appropriately balance potential future tax liabilities between the parties.

Regulations. IRS regulations require transferors of property in divorce settlements to provide transferees with tax basis information. Since this data must be produced anyway, it is information the trier of fact should become aware of in fashioning a fair, equitable settlement.

According to Michigan Court of Appeals decisions, it is the burden of the party seeking credit for assuming future tax to present evidence of potential tax consequences. However, the court has also ruled that it is within the trial court's discretion whether to take taxes into account in valuing property, even when evidence of future tax is presented. *Nalevayko v Nalevayko*, 198 Mich App 163, 497 NW2d 533 (1993).

Distinctions in tax attributes. It is generally appropriate to award a full credit against the value of property on which future tax is certain to be paid. For instance, the value of pensions, 401(k) accounts, accrued bonuses, etc., cannot be derived until a tax liability is paid.

In considering a credit for potential future tax for property that will provide value before sold (e.g., a business, rental property), both the probability and likely timing of the tax liability should be taken into account.

Practice Tip

- *The thrust of considering and taking into account potential future tax associated with marital assets is to more or less balance responsibility for future tax between the parties—either by an approximate equal division of future tax or by extending a credit against value to a party who is assuming a significantly disproportionate share.*

III. Dependency Exemptions for Children of Divorced or Separated Parents

§9.3 The 2017 Tax Act eliminated dependency exemptions effective January 1, 2018. Thus, there is no longer a federal tax benefit from the exemption, which was $4,050 in 2017. However, the CTC was increased from $1,000 to $2,000 per qualifying child limiting the refundable amount to $1,400 per qualifying child. The CTC provision of the 2017 Tax Act is temporary and will expire on December 31, 2025.

In 2021, the American Rescue Plan Act temporarily expanded the CTC from $2,000 to $3,600 per child under age 6 and $3,000 per child up to age 17 (rather than the previous limit of age 16). The credit amount gradually diminishes for single filers earning more than $75,000 per year, head of household filers earning more than $112,500, and married couples earning more than $150,000 a year. The 2021 act temporarily made the tax credit fully refundable and paid out half of the total credit in monthly payments for the first six months, rather than once per year. In 2022, the CTC reverted back to $2,000 per qualifying child limiting the refundable amount to $1,500. The 2022 credit starts phasing out for single and head of household filers earning more than $200,000 per year and married couples earning more than $400,000 a year.

In addition, the Michigan income tax exemption, increased to $5,400 in 2023 and to $5,600 in 2024, remains in effect. The federal rules applicable to dependents still apply for both the CTC and the Michigan exemption.

A "qualifying child." A parent has a "qualifying child" when all of the following are established:

- **Divorce or separation requirement:** The parents are divorced, legally separated, or have lived apart for the last six months of the year.
- **Relationship requirement:** The child is the taxpayer's son, daughter, stepson, or step-daughter.
- **Residency requirement:** The child lived with the parents, on a combined basis, more than half the year, and with the taxpayer (custodial) parent for a greater portion of the year than with the other (noncustodial) parent.
- **Age requirement:** The child is under a certain age (under age 19 generally; under age 17 for the CTC; and if a full-time student, 24). However, there is no age limitation if the child is permanently and totally disabled.
- **Support requirement:** The parents have provided more than half the child's support during the year.

See IRS Pub 504 (2023).

Release of CTC or Michigan exemption. The custodial parent may release the CTC or Michigan exemption for a child to the noncustodial parent by executing a written waiver.

Physical custody by custodial parent more than half of the year. The parent with physical custody for more than half the year is the *custodial parent* and is enti-

tled to claim the dependency exemption regardless of which parent provided more than half the child's support.

For one or more years. The release or waiver of an exemption to the noncustodial parent may be done for one year, a specified number of years, or all future years. The custodial parent may revoke a previous release of an exemption. The revocation is effective for the tax year following timely delivery of the revocation to the noncustodial parent.

Practice Tips

- *It is generally advisable to provide that the custodial parent execute the release each year subject to the timely, full payment of child support by the noncustodial parent.*
- *Or, the custodial parent may revoke a previously granted release if child support is in arrears.*
- *It is also advisable to provide for consequential damages for a noncustodial parent if a custodial parent does not release an exemption without cause contrary to the settlement.*

Authority of Michigan family courts to award the exemption. The Michigan Court of Appeals, consistent with a large majority of state courts nationwide, has ruled that Michigan state courts have authority to award the exemption for children of divorced or separated parents. *Fear v Rogers*, 207 Mich App 642, 526 NW2d 197 (1994).

It has not yet been clearly established in Michigan whether the award of the exemption is part of the child support package—and hence modifiable—or part of the property settlement—which is generally nonmodifiable. *See Fear* (Hammond, J., dissenting).

IV. Tax Treatment of Divorce-Related Legal and Accounting Fees

§9.4 The 2017 Tax Act eliminated miscellaneous itemized deductions effective January 1, 2018. Thus, legal and accounting fees for divorce-related services are not deductible—even if they are related to tax advice. However, fees relating to the property settlement may still be added to the tax basis of assets received or retained (hence, reducing gain on a future sale). This can apply to fees attributable to services related to the retention, preservation, or acquisition of property awarded in a divorce settlement. Such fees are generally allocated among the property interests involved pro rata their respective fair market values. This tax benefit from the payment of fees is frequently overlooked.

Documentation of benefit. Whenever a fee may be added to the tax basis of property retained or received in a divorce settlement, it is important that the invoice or an accompanying client letter provide sufficient detail to support the beneficial tax treatment.

V. Qualified Domestic Relations Orders and Eligible Domestic Relations Orders

§9.5 Definition. A *QDRO* or an *EDRO* is a judgment, decree, or order (including approval of a property settlement agreement) made pursuant to state domestic relations law and relating to the provision of child support, spousal support, or marital property rights for a spouse, former spouse, child, or other dependent of a plan participant.

Required information. For an order to be a qualified or eligible order, it must expressly provide various information regarding the participant and the spouse taking an assignment in the benefit plan—the *alternate payee* (a spouse, former spouse, or child of the participant)—as well as the amount or percentage of the benefit to be assigned to the alternate payee (or the manner by which the amount or percentage is to be determined).

Significant collateral benefits. Too often, a divorce judgment or settlement agreement simply provides that an interest in a plan will be divided by a QDRO or an EDRO. The preferred practice is to specify the collateral benefits associated with the assigned interest, including the following:

- **Survivor benefits.** The alternate payee should be designated as a beneficiary of pre- and postretirement survivor benefits with respect to the interest divided between the parties.
- **Right to draw early.** It should be provided that the alternate payee may draw the benefit at the earliest time permitted by law and under the plan.
- **Participation in plan enhancements.** The judgment or settlement agreement should also generally provide that the alternate payee share proportionately in plan enhancements such as cost-of-living adjustments.
- **Death benefit protection.** It should also be provided that the alternate payee be designated as beneficiary of any death benefit provided by the plan to the extent necessary to preserve the alternate payee's interest.

Under Michigan law, all collateral benefits pass to the alternate payee unless some or all are specifically excluded in the judgement of divorce or settlement agreement. *See* 2006 PA 288.

Postjudgment uses of QDROs and EDROs. QDROs and EDROs can be used to serve postjudgment purposes including providing funds to satisfy spousal and child support arrearages or a default on a property settlement installment payment. They can also be used as a source of funds to provide payment of legal fees. While qualified plan interests cannot generally be used to formally secure divorce-related obligations, they can provide a source of funds postjudgment in the event of a default on any of these obligations.

VI. Filing Status and Related Matters

§9.6 Marital status on December 31 governs whether the parties are married or single for tax return filing purposes.

Married at year-end. If the parties are married at year-end, they must file as

- **married, filing jointly,** using the most favorable rates;
- **married, filing separately,** using the least favorable rates; or
- **single or head of household** if the following requirements are met:
  - a separate tax return is filed,
  - the individual provides more than half the cost of maintaining the home during the year,
  - the home is used as the principal residence of a child who qualifies as the taxpayer's dependent (whether claimed or not), and
  - the taxpayer and the spouse have lived apart for the last six months of the year.

Divorced or separated at year-end. If the parties are divorced or legally separated as of December 31, they may not file a joint return but rather must file as single individuals (or a head of household if they meet the requirements).

Practice Tip

- *Whenever it is feasible for a divorce to be entered in either of two years—other considerations aside—it is generally advisable to run the numbers both ways to determine the tax effects on the parties, both individually and combined.*

State court authority to order the filing of a joint return. A trial court has discretion to *compel* a party to sign a joint tax return for a tax year occurring during the marriage when it is in the best interests of the marital estate and (1) the court cannot compensate for the difference in tax liability through property allocation; (2) the requesting spouse has no history of tax problems; (3) the parties routinely filed joint tax returns during the marriage; and (4) the court orders the requesting spouse to indemnify the reluctant spouse for any resulting tax liability. *Butler v Simmons-Butler*, 308 Mich App 195, 863 NW2d 677 (2014).

Disposition of tax refunds, applied overpayments, estimated tax payments, and loss carryover. Frequently overlooked in settlements is the allocation between the parties of a tax refund, an overpayment of tax applied to the next year, estimated tax payments in the year of divorce, or various loss carryovers. These are marital assets that have value. The IRS has specific allocation rules for some tax attributes, but in many instances the IRS allows the parties to allocate these tax credits between one another.

VII. Sale of the Marital Residence

§9.7 Exclusion of gain on sale of principal residence. In general, IRC 121 provides for the exclusion of up to $250,000 of gain—$500,000 for married taxpayers who satisfy the requirements summarized below—on the sale of a home owned and used as a principal residence by the taxpayers for two of the five years preceding the sale.

Requirements for the $500,000 exclusion for married taxpayers:

- The parties must file a joint return for the year of sale.

- At least one of the spouses must satisfy the two-out-of-five-years ownership requirement.
- Both parties must satisfy the two-out-of-five-years use requirement.
- Neither party may have used the exclusion within the two years preceding the sale.

Exceptions to the two-year rule. As indicated above, the exclusion is generally not available if it has been used during the two years preceding the date of sale. A taxpayer who fails to satisfy the two-year requirement because of a change of employment, health problems, or other unforeseen circumstances is allowed a percentage of the $250,000 (or $500,000 for married taxpayers) equal to the percentage of the two years the ownership and use requirements are met.

> **Example:** A taxpayer lives in a home for six months, at which point he sells the home and moves because of a job transfer; since 25 percent of the two-year period requirement has been satisfied, 25 percent of the $250,000 or $500,000 exclusion—$62,500 for a single taxpayer or $125,000 for married taxpayers—is available.

Date for determining marital status. The marital status on the date of sale is used to determine whether the exclusion is $250,000 or $500,000. However, even if the parties are married on the date of sale, they must satisfy the three other requirements noted above—including filing a joint return for the year of sale. Thus, if the parties are married on the date of sale but divorced later in the same year, they may not file a joint return and hence do not satisfy one of the requirements for the $500,000 exclusion.

Special rules regarding married and divorced taxpayers:

- **Effect of marriage.** If a single taxpayer who otherwise qualifies for the exclusion marries someone who has already used it within the applicable two years, the newly married taxpayer's exclusion is limited to $250,000 (versus $500,000). To qualify for a $500,000 exclusion, the new spouse must occupy the home for two years, and two years must elapse since either has used the exclusion.
- **Two-out-of-five-years ownership requirement.** A person who acquires an interest in a principal residence from a spouse incident to divorce is considered to have owned the interest in the residence for as long as it was owned by the transferor spouse (the tacking rule).

  > **Example:** Assume a divorce settlement transfers spouse A's half interest in the marital residence acquired five years ago to spouse B. If spouse B were to sell the home one year after the divorce, spouse B would satisfy the two-out-of-five-years ownership requirement because spouse A's period of ownership of the half interest transferred to spouse B carries over to spouse B.

- **Two-out-of-five-years use requirement.** Use by one spouse that is specifically provided for in the divorce settlement is attributed to the other spouse.

Example: Assume a divorce settlement provides that spouse A is to remain in the home, which the couple continues to own as tenants in common, until their youngest child reaches the age of majority, five years after the divorce. Spouse B will qualify to use the exclusion on half of the gain because spouse B has continued to own the home and because spouse A's use—expressly provided for in the divorce settlement—is attributed to spouse B under IRC 121.

Practice Tip

- *It should be noted that the use by one spouse will be attributed to the other only if expressly provided for in the divorce judgment or property settlement.*

10
Paternity

3. Other Requirements §10.65

Summary of Paternity

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Overview.

The common-law rule is that a married woman's husband is presumed to be the legal father of any child conceived or born during the marriage. This rule is still the starting point of legal analysis when the marriage involves an opposite-sex couple.

Actions to determine paternity may be brought under the Paternity Act. Parents may also sign an acknowledgment of parentage under the Acknowledgment of Parentage Act, and a putative father may file a notice of intent to claim paternity under the Adoption Code, which raises a rebuttable presumption of paternity. A putative father may also establish paternity under the Revocation of Paternity Act (RPA), which will be renamed the Revocation of Parentage Act per 2024 PA 29 (eff. sine die, which is the 91st day after the 2024 legislature adjourns). When one or more of the parties receive Title IV-D services, actions to establish an alleged father's paternity may also be brought under the Genetic Parentage Act (GPA) or the Summary Support and Paternity Act (SSPA).

The establishment of paternity under another state's law has the same effect as a Michigan acknowledgment of parentage or order of filiation.

If a child is the subject of a petition brought in a proceeding brought under the Juvenile Code, a putative father may be entitled to notice and an opportunity to establish legal paternity. Putative fathers may not seek custody under the Child Custody Act of 1970 without a prior acknowledgment of paternity or order of filiation.

In a divorce action, the court has no authority to determine the paternity of a third party, although it may determine the husband's paternity rights if the court has in personam jurisdiction over the husband. A finding of fact in a divorce decree that a child was born of the marriage bars relitigation of paternity, even if the issue was not contested.

Actions under the Paternity Act. §§10.1–10.40.

Parties; standing. §§10.2–10.7.

The action may be filed by the child's mother, putative father, or, where the child is supported by public assistance, by the Department of Health and Human Services (DHHS).

The plaintiff must allege that the child was born *out of wedlock. Out of wedlock*—the mother was unmarried for the entire time from the child's conception to birth, or a court has previously determined that the child was not the issue of the marriage.

There is a strong presumption that any child conceived or born to a married couple before a divorce action is started is legitimate, which can be rebutted only by clear and convincing evidence.

The child was not born out of wedlock, and thus the putative father had no standing where

- the child was conceived while the mother was unmarried but born after she married another man
- the child was conceived and born while the mother was married to another man even though tests indicated 99.99 percent probability of the putative father's paternity

See §10.4 for additional caselaw.

Venue; limitations. §§10.8–10.9.

Venue—in the county where the mother or the child resides. If the mother and child do not reside in Michigan, in the county where the putative father resides or is found.

The action may be instituted while the child's mother is pregnant or until the child is 18 years old. No *trial* can be held until the child is born, unless the defendant parent consents.

Complaint, summons, service. §10.11.

The complaint must name the person believed to be the father and state, as nearly as possible, when and where the mother became pregnant.

The complaint must be verified unless it is filed by the DHHS, in which case it is filed on information and belief.

The summons must include notice that the action will determine the party's obligation to support the child and may determine rights to custody and parenting time.

Notice of the procedure for the putative father to request appointed counsel must be served with the summons and complaint.

Right to counsel. §10.12.

An indigent defendant father has a right to appointed counsel. The court must personally advise the alleged father who appears in court of this right. If he decides to proceed without an attorney, the record must affirmatively show that he was advised of his right to an attorney at public expense and waived that right.

This right does not apply in a dispute over custody, parenting time, or nonpayment of child support arising after paternity is established, unless incarceration is a possible sanction.

Procedure. §§10.13–10.16.

The court may enter a default for failure to plead; neither party is required to testify before entry of the default.

There is no right to a jury trial.

Burden of proof—the plaintiff has the burden of proof by a preponderance of the evidence.

Blood- and tissue-typing tests and DNA identification profiling. §§10.17–10.24.

Either party, or the court on its own motion, may request the tests (the court may determine who pays). Must be requested at or before the pretrial conference or within the time specified by the court. Failure to make a timely request waives the right to tests unless the court permits later application.

If testing is ordered, the requesting party must serve notice on the other party (see §10.17 for requirements).

Without court order, the DHHS may file and serve the mother and the alleged father with notice that they and the child must appear for testing, as long as (1) notice is after service of process, (2) the parties have failed to consent to an order naming the man as the child's father within the time permitted for responsive pleading, and (3) notice is filed with the court and served on the mother and the putative father.

Failure to appear for court-ordered testing—the court may use any remedy available, including contempt, default, or the general sanctions in the civil court rules.

Admissibility of genetic test results—admissible without foundation testimony if (1) the test results are filed with the court and served on the mother and the alleged father and (2) no written objection is made within 14 calendar days after service of the report.

The objecting party must prove by clear and convincing evidence that foundation testimony or other proof of authenticity or accuracy is necessary for admission of the results or the report. See §10.21 for foundation requirements if necessary.

Establishment of paternity—on test results showing probability of paternity of 99 percent or higher. If two or more persons have a probability of paternity of 99 percent or higher, additional testing must be conducted until all but one of the putative fathers is eliminated.

Evidence. §§10.25–10.28.

Sexual activity—testimony is relevant only if acts occurred near the time of conception or offered to show the likelihood of a relationship at the time of conception.

Alibi notice—on the mother's request, the court may order the defendant to give this notice.

An expert testifying regarding genetic test results must be accredited by the American Association of Blood Banks or another nationally recognized organization.

Evidence not requiring foundation testimony:

- results or the written report of genetic testing (if no objection filed)
- documentation of genetic test expenses is prima facie evidence of amount without third-party foundation

- bills for the child's funeral expenses, the mother's confinement, or in connection with the mother's pregnancy are prima facie evidence of the amount without third-party foundation

Order of filiation. §§10.29–10.30.

The court must enter an order of filiation if determination of paternity is made by the court, by the defendant acknowledging paternity, or by entry of a default judgment.

The order of filiation must

- set child support pursuant to the child support formula
- include the health care related provisions of the child support formula
- unless Medicaid paid the confinement and pregnancy expenses or the pregnancy or complication of the pregnancy was the result of a battery, apportion the reasonable and necessary expenses of the mother's confinement and pregnancy between the parents in the same manner as the child support formula apportions medical expenses; the father is no longer solely responsible for confinement costs and necessary expenses, except in the Medicaid or battery scenarios
- if applicable, direct payments of a deceased child's funeral expenses
- establish custody and/or parenting time—must include specific provisions if there is no dispute over custody or parenting time; if disputed, the court should enter an order for support and a temporary order for custody and parenting time
- provide that, if the father marries the mother after the birth of the child and provides documentation of that marriage to the Friend of the Court, the father's obligation for unpaid confinement and pregnancy expenses will be abated (this is a new requirement for orders of filiation)

As a support order, the order of filiation must also contain provisions required by court rules and the Support and Parenting Time Enforcement Act (SPTEA). See §10.30 and §§5.22–5.23.

Support. §§10.31–10.34.

- **amount**—determined by the Michigan Child Support Formula (MCSF), unless applying the formula would be unjust or inappropriate (same rules as for other support orders)
- **health care expenses, etc.**—a support order must include provisions related to health care; specifically, every support order must set a family annual ordinary health care expense amount to cover uninsured costs, premiums, and copays for children (it is presumed that $454 per child per year will be spent on ordinary expenses; *see* 2021 MCSF-S 2.02(A)); this annual amount is apportioned according to the parents' income, and the payer's share is paid as part of the regular support payment
- **postmajority support**—the court may order support for a child between the ages of 18 and $19^1/_2$ who regularly attends high school full-time with reasonable expectation of graduation and lives full-time with support payee or at an institution

- **support for period before filing**—a child support obligation is only retroactive to the date the paternity complaint was filed; the court may only set an earlier date if it finds that the defendant avoided service of the suit, used threats or physical coercion to prevent the complainant from filing the action, or otherwise delayed the imposition of the support obligation; the former provisions for support dating back to a child's birth in certain circumstances have been removed
- **retroactive modification**—not permitted

After an order of filiation is entered, the court has continuing jurisdiction to provide for, change, and enforce the order's provisions regarding custody, support, or parenting time.

Enforcement. §§10.38–10.40.

Orders of filiation are enforceable under the SPTEA and the Uniform Interstate Family Support Act (UIFSA) (interstate cases) and may be set aside under the RPA.

Acknowledgment under the Adoption Code. §10.41.

Before an out-of-wedlock child is born, the person claiming to be the father may file a verified notice of intent to claim paternity. This raises a presumption that he is the father unless the mother denies the claim. The notice is admissible in paternity proceedings and creates a rebuttable presumption of paternity.

The Acknowledgment of Parentage Act. §§10.42–10.44.

Procedure.

Parenthood may be established without Paternity Act proceedings if the mother and the father of a child born out of wedlock sign an acknowledgment of parentage form and the signatures are notarized or witnessed by a legally competent, disinterested, and qualified adult. On execution, the parties consent to the court's general jurisdiction regarding child support, custody, or parenting time. After execution, the mother is presumed to have custody of the minor child unless the parents agree otherwise in writing or the court orders otherwise.

The form can be signed at any time during the child's life. See §10.42 for required notices on the form.

A minor parent may sign an enforceable acknowledgment of parentage, although the court may appoint a next friend or guardian ad litem for the minor parent.

Invalidation.

An acknowledging father cannot execute a valid affidavit of parentage when a child was conceived and born to a married mother and father if there was no judicial determination indicating that the child is not an issue of the marriage. A child may be acknowledged by a man that is not the child's biological parent if the man honestly but incorrectly believes he is the child's biological father when signing the acknowledgment of parentage.

The RPA. §§10.45–10.51.

Jurisdiction, venue, and timing. §10.45.

Covers actions to set aside acknowledgments, determinations, and judgments relating to paternity. May also be used to establish paternity.

May be filed as an original action in the circuit court where the mother or the child resides or if neither is in the state, where the child was born. If there is an existing action for support, custody, or parenting time, must be brought as a motion in that action.

Must generally be brought within three years of the child's birth.

If the court has jurisdiction over the child and a termination of parental rights petition has been filed, an action may not be brought under the act unless the court first finds that it is in the best interests of the child.

Actions to determine that a child was born out of wedlock. §§10.46–10.47.

Standing. The child's mother, the alleged father, the presumed father, or the DHHS may file an action to determine that a child was born out of wedlock if certain requirements are met. These requirements vary depending on the filing party and are outlined in MCL 722.1441.

Procedure. If the court determines the child was born out of wedlock, the child's paternity must be established. The court may order blood or genetic tests but the results are not binding. An alleged father who proves by clear and convincing evidence he is the child's father may be entitled to an order of filiation. The court may refuse to enter such an order if it is not in the child's best interests, but the court must state the reasons for the denial on the record.

The effect of judgments under the act is covered in MCL 722.1443.

Actions to revoke an acknowledgment of parentage. §§10.48–10.50.

Affidavit—must be supported by an affidavit showing mistake of fact, newly discovered evidence that could not by due diligence have been found before the acknowledgment was signed, fraud, misrepresentation or misconduct, or duress in signing the acknowledgment. The parties' knowledge that the acknowledging father may not be the child's biological father is insufficient to show misrepresentation or fraud. If the parties sign the acknowledgment of parentage under the mistaken belief that the acknowledged father was the child's biological father, that constitutes a sufficient mistake of fact.

Blood or genetic tests—*If the court finds the affidavit sufficient,* the court may order blood or genetic tests at the claimant's expense or take other appropriate action.

The filing party must prove by clear and convincing evidence that the man is not the father. The court may refuse to enter an order that would not be in the best interests of the child.

Motion to set aside affiliated father's paternity determination. §10.51.

Standing. A child's mother, alleged father, or affiliated father may move to set aside paternity if the determination resulted from the affiliated father's failure to participate in the proceedings establishing his paternity. MCL 722.1439(1).

For a court to have "determined" paternity within the meaning of MCL 722.1443(2), paternity must be contested and resolved. Where paternity is uncontested in a divorce, the divorce judgment does not change a man's status from *presumed father* to *affiliated father.*

Actions to set aside a genetic father determination. §10.52.

A child's mother, a genetic father, an alleged father, or a prosecuting attorney may seek an order determining that a genetic father is not a child's father by filing a complaint in an original action or a motion in an existing action. MCL 722.1438(1), (5).

The GPA. §10.53.

If either the mother or the alleged father is receiving Title IV-D services, the parties may voluntarily establish paternity when the child is born out of wedlock under the GPA, MCL 722.1461 et seq. A man may be considered the biological father if (1) the parties and the child submit to genetic testing by a qualified person, (2) the testing shows that the probability of paternity is 99 percent or higher, and (3) the parties sign the requisite DHHS form agreeing to submit the test. Paternity is established if the genetic testing determines that the man is the biological father.

The SSPA. §10.54.

A Title IV-D agency can establish paternity for a child who is receiving public assistance or whose mother or alleged father has applied for Title IV-D services under the SSPA, MCL 722.1491 et seq. *See also* MCR 3.230. The agency must file with the court a statement signed by either the agency or one of the parties and serve a copy of the statement and a notice of intent to establish paternity on the parties. The parties have 21 days to either submit a written request for genetic testing or produce proof of a paternity exclusion; otherwise, the alleged father is established as the child's legal father.

Divorce proceedings. §§10.55–10.60.

In general. §10.56.

The court may determine the husband's paternity rights during the divorce proceeding. There is a strong presumption, rebuttable only by clear and convincing evidence, that any child conceived or born to a married couple before the commencement of a suit for divorce is legitimate.

Res judicata. §10.57.

Res judicata does not bar a postdivorce paternity challenge under the RPA.

Rights and responsibilities of the nonbiological parent. §§10.58–10.60.

Generally, parties cannot be ordered to pay child support for unrelated children that they supported as their own if they have not adopted the children, the parental rights

of the natural parents have not been terminated, and there has been no guardianship proceeding.

A man who knowingly marries a pregnant woman and assumes the status of the child's father, even though he is not, may be estopped from denying paternity. In addition, a former partner of a same-sex couple who is seeking custody of a child to whom they did not give birth and with whom they do not share a genetic connection is entitled to make a case for equitable parenthood and has standing to bring an action under the Child Custody Act.

Under the equitable parent doctrine, a person who is not the biological father of a child may be considered a parent when he desires such recognition and is willing to support the child as well as wants the reciprocal rights of custody or visitation afforded to a parent. However, the doctrine has not been applied when the parties are unmarried and the child is born out of wedlock.

Child Protective Proceedings. §10.61.

In a child protective proceeding where the child has a legal father, a putative father may not be identified or participate unless the presumption of a child's legitimacy is rebutted. If no legal father exists, a court may conduct a "putative father hearing" to identify the alleged natural father and to direct service of notice on him. After notice is served, the court may find one or more of the following:

- notice has been properly provided
- a preponderance of the evidence established that the putative father is the child's natural father and has 14 days to establish a legal relationship with the child (which may be extended for good cause)
- there is sufficient probable cause to believe that another reasonably identifiable man is the child's father
- the natural father of the child cannot be determined after a diligent search

If after proper notification, the child's natural father fails to appear or fails to establish a legal relationship with the child pursuant to the court's order, the court may find that he waives the right to all subsequent notice, including notice of termination proceedings and the right to an attorney.

Establishing the identity, location, and parental rights of the father of a child subject to a child protective proceeding prevents later procedural delays and disruption of permanency plans.

Interstate and International Adjudication of Paternity. §§10.62–10.65.

The establishment of paternity under the law of another state has the same effect and may be used for the same purpose as a Michigan acknowledgment of paternity or order of filiation.

The UIFSA, MCL 552.2101 et seq., allows a Michigan court to serve as either the initiating or responding tribunal in interstate proceedings brought under a support enforcement act to determine parentage as well as support.

I. Proceedings Under the Paternity Act

A. Governing Authority

§10.1 The governing authority for paternity actions is the Paternity Act, MCL 722.711 et seq., and MCR 3.217, Actions Under the Paternity Act. Paternity may also be established in an action under the RPA, MCL 722.1431 et seq. Statutes and caselaw governing paternity are likely to be revised in light of *Obergefell v Hodges*, 576 US 644 (2015) (legalizing same-sex marriage nationwide).

Note that if a foreign language interpreter is "necessary for a person to meaningfully participate in the case or court proceeding," the court will appoint an interpreter (either in response to a request or sua sponte) for a party or a testifying witness. MCR 1.111(B)(1). The court may appoint an interpreter for a person other than a party or a witness who has a "substantial interest" in the proceeding. MCR 1.111(B)(2).

B. The Parties

§10.2 The mother, the alleged father, or the DHHS may bring the paternity action. MCL 722.714(1).

The DHHS may file a complaint on the child's behalf, joining the mother or the alleged father as a plaintiff, if the child is supported in whole or in part by public assistance. MCL 722.714(12).

A minor may prosecute or defend any proceedings. The court may appoint a next friend or guardian ad litem, although this is not required. MCL 722.714(11).

MCL 722.714(1) does not define who may be sued in a paternity action under the Paternity Act. In *Black v Cook*, No 360492, ___ Mich App ___, ___ NW3d ___ (Mar 23, 2023), plaintiff sought to establish that he is the father of a minor child born out of wedlock when the child's mother is deceased and the child is in the care of a guardian. Plaintiff named the deceased mother and the child's guardian as defendants. A deceased individual cannot be sued as a matter of law, and the Paternity Act does not address whether a guardian may be named as a defendant in this action. There does not appear to be any law that precludes a plaintiff in a Paternity Act case from bringing an action against a minor child to determine the paternity of that child. The court of appeals ruled that even if this paternity action was incorrectly styled, the trial court erred in dismissing it. The court reversed and remanded to allow plaintiff to amend the complaint to name the minor child as a party defendant under MCL 722.711 et seq.

C. Standing

1. In General

§10.3 To establish standing in a paternity action, the plaintiff must allege that the child was born out of wedlock. *Girard v Wagenmaker*, 437 Mich 231, 470 NW2d 372 (1991). A child is born out of wedlock if the mother was unmarried for the entire time from conception to birth or if a court has previously determined that the child was not the issue of the marriage. MCL 722.711(a);

Spielmaker v Lee, 205 Mich App 51, 517 NW2d 558 (1994). Where a person "does not have standing to *bring* an action under the Paternity Act, he [or she] is not entitled to discovery to assist in *developing* a paternity claim." *Sprenger v Bickle*, 302 Mich App 400, 405, 839 NW2d 59 (2013). Note, however, that the RPA provides broader standing for certain putative fathers, referred to in the act as "alleged father[s]," to bring an action to establish paternity. MCL 722.1431 et seq.; *In re MGR*, 323 Mich App 279, Note 2, 916 NW2d 662 (2018), *rev'd on other grounds,* 504 Mich 852, 928 NW2d 184 (2019) (court applied definition for *putative father* as "a man reputed, supposed, or alleged to be the biological father of a child" from *Girard v Wagenmaker*, 173 Mich App 735, 740, 434 NW2d 227 (1988), *rev'd on other grounds,* 437 Mich 231, 470 NW2d 372 (1991)).

The Paternity Act and the Acknowledgment of Parentage Act constitute legislation envisioning alternative mechanisms to establish paternity where a child is born out of wedlock, i.e., an acknowledgment of parentage or an order of filiation. However, the legislature did not intend the creation of two legal fathers for one child through utilization of both acts, one by acknowledgment and one by order of filiation. A court cannot recognize both. If an acknowledgment of parentage has been properly executed, subsequent recognition of a person as the father in an order of filiation by way of a paternity action cannot occur unless the acknowledgment has been revoked. *Sinicropi v Mazurek*, 273 Mich App 149, 729 NW2d 256 (2006).

Once the pleading requirements are met in a paternity action, the court has subject-matter jurisdiction to determine whether the child was born out of wedlock. *Department of Soc Servs v Carter*, 201 Mich App 643, 506 NW2d 603 (1993); *see also McHone v Sosnowski*, 239 Mich App 674, 609 NW2d 844 (2000) (following *Girard*). Denying a putative father standing to challenge paternity constitutes a denial of due process only if the putative father has an established relationship with the child. *Sinicropi; Family Indep Agency v Heier (In re CAW) (On Remand)*, 259 Mich App 181, 673 NW2d 470 (2003).

In *Barnes v Jeudevine*, 475 Mich 696, 718 NW2d 311 (2006), a 4-3 decision, the supreme court held that defendant's default judgment of divorce stating that "'no children were born of this marriage and none are expected,'" *id.* at 700, did not qualify as a court determination that the child was born out of wedlock because it did not settle with finality a controversy regarding the child's legitimacy. The dissenting justices would have held that the default judgment was a legally sufficient court determination that the child was not the issue of defendant's marriage.

A paternity action may be brought even though the child is the result of the mother's uncharged act of criminal sexual conduct with the father, an underage boy. *LME v ARS*, 261 Mich App 273, 680 NW2d 902 (2004).

Practice Tip

- *When questioning the parties at the time of taking proofs for the judgment of divorce, be sure to ask whether any children were born after the date the parties married. Don't just ask the general question whether there are "children of the marriage." If any children are born, they are presumed to be children of the mar-*

riage. Litigants often believe they do not have to disclose children born during the marriage but fathered by a man other than the husband. Barnes makes clear that the court must address the paternity of all children born or conceived between the date of the marriage and the date of the divorce.

2. Was the Child Born "Out of Wedlock"?

§10.4 In the following circumstances, the child was found to have been born while the mother was married and thus the putative father had no standing.

- The child was conceived and born while the mother was married to another man. *Girard v Wagenmaker*, 437 Mich 231, 470 NW2d 372 (1991); *cf. Syrkowski v Appleyard*, 420 Mich 367, 362 NW2d 211 (1985) (surrogate mother case where putative father was allowed to use Paternity Act to determine his paternity of child).
- Defendant became pregnant during relationship with plaintiff, plaintiff filed suit during pregnancy to establish paternity, and defendant married another man before the child was born. *Numerick v Krull*, 265 Mich App 232, 694 NW2d 552 (2005).
- Defendant asserted she was pregnant with plaintiff's child shortly after her divorce was finalized but the child was born after defendant and her ex-husband remarried. *Sprenger v Bickle*, 302 Mich App 400, 839 NW2d 59 (2013);
- The child was conceived while the mother was married. *Department of Soc Servs v Baayoun*, 204 Mich App 170, 514 NW2d 522 (1994) (mother and Department of Social Services lacked standing to seek orders of filiation and support from defendant).
- The child was conceived while the mother was unmarried but born after she married another man. *Spielmaker v Lee*, 205 Mich App 51, 517 NW2d 558 (1994).
- The child was conceived and born while the mother was married, even though test results indicated 99.99 percent probability of paternity for the putative father. *Aichele v Hodge*, 259 Mich App 146, 673 NW2d 452 (2003); *Hauser v Reilly*, 212 Mich App 184, 536 NW2d 865 (1995).
- The child was conceived and born while the mother was married, but the determination of paternity was the result of the filing of plaintiff's action rather than a determination by a court prior to the filing of the action. *McHone v Sosnowski*, 239 Mich App 674, 609 NW2d 844 (2000).

3. A Court's Prior Determination

§10.5 A court's prior rulings in an unrelated divorce action can affect the putative father's standing in the paternity proceeding. For example:

- No standing was found, even though the divorce complaint alleged that no children were born of the marriage, where the husband had not been aware

at that time that his wife was pregnant. *Department of Soc Servs v Baayoun*, 204 Mich App 170, 514 NW2d 522 (1994).

- Standing was found where the allegations and acknowledgments in the mother's divorce from her husband coupled with the absence of support or custody provisions in the divorce judgment implicitly recognized that the child was not the issue of the marriage. *Afshar v Zamarron*, 209 Mich App 86, 530 NW2d 490 (1995).
- No standing was found where the divorce judgment specifically addressed the custody, support, and visitation of a child later determined to be born out of wedlock. *McHone v Sosnowski*, 239 Mich App 674, 609 NW2d 844 (2000).
- No standing was found where there was no paternity determination made in legal proceedings involving a husband and wife establishing that the husband was not the father of a child born during the marriage to the wife. The trial court erred in enforcing a New York order of filiation under the Full Faith and Credit Clause where the New York court concluded that it lacked personal jurisdiction over the husband, a necessary party to the paternity proceedings. *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 805 NW2d 226 (2011).

For the res judicata effect of a divorce decree, see §10.57.

4. Exceptional Situations

§10.6 Where a mother did not know that she was pregnant at the time of the divorce, and the ex-husband participated in the paternity action by submitting to a blood test, the paternity action was the proper forum for determining whether the child was an issue of the marriage. *Department of Soc Servs v Carter*, 201 Mich App 643, 506 NW2d 603 (1993). See also *Altman v Nelson*, 197 Mich App 467, 495 NW2d 826 (1992), where the issue of the putative father's standing arose during a custody battle, over a year after the order of filiation was entered. In the original paternity suit, there was evidence that defendant mother was married at the time of the birth. However, the trial judge never addressed the marital status or standing issues, and the mother did not appeal the order of filiation. The court of appeals viewed the trial court's failure to address the issues as an error in the exercise of its jurisdiction rather than a lack of jurisdiction; the order of filiation was not void, and the mother waived her rights by waiting too long.

5. Standing of the Child

§10.7 A legitimate child lacks standing to bring an action under the Paternity Act. *Puffpaff v Hull*, 169 Mich App 688, 426 NW2d 778 (1988). An illegitimate child may pursue additional paternity and support obligations under a court's equity jurisdiction, *Spada v Pauley*, 149 Mich App 196, 385 NW2d 746 (1986).

D. Jurisdiction and Venue

§10.8 The family division of the circuit court has jurisdiction over paternity actions. MCL 600.1021(1)(h). A defendant must raise any issue regarding personal jurisdiction in the first responsive pleading or else it is waived. *Teran v Rittley*, 313 Mich App 197, 882 NW2d 181 (2015) (citing MCR 2.116(D)(1)).

"MCL 722.714(1) does not expressly limit the circuit court's subject-matter jurisdiction[; r]ather, [it] concerns venue and indicates where a paternity action should be filed." 313 Mich App at 206. Venue is in the county where the mother or the child resides. If the mother and the child reside outside the state, venue is in the county where the putative father resides or is found. That the child was conceived or born outside of Michigan does not bar a complaint from being entered against the putative father. MCL 722.714(1); *see Teran,* 313 Mich App at 206–208 (concluding that when defendant putative father "was, in fact, 'found' in [Michigan], and … voluntarily entered his appearance in [plaintiff-mother's paternity] action," he "thereby submitt[ed] to the personal jurisdiction of the circuit court, which possessed subject-matter jurisdiction over the issues raised in the lawsuit," notwithstanding that "the father, mother and child all reside[d] outside of Michigan").

Jurisdiction over a putative father who is out of state can be established under Michigan's long-arm statute. *See* MCL 600.705. Paternity may also be established under the UIFSA, which has its own long-arm provisions. See §§10.63–10.65.

Note that the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1206, may apply if the paternity action falls under the definition of *child custody proceeding* set forth in the UCCJEA. *See Fisher v Belcher*, 269 Mich App 247, 713 NW2d 6 (2006) (holding that party's action was not UCCJEA child custody proceeding because "initial pleadings were not custodial in nature"); *see also Jones v Peake*, No 356436 (Mich Ct App Jan 20, 2022) (unpublished) (holding by express terms of MCL 722.1102(d), paternity proceeding in which custody or parenting time is not issue is not child custody proceeding).

E. Statute of Limitations

§10.9 A paternity action may be instituted while the child's mother is pregnant or at any time before the child reaches age 18. MCL 722.714(3). However, unless the defendant parent consents, there can be no trial before the child's birth. MCL 722.715(2).

F. Procedures in General

§10.10 A paternity action is generally considered civil in nature. *Bowerman v MacDonald*, 431 Mich 1, 427 NW2d 477 (1988). The rules applicable to other civil actions govern procedure unless modified by MCR 3.217 and the Paternity Act. MCL 722.714(1); *Larrabee v Sachs*, 201 Mich App 107, 506 NW2d 2 (1993).

Note that the UCCJEA, MCL 722.1101 et seq., "is intended to resolve jurisdictional disputes relating to child-custody determinations and proceedings." *Jones*

v Peake, No 328566 (Mich Ct App Mar 10, 2016) (unpublished). The UCCJEA is applicable and may strip a Michigan trial court of jurisdiction when the matter before the court constitutes a child custody determination or a child custody proceeding. *Id.* A "'[c]hild-custody determination' means a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child." MCL 722.1102(c). A "'[c]hild-custody proceeding' means a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue." MCL 722.1102(d). In *Jones,* the UCCJEA did not apply to plaintiff's request under the Paternity Act for child support and an order of filiation because "legal custody, physical custody, and parenting time were never issues in the proceeding." *See also Fisher v Belcher*, 269 Mich App 247, 713 NW2d 6 (2005) (holding that party's action was not UCCJEA child custody proceeding because "initial pleadings were not custodial in nature"). The UCCJEA may be applicable if the paternity action falls under the definition of child custody proceeding set forth in the UCCJEA. *See also Jones* (holding by express terms of MCL 722.1102(d), paternity proceeding in which custody or parenting time is not issue is not child custody proceeding). See Michigan Judicial Institute's Determine/Modify Interstate Child-Custody Dispute Checklist (Preliminary Matters) for more information.

G. The Complaint, the Summons, and Service

§10.11 The complaint. The complaint must name the person who is believed to be the father of the child as the father and state, as nearly as possible, when and where the mother became pregnant. MCL 722.714(7). The complaint must be verified by oath or affirmation, MCL 722.714(4), unless it is filed by the DHHS, in which case, the facts are set forth on information and belief. MCL 722.714(7).

It is a misdemeanor to file or aid in filing a false complaint about the identity of the father. MCL 722.722.

The summons. The summons must contain notice that the paternity action will determine the party's obligation to support the child and may determine the party's rights to custody of and parenting time with the child. MCL 722.714a(1).

A notice of the procedure for the defendant father to request the appointment of an attorney must be served with the summons and complaint. MCR 3.217(D)(1).

Service. Service can be made in any manner prescribed by the court rules for civil actions (*see, e.g.,* MCR 2.105). MCL 722.714(3). A 1986 amendment to the Paternity Act deleted the practice of issuing bench warrants for the putative father's arrest.

If the putative father is serving in the military, each branch of the military has procedures when military personnel are subject to a paternity claim. Generally, commanding officers must advise persons in their command of actions against them and of their legal rights and responsibilities. *See* 32 CFR 584.1; Army Reg 608-99. See also §1.18 for service generally.

If the putative father is incarcerated within the Michigan Department of Corrections, he must be given adequate notice of the proceedings and an opportunity to respond and to participate. *See* MCR 2.004. However, the protections of MCR 2.004 apply only to parents incarcerated by the Michigan Department of Corrections. *Family Indep Agency v Davis (In re BAD)*, 264 Mich App 66, 690 NW2d 287 (2004). A parent incarcerated in another state or in a county jail cannot rely on this court rule. See also §1.15.

H. Appointed Counsel

§10.12 If the complainant is the parent who has physical possession of the child and cannot afford an attorney, they may be represented by the prosecuting attorney or another party permitted by statute if the complainant (1) is eligible for public assistance or without means to employ an attorney or (2) receives child support services as provided by federal law. *See* MCL 722.714(4)–(5).

An indigent defendant father has a right to appointed counsel. *Larrabee v Sachs*, 201 Mich App 107, 506 NW2d 2 (1993); *see also* MCL 722.714(13); *Artibee v Cheboygan Circuit Judge*, 397 Mich 54, 243 NW2d 248 (1976). The following procedure is used to inform the alleged father of this right:

1. A notice of the procedure for requesting the appointment of an attorney must be served with the summons and complaint.
2. If the alleged father appears in court following the issuance of a summons, the court must personally advise him of his right to the assistance of an attorney and that the court will appoint an attorney at public expense if he is financially unable to provide an attorney of his choice.
3. If he indicates he wants to proceed without an attorney, the record must affirmatively show that he was advised of his right to an attorney at public expense and waived that right.

MCR 3.217(D).

Appointed counsel is not required for any dispute on custody or parenting time; see §10.35. There is no automatic right to appointed counsel in a proceeding regarding nonpayment of child support, *Sword v Sword*, 399 Mich 367, 249 NW2d 88 (1976), unless it is a contempt proceeding with the possibility of incarceration, *Mead v Batchlor*, 435 Mich 480, 460 NW2d 493 (1990).

I. Default

§10.13 The court may enter a default judgment against the defendant mother or father if a responsive pleading is not filed in accordance with the Michigan Court Rules. Neither party is required to testify before entry of a default judgment in a paternity action. MCL 722.714(8).

J. Jury Trials

§10.14 MCL 722.715 once stated that either party could demand a jury trial, but this provision was deleted by 1998 PA 113.

K. Res Judicata

§10.15 Prior divorce proceedings. Before the RPA's enactment, case-law held that if a child is determined to be a child of the marriage in a divorce judgment, the doctrine of res judicata bars relitigation of paternity. *See, e.g.*, *Hackley v Hackley*, 426 Mich 582, 395 NW2d 906 (1986) (support order arising from divorce decree constituted adjudication of paternity and duty of support); *Rucinski v Rucinski*, 172 Mich App 20, 431 NW2d 241 (1988) (where husband had not denied paternity during divorce proceedings, divorce judgment and support order constituted adjudication of paternity). Under the RPA, however, a challenge may be made at any stage of the proceeding in a support, a custody, or a parenting time action. MCL 722.1443(1); *see also* MCL 722.1441(5); *Glaubius v Glaubius*, 306 Mich App 157, 175, 855 NW2d 221 (2014) ("in the particular circumstances described in the [RPA], the Legislature intended to authorize postjudgment challenges to paternity, including for cases in which paternity was or could have been litigated"). Accordingly, res judicata does not bar a postdivorce paternity challenge under the RPA. *Glaubius.*

Another state's determination. The establishment of parentage (*parentage* replaces the term *paternity* in MCL 722.714b, *amended by* 2024 PA 28 (eff. sine die)) under the law of another state has the same effect and may be used for the same purposes as an acknowledgment of parentage or order of filiation under the Paternity Act. MCL 722.714b. However, an order of filiation from another state will not be given effect if that order does not comply with the requirements of Michigan's Paternity Act. *See Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 805 NW2d 226 (2011) (plaintiff lacks standing to seek paternity under Michigan's Paternity Act as New York court's filiation order lacked personal jurisdiction over husband, necessary party to paternity proceedings under Michigan law).

Another country's determination. Michigan has relitigated paternity issues previously adjudicated in another country to advance Michigan's public policy. See *Bessmertnaja v Schwager*, 191 Mich App 151, 477 NW2d 126 (1991), where a Michigan court relitigated paternity issues after a Swedish court had found plaintiff to be the child's father but did not order child support. The Michigan court relitigated because the Swedish judgment would have violated Michigan's public policy to provide support to illegitimate children.

L. Burden of Proof

§10.16 The plaintiff has the burden of proof by a preponderance of the evidence. *Smith v Robbins*, 91 Mich App 284, 283 NW2d 725 (1979); *Huggins v Rahfeldt*, 83 Mich App 740, 269 NW2d 286 (1978); *see also Rivera v Minnich*, 483 US 574 (1987).

M. Blood- and Tissue-Typing Tests and DNA Identification Profiling

1. Court-Ordered Testing

§10.17 The Paternity Act provides for blood- and tissue-typing tests and DNA identification profiling. MCL 722.716. Tests of the mother, the alleged father, and the child may be requested by either party or may be ordered by the

court on its own motion. Under the Paternity Act, a court is authorized to order the child, the mother, and the alleged father to undergo blood- and tissue-typing tests to determine paternity. The Paternity Act does not authorize a court to order other individuals to submit to blood- or tissue-typing tests to determine paternity. *See In re Estate of Seybert*, 340 Mich App 207, 985 NW2d 874 (2022) (holding that trial court erred when ordering decedent's daughter to provide sample of her DNA to determine whether man claiming to be heir of decedent was in fact decedent's biological son for purposes of determining his rightful claim to decedent's estate). The court may also determine who is responsible for paying for the tests. *Id.*

Required notice. If the court orders testing, the party who requested the testing must serve notice on the other party explaining

1. the test to be performed,
2. the purpose and potential uses of the test,
3. how the test will be used to establish paternity or nonpaternity,
4. how the individual will be provided with the test results, and
5. the individual's right to keep test results confidential (see §10.24).

MCL 722.714a(2).

Procedural matters. The parties must make an application for blood- or tissue-typing tests at or before the pretrial conference or within the time specified by the court. Failure to do so waives the right to these tests unless the court permits a later application. MCR 3.217(B); *see also Kenner v Watha*, 115 Mich App 521, 323 NW2d 8 (1982) (decided under similar provision of previous version of this rule).

As a due process right, the defendant alleged father in a paternity case has a right to blood tests and a right to have the tests paid for if he cannot afford the costs. *Little v Streater*, 452 US 1 (1981).

Paternity test results and, if a determination of exclusion cannot be made, a written report must be served on the mother and the alleged father and filed with the court. MCL 722.716(4).

See *Michigan Family Law* §13.16 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for further discussion of these tests.

2. Testing Requested by Department of Health and Human Services

§10.18 The DHHS or its designee may file and serve the mother and the alleged father with a notice requiring that they and the child appear for genetic paternity testing. A court order is not required for this notice. There are three requirements:

1. The notice must be after service of process.
2. Within the time permitted for a responsive pleading, the parties must have failed to consent to an order naming the man as the child's father.
3. The notice must be filed with the court and served on both the mother and the alleged father.

MCL 722.714(9).

The notice must include the five explanations indicated in §10.17.

The procedure for the paternity testing is the same as for court-ordered testing. *Id.*

If any party does not appear for testing, a court order to compel testing may then be sought. The DHHS or its designee may also seek other relief as permitted by statute or court rule. MCL 722.714(10).

If the DHHS paid for the genetic testing expenses, the court may order repayment by the alleged father if the court declares paternity. MCL 722.716(3).

3. Requirement of a Hearing

§10.19 A probable-cause hearing is not required before ordering blood- or tissue-typing tests. Filing a verified complaint under MCL 722.714 is sufficient ground for ordering blood- and tissue-typing tests. *Bowerman v MacDonald*, 431 Mich 1, 427 NW2d 477 (1988).

4. Enforcement of Court-Ordered Testing

§10.20 If the court orders a test and a party refuses to submit to it, the court may use any remedy available, including entering a default judgment at the request of the appropriate party or allowing the refusal to be disclosed at trial, unless good cause is shown. MCL 722.716(1).

Other remedies include the contempt sanction, as well as the general sanctions found in the civil court rules. If a party fails to comply with the testing order, the other party may ask the court for an order that the blood test results be taken as established against the party who refused to submit to blood tests. MCR 2.313(B)(2)(a).

5. Evidentiary Issues

a. Foundation for Tests

§10.21 Genetic test results are admissible in evidence without foundation testimony or other proof of authenticity or accuracy if (1) genetic testing results are filed with the court and served on the mother and the alleged father and (2) no objection to the report is made, in writing, within 14 calendar days after service of the report. MCL 722.716(4).

If an objection is filed within the 14-day period, the court will, on the motion of either party, hold a hearing to determine the admissibility of the written report. The objecting party has the burden of proving by clear and convincing evidence that foundation testimony or other proof of authenticity or accuracy is necessary for the admission of the results or the written report. *Id.*

Practice Tip

- *The court may not schedule a trial on the issue of paternity until the 14-day period expires to allow the alleged father the opportunity to submit objections.*

If necessary, the chain of identification from the time that blood or tissue samples are taken to the time they are analyzed may be established either directly or by circumstantial evidence. The foundation requirements are that

1. the blood tested was in fact that of the defendant, the plaintiff, and the child;
2. the test results were based on reliable blood samples;
3. a chain of identification is established from the time the blood samples were taken to the time the samples were analyzed; and
4. the chain of identification is shown by personal knowledge that the questioned samples were subject to reliable, usual office procedures established for tracing blood samples between the time the samples were drawn and the time they were analyzed.

Burnside v Green, 171 Mich App 421, 425, 431 NW2d 62 (1988).

b. The Establishment of Paternity

§10.22 If a qualified person using a blood- or tissue-typing test or a DNA profile determination concludes that there is a probability of paternity of 99 percent or higher, paternity is established. MCL 722.716(5).

If two or more persons are determined to have a probability of paternity of 99 percent or higher, additional testing must be conducted until all but one of the putative fathers is eliminated, unless the dispute involves putative fathers with identical DNA. *Id.*

Note that the Michigan Court of Appeals held in *In re Doe*, No 366773, ___ Mich App ___, ___ NW3d ___ (Jan 25, 2024), that the procedures for determining paternity under the Safe Delivery of Newborns Law, MCL 712.1 et seq., are comparable or identical to those of the Paternity Act, MCL 722.711 et seq., and the petitioner in that case was not required to file a paternity action under the Paternity Act to establish legal fatherhood.

c. The Physician-Patient Privilege

§10.23 The results of the blood test are not protected by the physician-patient privilege and may not be excluded from evidence on that basis. *Osborn v Fabatz*, 105 Mich App 450, 306 NW2d 319 (1981).

6. Confidentiality Requirements

§10.24 No one may disclose information—or sell, offer, or transfer genetic material—obtained as a result of genetic paternity testing authorized by the Paternity Act. A violation of this provision is a misdemeanor. MCL 722.716a.

N. Discovery and Evidence

1. In General

§10.25 The rules applicable to other civil actions govern procedure in paternity actions except as modified by MCR 3.217 and the Paternity Act. *Larrabee v Sachs*, 201 Mich App 107, 506 NW2d 2 (1993); *see also* MCL 722.714(1).

A defendant in a paternity action may not refuse to give any testimony unless the testimony would be criminally incriminating. *Larrabee.*

2. Expert Medical Testimony

§10.26 An expert testifying regarding the genetic test results must be accredited for paternity determinations by the American Association of Blood Banks or another nationally recognized organization. MCL 722.716(2). The testimony of a medical doctor may also be needed to estimate the date of conception.

3. Fraud by the Mother

§10.27 Fraud or misrepresentation regarding a mother's use of birth control is not a defense to or a mitigating factor in an action for child support under the Paternity Act. The circumstances of a child's conception do not affect the parents' obligation to support their child. *Beard v Skipper*, 182 Mich App 352, 451 NW2d 614 (1990); *Faske v Bonanno*, 137 Mich App 202, 357 NW2d 860 (1984).

4. Evidence Not Requiring Foundation

§10.28 Under the Paternity Act, three types of evidence are admissible without third-party foundation testimony.

1. Results or the written report of genetic testing are admissible in evidence without foundation testimony if no objection is filed. MCL 722.716(4). See §10.21.
2. Documentation of genetic testing expenses is prima facie evidence of the amount without third-party foundation. MCL 722.716(3).
3. A bill for a child's funeral expenses or for expenses connected to the mother's pregnancy or the birth of the child, or actuarially based case rates as determined by the DHHS, without third-party foundation testimony, is prima facie evidence of the relevant funeral or medical expense. MCL 722.712(7).

While caselaw held that the former versions of MCL 722.712(1) and .717(2) did not constitute impermissible gender-based discrimination by requiring the father to pay all of the confinement expenses and costs of the pregnancy and birth (*see Rose v Stokely*, 258 Mich App 283, 673 NW2d 413 (2003)), the impact of the ruling has been superseded by statutory amendments. Specifically, unless Medicaid paid the confinement and pregnancy expenses or the pregnancy or complication of the pregnancy was the result of a battery, the court *must* apportion the reasonable and necessary expenses connected to the mother's pregnancy and birth of the child between the parents in the same manner as the child support formula apportions medical expenses. The father is no longer solely responsible for confinement costs and necessary expenses, except in the Medicaid or battery scenarios. MCL 722.712.

O. Order of Filiation

1. In General

§10.29 The court must enter an order of filiation if a determination of paternity is made. MCL 722.717(1). An order of filiation has the same effect, is subject to the same provisions, and is enforced in the same manner regardless of who commences the action. MCL 722.714(14). The determination of paternity can be made by the court, by the defendant mother or father acknowledging paternity with a written acknowledgment of parentage (as it refers to the written acknowledgment, *parentage* replaces the term *paternity* in MCL 722.717(1)(b), *amended by* 2024 PA 28 (eff. sine die)), by entry of a default judgment against the appropriate person, or by genetic testing under MCL 722.716. MCL 722.717(1).

An order of filiation in a paternity action does not provide a basis for affording statutory grandparenting time. *See Frame v Nehls*, 452 Mich 171, 550 NW2d 739 (1996).

2. Required Provisions

§10.30 The order of filiation must include

- a child support amount pursuant to the child support formula
- the health care related provisions of the child support formula
- an apportionment between the parents of the reasonable and necessary expenses of the mother's pregnancy and birth of the child, in the same manner as the child support formula apportions medical expenses (the father may be apportioned 100 percent of these expenses if Medicaid paid the pregnancy and birth expenses or the pregnancy or complication of the pregnancy was the result of a battery); the father is no longer solely responsible for confinement costs and necessary expenses except in the Medicaid or battery scenarios
- if applicable, direct payment of a deceased child's funeral expenses
- provisions for custody and/or parenting time—must include specific provisions if there is no dispute over custody or parenting time; if disputed, the court should enter an order for support and a temporary order for custody and parenting time
- provisions that, if the father marries the mother after the birth of the child and provides documentation of that marriage to the Friend of the Court, the father's obligation for unpaid confinement and pregnancy expenses will be abated (a new requirement for orders of filiation)

Note that any pre–October 1, 2004, order for confinement and pregnancy expenses must be considered, by operation of law, to provide the abatement of the remaining unpaid expenses if the father marries the mother regardless of whether the marriage took place before or after October 1, 2004. MCL 722.712(6); *Booker v Shannon*, 285 Mich App 573, 776 NW2d 411 (2009).

In addition, as a support order, there are requirements set forth at MCR 3.211(D) and in the SPTEA, MCL 552.601 et seq. See §5.23 for a list of required provisions.

3. Support Provisions

a. In General

§10.31 An order of support must be entered. MCL 722.717. The support amount is determined by the MCSF, unless applying the formula would be unjust or inappropriate in the individual case. The order must also include provisions related to health care; specifically, every support order must set a family annual ordinary health care expense amount to cover uninsured costs, premiums, and copays for children (it is presumed that $454 per child per year will be spent on ordinary expenses); this annual amount is apportioned according to the parents' income, and the payer's share is paid as part of the regular support payment. See §§5.13–5.16.

For enforcement and Friend of the Court purposes, *support* is also defined to include the payment of money ordered by the circuit court under the Paternity Act, MCL 722.711 et. seq., for the necessary expenses for the mother's pregnancy or the birth of the child, or for the repayment of genetic testing expenses. MCL 552.502a(k)(ii), .602(ii)(*ii*).

b. Postmajority Support

§10.32 The Paternity Act provides for postmajority support for children between the ages of 18 and $19^1/_2$ who regularly attend high school full-time, have a reasonable expectation of graduation, and reside full-time with the payee of support or at an institution. MCL 722.717(2), 552.605b.

c. Retroactive Support Orders

§10.33 A child support obligation is only retroactive to the date the paternity complaint was filed, unless the defendant was avoiding service, the defendant used threats or physical coercion to prevent the complainant from filing the action, or the defendant otherwise delayed the imposition for the support obligation. MCL 722.717(2). *But see Teran v Rittley*, 313 Mich App 197, 213, 882 NW2d 181 (2015) (when "the record support[ed] the trial court's conclusion that '[defendant-father] otherwise delayed the imposition of a support obligation,' MCL 722.717(2)(c), by seeking and obtaining dismissal of [a previously filed, out-of-state] child support action[,] … the trial court did not abuse its discretion by ordering that defendant's child support obligation commenced as of … the date the [out-of-state] child support action was dismissed"). The former provisions for support dating back to a child's birth in certain circumstances have been removed.

d. Retroactive Modification of Support

§10.34 Retroactive modification of support is not permitted. MCL 552.603(2). *But see Adler v Dormio*, 309 Mich App 702, 872 NW2d 721 (2015) (allowing affiliated father who successfully challenged paternity under RPA to

move for relief from judgment to challenge support arrears). See §5.33 for further discussion of retroactive modification of support.

4. Custody Provisions

§10.35 If there is no dispute regarding custody, the court must include in the order of filiation specific provisions for the custody and parenting time of the child. MCL 722.717b.

If the parties dispute custody or parenting time, the court must immediately enter an order to establish support and a temporary order to establish custody and parenting time. In a dispute regarding custody or parenting time, neither the prosecuting attorney nor appointed counsel is required to represent either party on the issue. *Id.* Disputes regarding custody or parenting time, as in other domestic relations actions, come under the authority of the Friend of the Court. MCL 552.502(m), .505.

5. Continuing Jurisdiction

§10.36 After an order of filiation is entered, the court has continuing jurisdiction to provide for, change, and enforce provisions of the order relating to the custody, support, or parenting time of the child. The court also has continuing jurisdiction to set aside an order of filiation under the RPA, MCL 722.1431 et seq. MCL 722.720. Any final order or judgment may be appealed by the parties or a guardian ad litem appointed by the court for the child. MCL 722.724.

6. Costs and Fees

§10.37 On entry of an order of filiation, the clerk of the court shall collect a fee of $50 from the person against whom the order of filiation is entered. MCL 333.2891(9)(a).

Under MCL 722.727, the court may assess the filing fee, judgment fee, or stenographer fee against the father in an order of filiation. However, the former statutory authority to award the expenses of the proceedings was removed by the 2004 amendments to MCL 722.717(2). Therefore, the caselaw authority for an award of attorney fees and the costs of travel, meals, and lodging in a paternity action has been rendered moot. See *Bessmertnaja v Schwager*, 191 Mich App 151, 477 NW2d 126 (1991), and *Thompson v Merritt*, 192 Mich App 412, 481 NW2d 735 (1991), for interpretations of the prior law.

The statutory Friend of the Court fee of $3.50 per month for support orders applies to paternity orders as well. MCL 600.2538.

The court may order the father to repay the DHHS if it paid for the genetic testing. MCL 722.716(3). Documentation of the testing expenses is admissible and constitutes prima facie evidence of the amount paid without third-party foundation testimony. *Id.*

P. Enforcement of Support Obligations

1. In General

§10.38 Orders of filiation are enforced under the SPTEA, MCL 552.601 et seq. Generally, this includes income withholding. If payments are delinquent, driver's, occupational, sporting, and/or recreational licenses can be suspended. Contempt proceedings provided for under the SPTEA, with possible incarceration, are also available. *See* MCL 722.719(3). Enforcement of a child support order is discussed more fully in chapter 5.

In addition, the court may require a bond to be posted, as well as appoint a receiver of real and personal property. MCL 722.719.

If there is a default on a payment mentioned in the bond, the Paternity Act provides for a show-cause hearing that may result in an order of execution against goods and chattels for the judgment amount and costs. MCL 722.719(2).

2. Interstate and International Enforcement

§10.39 Interstate and international enforcement may be done using the UIFSA, MCL 552.2101 et seq. This includes enforcing another state's or foreign country's order in Michigan, as well as enforcing a Michigan order elsewhere. See §§10.63–10.65 and chapter 5 for a discussion of the UIFSA's enforcement procedures.

3. Setting Aside an Order of Filiation

§10.40 The court has continuing jurisdiction to set aside an order of filiation under the RPA, MCL 722.1431 et seq. MCL 722.720. If "paternity was determined based on [an] affiliated father's failure to participate in the court proceedings, the [child's] mother, an alleged father, or the affiliated father may file a motion … to set aside the determination" with the court that made it. MCL 722.1439(1). Motions must generally be filed within the later of three years after the child's birth or one year after the date of the order of filiation. MCL 722.1439(2).

II. Acknowledgment Under the Adoption Code

§10.41 Before the birth of a child born out of wedlock, a person claiming to be the father of the child may file a verified notice of intent to claim paternity with the family division of the circuit court. A man who files a notice of intent to claim paternity is presumed to be the father unless the mother denies the claim. The notice is admissible in paternity proceedings and creates a rebuttable presumption of paternity. MCL 710.33.

If contemporaneous actions are filed under the adoption code and the paternity act, the putative father is entitled to have the adoption proceedings stayed pending resolution of the paternity action if he can establish good cause to do so, as determined by the trial court on a case-by-case basis. *Linden v Mattson (In re MKK)*, 286 Mich App 546, 781 NW2d 132 (2009).

III. The Acknowledgment of Parentage Act

A. Procedure

§10.42 An acknowledgment of parentage that complies with the act requirements and that is "filed with the state registrar establishes parentage and is the equivalent to an adjudication of parentage of the child and confers on the acknowledged parent all rights and duties of a parent." MCL 722.1004, *amended by* 2024 PA 31 (eff. sine die). The acknowledgment can be the basis for court-ordered child support, custody, or parenting time without further adjudication under the Paternity Act or the Assisted Reproduction and Surrogacy Parentage Act, MCL 722.1701 et seq., *added by* 2024 PA 24 (eff. sine die). MCL 722.1004, *amended by* 2024 PA 31 (eff. sine die); *Hoshowski v Genaw*, 230 Mich App 498, 584 NW2d 368 (1998).

Note that the Paternity Act and the Acknowledgment of Parentage Act constitute legislation envisioning alternate mechanisms to establish paternity where a child is born out of wedlock, i.e., an acknowledgment of parentage or an order of filiation. However, the legislature did not intend the creation of two legal fathers for one child through utilization of both acts, one by acknowledgment and one by order of filiation. A court cannot recognize both. If an acknowledgment of parentage has been properly executed, subsequent recognition of a person as the father in an order of filiation by way of a paternity action cannot occur unless the acknowledgment has been revoked. *Sinicropi v Mazurek*, 273 Mich App 149, 729 NW2d 256 (2006).

The term *child* means a child

- conceived and born to a woman who was not married at the time of the conception or birth of the child,
- that a court determined is not the issue of a marriage (despite being born or conceived during marriage), or
- "born to an individual who gave birth to a child conceived through assisted reproduction."

MCL 722.1002(c) (amended and relettered from (b) by 2024 PA 31 (eff. sine die)).

A man is considered to be the natural father of a child born out of wedlock if he joins with the child's mother and acknowledges that the child is his child by completing the acknowledgment of parentage form (an affidavit of parentage). MCL 722.1003(1). An individual is considered to be the natural parent of a child born out of wedlock who was conceived by assisted reproduction as defined under the Assisted Reproduction and Surrogacy Parentage Act if the individual joins with the individual who gave birth to the child and acknowledges the child with an acknowledgment of parentage. MCL 722.1003(2), *amended by* 2024 PA 31 (eff. sine die). The spouse of a married individual who gave birth to a child conceived by assisted reproduction is considered to be the child's acknowledged parent by completing an acknowledgment of parentage. MCL 722.1003(3), *amended by* 2024 PA 31 (eff. sine die). The acknowledgment of parentage form is valid and effective if signed by the required individuals, *see* MCL 722.1003(1)–(3), *amended*

by 2024 PA 31 (eff. sine die), and the signatures are notarized or witnessed by a legally competent, disinterested adult who is an employee of one of the following:

- a hospital, publicly funded or licensed health clinic, or pediatric office
- the Friend of the Court, prosecuting attorney, or court
- the DHHS or a county health agency or records departments
- a head start program or local social services provider
- a county jail or state prison

MCL 722.1003(4) (amended and renumbered from (2) by 2024 PA 31 (eff. sine die)). The form can be signed at any time during the child's lifetime. *Id.* For administrative purposes, a completed acknowledgment of parentage is filed with the state registrar in the parentage registry. MCL 722.1005(1).

The acknowledgment of parentage form must contain the following written notices to the parties:

> (a) The acknowledgment of parentage is a legal document.
>
> (b) Completion of the acknowledgment is voluntary.
>
> (c) For acknowledgments of parentage signed according to section 3(1) [a man is considered the natural father of a child born out of wedlock if he joins with the child's mother and completes an acknowledgment of parentage], the mother has initial custody of the child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or agreed by the parties in writing and acknowledged by the court. This grant of initial custody to the mother does not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.
>
> (d) Either parent may assert a claim in court for parenting time or custody.
>
> (e) The parents have a right to notice and a hearing regarding the adoption of the child.
>
> (f) Both parents have the responsibility to support the child and to comply with a court or administrative order for the child's support.
>
> (g) Notice that signing the acknowledgment waives the following:
>
> (i) Blood or genetic tests to determine if the man is the biological father of the child.
>
> (ii) Any right to an attorney, including the prosecuting attorney or an attorney appointed by the court in the case of indigency, to represent either party in a court action to determine if the man is the biological father of the child.
>
> (iii) A trial to determine if the man is the biological father of the child.
>
> (h) That in order to revoke an acknowledgment of parentage, an individual must file a claim as provided under the [RPA].

MCL 722.1007, *amended by* 2024 PA 31 (eff. sine die).

A minor parent is permitted to sign an acknowledgment of parentage with the same legal effect as if the minor were of legal age. A court may, at its discretion,

appoint a next friend or guardian ad litem to represent the minor parent. MCL 722.1009.

On execution and filing of the form, the parents consent to the general, personal jurisdiction of the court regarding issues of support, custody, and parenting time. MCL 722.1010.

After an acknowledgment of parentage is completed under MCL 722.1003(1) (a man is considered the natural father of a child born out of wedlock if he joins with the child's mother and completes an acknowledgment of parentage) and is filed with the state registrar, the mother has initial custody, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed on by the parties in writing and acknowledged by the court. MCL 722.1006, *amended by* 2024 PA 31 (eff. sine die). This grant of initial custody to the mother does not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time. *Id.* Therefore, the father is not required to demonstrate proper cause or a change in circumstance to change the initial custodial grant as there was no judicial determination on custody, and custody is only determined through operation of law under MCL 722.1001. *Sims v Verbrugge*, 322 Mich App 205, 911 NW2d 233 (2017).

B. Invalidation

§10.43 An acknowledging father cannot execute a valid affidavit of parentage when a child was conceived and born to a married mother and father if there was no judicial determination indicating that the child is not an issue of the marriage. *Aichele v Hodge*, 259 Mich App 146, 673 NW2d 452 (2003); *see also Michael H v Gerald D*, 491 US 110 (1989) (putative father has no substantive due process right to establish and maintain relationship with his child who was conceived and born while mother was married to another man). Note, however, that "'the Acknowledgment of Parentage Act does not prohibit a child from being acknowledged by a man who is not his or her biological father' … [when the] man honestly, but mistakenly, believe[s] that he [is] the biological father of a child and sign[s] an acknowledgment of parentage under such belief." *In re Moiles*, 303 Mich App 59, 72, 840 NW2d 790 (2013), *reversed and vacated in part,* 495 Mich 944, 843 NW2d 220 (2014) (quoting *Asbury v Custer (In re Estate of Daniels)*, 301 Mich App 450, 457, 837 NW2d 1 (2013)).

Revoking an acknowledgment of parentage is discussed in §§10.48–10.50.

C. Pre–June 1997 Acknowledgments

§10.44 All acknowledgments signed before the effective date of the Acknowledgment of Parentage Act are still valid and the procedures for revocation apply to all acknowledgments, including those signed before the act's effective date of June 1, 1997. MCL 722.1012.

IV. The Revocation of Paternity Act (Revocation of Parentage Act)

A. Jurisdiction, Venue, and Timing

§10.45 The RPA was amended via 2024 PA 29 (eff. sine die) and retitled the Revocation of Parentage Act. The amendments added references to the newly enacted Assisted Reproduction and Surrogacy Parentage Act, MCL 722.1701 et seq., *added by* 2024 PA 24 (eff. sine die), and incorporated gender neutral substitutions in various provisions.

Under the RPA, a court may determine a child's parentage (the term *paternity* in the RPA is largely replaced with the term *parentage,* MCL 722.1431 et seq., *amended by* 2024 PA 29 (eff. sine die)) and set aside acknowledgments, determinations, and related judgments. *See* MCL 722.1443(2). An action under the act may be filed as an original action in the circuit court where either the mother or the child resides or, if neither is in the state, where the child was born. If, however, there is an existing action for support, custody, or parenting time of the child, or an existing action under MCL 712A.2, a claim under the act must be brought by motion in the existing action. MCL 722.1443(1).

A party seeking to set aside a presumed parent's parentage must generally do so within three years after the child's birth. MCL 722.1441, *amended by* 2024 PA 29 (eff. sine die) (replacing *father* and *paternity* with *parent* and *parentage,* respectively). A complaint or motion contesting an order of filiation or acknowledgment of parentage must be filed within the later of three years after the child's birth or one year after the date of the order or the date the acknowledgment of parentage was signed. MCL 722.1437(1), .1439.

The court may, on request, extend the time for filing an action or motion under the act. MCL 722.1443(14) (amended and renumbered from (12) by 2024 PA 29 (eff. sine die)).

> A request for extension shall be supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under this act but did not file the action or motion within the time allowed under this act because of 1 of the following:
>
> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found earlier.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress.

Id.

The party filing the request to extend "has the burden of proving, by clear and convincing evidence, that granting relief under th[e] act will not be against the best interests of the child considering the equities of the case." MCL 722.1443(15) (amended and renumbered from (13) by 2024 PA 29 (eff. sine die)). However, a court may only grant an extension if it is the petitioner's mistake of fact or belief, not the respondent's, that prevented the petitioner from filing

timely. MCL 722.1443(14)(a) (amended and renumbered from (12)(a) by 2024 PA 29 (eff. sine die)); *Kalin v Fleming*, 322 Mich App 97, 910 NW2d 707 (2017).

If the court has jurisdiction of the child under MCL 712A.1–.32 "and a petition has been filed to terminate the parental rights to [that] child," no action may be brought under the act unless the court first finds that such an action "would be in the best interests of the child." MCL 722.1443(17) (amended and renumbered from (15) by 2024 PA 29 (eff. sine die)).

Authority to enter custody or parenting time orders. Although "neither MCL 722.717 [(of the Paternity Act)] nor MCL 722.1445 [(of the RPA)] explicitly provides a trial court with the authority to enter child custody or parenting-time orders in conjunction with the entry of an order of filiation," when a "plaintiff's complaint … present[s] a child custody dispute, … upon making a determination of paternity, [a] trial court ha[s] authority under [MCL 722.27(1) of] the Child Custody Act to enter orders regarding child custody and parenting time." *Demski v Petlick*, 309 Mich App 404, 440, 443–444, 873 NW2d 596 (2015) (not error for trial court to enter custody and parenting time orders in conjunction with order of filiation after determining child was born out of wedlock).

B. Actions to Determine That a Child Was Born out of Wedlock

1. Who May File

§10.46 Section 11 of the RPA, MCL 722.1441, permits a child's mother, the alleged father, the DHHS, and the presumed father to challenge parentage in certain circumstances by filing a complaint or motion to determine that a child is born out of wedlock. *See* MCL 722.1441(5). An *alleged father* is a man who could have fathered the child. MCL 722.1433(c). A *presumed father* is a man who was married to the mother at the time of conception or birth. MCL 722.1433(e). The term *presumed father* is changed to *presumed parent* and refers to an individual who was married to the child's mother at conception or birth. MCL 722.1433(f) (amended and relettered from (e) by 2024 PA 29 (eff. sine die)).

The child's mother may file if

- her complaint or motion identifies the alleged father by name and "[t]he presumed parent, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child," MCL 722.1441(1)(a), *amended by* 2024 PA 29 (eff. sine die); or
- her complaint or motion identifies the alleged father by name and either (1) for at least two years prior to the action, the presumed parent has failed "without good cause, to provide regular and substantial support for the child" or to comply substantially with a support order or (2) the child is less than three years old and does not live with the presumed parent, MCL 722.1441(1)(b), *amended by* 2024 PA 29 (eff. sine die).

The alleged father may file if

- he "did not know or have reason to know that the mother was married at the time of conception" and "[t]he presumed parent, the alleged father, and the

child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child," MCL 722.1441(3)(a), *amended by* 2024 PA 29 (eff. sine die);

- he "did not know or have reason to know that the mother was married at the time of conception" and either (1) for at least two years prior to the action, the presumed parent has failed "without good cause, to provide regular and substantial support for the child" or to comply substantially with a support order or (2) the child is less than three years old and does not live with the presumed parent, MCL 722.1441(3)(b), *amended by* 2024 PA 29 (eff. sine die); or
- "the mother was not married at the time of conception," MCL 722.1441(3)(c).

See Sprenger v Bickle, 307 Mich App 411, 861 NW2d 52 (2014) (no standing under MCL 722.1441(3)(a) or (c) where alleged father knew mother was still married when they had sexual relations and experts testified it was extremely unlikely child was conceived after divorce judgment issued). An alleged father is required to name a presumed father when the father is a necessary party under MCR 2.205 because "[a] successful action by [the alleged father] would strip [the presumed father] of interests that must not be set aside without [the presumed father's] fair chance to defend those interests." *Graham v Foster*, 311 Mich App 139, 145, 874 NW2d 355 (2015), *affirmed in part and vacated in part,* 500 Mich 23, 31, 893 NW2d 319 (2017) ("vacat[ing] that portion of the Court of Appeals' opinion preemptively adjudicating whether [the nonparty, presumed father] may avail himself of a statute of limitations defense" where statute of limitations defense is personal and defendant-mother cannot assert statue of limitations defense that is only available to nonparty, presumed father).

The DHHS may file if

- the child is being supported by the DHHS and
- for at least two years before the action, the presumed parent has failed (1) "without good cause, to provide regular and substantial support for the child" or to comply substantially with a support order or (2) the child is less than three years old and does not live with the presumed parent.

MCL 722.1441(4), *amended by* 2024 PA 29 (eff. sine die).

The *presumed parent* may file an action within three years after the child's birth or may raise the issue in a divorce or separate maintenance action against the mother. MCL 722.1441(2), *amended by* 2024 PA 29 (eff. sine die); *see Taylor v Taylor*, 323 Mich App 197, 916 NW2d 652 (2018).

Res judicata does not bar a postdivorce motion under the RPA to determine that the child was born out of wedlock. *Glaubius v Glaubius*, 306 Mich App 157, 175, 855 NW2d 221 (2014).

The RPA's standing requirements for alleged fathers have been held constitutional under both the U.S. and Michigan Constitutions. *Grimes v Hook-Williams*, 302 Mich App 521, 839 NW2d 237 (2013). The *Grimes* court also held that

plaintiff, the alleged father, was barred from bringing an action under the RPA concerning defendant-mother's child because he lacked standing under MCL 722.1441(3)(a). The court concluded plaintiff knew or should have known defendant was married when the child was conceived because he admitted knowing defendant was married when they started dating and defendant never stated she obtained a divorce before the child's conception.

Constitutionality of the RPA. MCL 722.1441 does not violate the Equal Protection Clause in either the Michigan or U.S. Constitutions. *Demski v Petlick*, 309 Mich App 404, 873 NW2d 596 (2015).

2. Procedure

§10.47 A trial court is not required to hold an evidentiary hearing to determine whether a child was born out of wedlock under MCL 722.1441(1)(a) "absent a threshold showing" that the court must resolve "contested factual issues" to make an informed decision. *Parks v Parks*, 304 Mich App 232, 240, 850 NW2d 595 (2014). In *Parks,* the trial court denied defendant mother's motion to terminate plaintiff presumed father's custody and to determine that the parties' child was born out of wedlock. The court of appeals affirmed, holding "that defendant's allegations failed to meet the threshold requirement which would have potentially entitled her to an evidentiary hearing" because "[t]here were no disputed facts before the court," and even if defendant mother's allegations were accepted as true, "the statements themselves failed to raise a question as to whether there was a mutual acknowledgment of [the alleged father's] biological relationship to the child." *Id.* at 243. Defendant's allegations in her motion involved potentially inadmissible hearsay and merely showed that plaintiff questioned his paternity, not that he acknowledged the alleged father's paternity. Plaintiff also maintained that he was the child's father in his responsive pleading.

The RPA applies to a child conceived through in vitro fertilization (IVF). In *Jones v Jones*, 320 Mich App 248, 905 NW2d 475 (2017), the wife conceived a child through IVF from an anonymous sperm donor after separation from her husband. The court of appeals held that because the couple was married at the time of conception, the child was not born out of wedlock and the RPA applied.

If the court determines that the child was born out of wedlock, the child's parentage must be established under the law of Michigan or another jurisdiction. MCL 722.1441, *amended by* 2024 PA 29 (eff. sine die). The court must order the parties to participate in and pay for blood or genetic tests to assist the court in making the determination under the act. See SCAO form CC 434. Though required, the results are not binding on the court. MCL 722.1443(6) (amended and renumbered from (5) by 2024 PA 29 (eff. sine die)). Genetic testing must not be used to challenge parentage of a parent under parts 2 or 3 of the Assisted Reproduction and Surrogacy Parentage Act, nor can it establish the parentage of a donor. MCL 722.1443(7), *amended by* 2024 PA 29 (eff. sine die); *see also* MCL 722.1433(d), *amended by* 2024 PA 29 (eff. sine die) (*donor* defined).

If an alleged father files an action and proves by clear and convincing evidence that he is the child's father, "the court may make a determination of paternity and

enter an order of filiation as provided for under section 7 of the [P]aternity [A]ct," MCL 722.717. MCL 722.1445. However, a court may refuse to enter an order affecting paternity if the court finds evidence that it would not be in the child's best interests. MCL 722.1443(4). The court may consider the factors in MCL 722.1443(4) in making this determination and has discretion in which factors it considers. *Demski v Petlick*, 309 Mich App 404, 873 NW2d 596 (2015) (trial court did not err in only considering some factors under MCL 722.1443(4)). (Note that the RPA was amended post *Demski.*) If the court refuses to enter an order, it must state its reasons for doing so on the record. *Id.*

When challenging whether a child is born out of wedlock under MCL 722.1443(4), the plaintiff bears the burden of persuasion on the best interests factors set out in MCL 722.1443(4). *See Demski.* However, the burden of proof for evaluating best interests under MCL 722.1443(4) is still unclear. In *Demski,* the court of appeals held that the trial court was not required to apply the clear and convincing evidence standard articulated in the lead opinion in *Helton v Beaman*, 304 Mich App 97, 850 NW2d 515 (2014), *result affirmed by order,* 497 Mich 1001, 861 NW2d 621 (2015), when determining whether it was in the child's best interests to determine she was born out of wedlock. The *Demski* court explained that *Helton* is a nonbinding plurality opinion and that it applied the clear and convincing evidence standard when determining whether revoking an acknowledgment of parentage was in a child's best interests under the Child Custody Act. In contrast, *Demski* dealt with a determination that a child was born out of wedlock. The best interests factors in MCL 722.1443(4) specifically apply to such a determination and the statute does not expressly state a clear and convincing evidence standard.

A judgment entered under the RPA "does not relieve a man from a support obligation … before the action was filed" nor does it "prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment." MCL 722.1443(3); *see Adler v Dormio*, 309 Mich App 702, 872 NW2d 721 (2015). In *Adler,* the court held that MCL 722.1433(3) (since renumbered MCL 722.1433(c)) permitted an affiliated father, whose judgment of filiation was set aside in an action under the RPA, to move to vacate his support orders and support arrears under MCR 2.612(C)(1)(f).

The RPA "does not establish a basis for termination of an adoption and does not affect any obligation of an adoptive parent to an adoptive child." MCL 722.1443(10) (amended and renumbered from (8) by 2024 PA 29 (eff. sine die)). Similarly, an action cannot be brought under the RPA to challenge the parentage of a child (1) conceived through assisted reproduction without surrogacy if the parents may be determined under the Assisted Reproduction and Surrogacy Parentage Act or (2) conceived under a surrogacy agreement complying with the Assisted Reproduction and Surrogacy Parentage Act. MCL 722.1443(11), *amended by* 2024 PA 29 (eff. sine die). An alleged father convicted of criminal sexual conduct may not bring an action under the act pertaining to a child whose conception resulted from the criminal conduct. MCL 722.1443(16) (amended and renumbered from (14) by 2024 PA 29 (eff. sine die)).

C. Actions to Revoke an Acknowledgment of Parentage

1. In General

§10.48 A claim for the revocation of an acknowledgment of parentage can be brought by "[t]he mother, the acknowledged parent, an alleged father, or a prosecuting attorney [or another party permitted by statute]." MCL 722.1437(1)–(2), *amended by* 2024 PA 29 (eff. sine die). See SCAO forms CC 435 and CC 436. An *acknowledged parent* is "an individual who has affirmatively held themself out to be the child's parent by executing an acknowledgment of parentage." MCL 722.1433(a), *amended by* 2024 PA 29 (eff. sine die). An *alleged father* is a man who could have fathered the child. MCL 722.1433(c). The prosecuting attorney, Friend of the Court, or appointed counsel is not required to represent any party regarding a claim for revocation. MCL 722.1437(7).

2. The Affidavit

§10.49 A claim for revocation must be supported by an affidavit containing facts showing one of the following:

> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment.

MCL 722.1437(4). See SCAO form CC 435. The court must find the affidavit sufficient before proceeding with the revocation action. *Helton v Beaman*, 304 Mich App 97, 103, 850 NW2d 515 (2014), *result affirmed by order,* 497 Mich 1001, 861 NW2d 621 (2015).

The parties' knowledge that the acknowledging father may not be the child's biological father is insufficient to show misrepresentation or fraud under MCL 722.1437(4). *In re Moiles*, 495 Mich 944, 843 NW2d 220 (2014) (*Moiles II*). In *Moiles II,* the supreme court explained its reversal of the court of appeals holding in *In re Moiles*, 303 Mich App 59, 840 NW2d 790 (2013), regarding the sufficiency of the affidavit, as follows:

> Under the Acknowledgment of Parentage Act, MCL 722.1001 et seq., an acknowledging father is not required to attest that he is the biological father. Thus, the Court of Appeals erred in concluding that the parties' knowledge of the possibility that respondent was not the biological father of the child was sufficient to demonstrate either fraud or misrepresentation under MCL 722.1437(2) [now MCL 722.1437(4)]. The circuit court similarly erred when, in partial reliance on the DNA identification profiling results, it granted the petition for revocation of the acknowledgment of parentage.

495 Mich at 944–945.

In *Helton,* which was decided shortly before the supreme court's decision in *Moiles II,* the court rejected plaintiff's allegations of misconduct and fraud because defendants signed the acknowledgment of parentage believing the acknowledged father was the child's biological father. However, their mistaken belief, along with DNA evidence supporting plaintiff's claim that he was the biological father, constituted a "mistake of fact sufficient to proceed with [the] revocation action." 304 Mich App at 105; *see also Bay Cty Prosecutor v Nugent*, 276 Mich App 183, 190, 740 NW2d 678 (2007) (interpreting MCL 722.1011(2)(a) (repealed and replaced by MCL 722.1437(4)(a)), court held that mistake of fact was made when acknowledging father signed affidavit of parentage under belief he was child's biological father, but DNA test results later proved he was not child's biological father).

In the context of MCL 722.1437(4), "[a] mistake of fact is 'a belief that a certain fact exists when in truth and in fact it does not exist.'" *Rogers v Wcisel*, 312 Mich App 79, 95, 877 NW2d 169 (2015) (quoting *Montgomery Ward & Co v Williams*, 330 Mich 275, 279, 47 NW2d 607 (1951)). Consequently, DNA evidence alone is insufficient to establish a mistake of fact in an affidavit to revoke an acknowledgment of parentage. Biological evidence is a separate factor to consider after the court finds the moving party's affidavit sufficient. A mistake of fact can exist even when a party has doubts or some knowledge that the fact might be untrue. The law requires merely that the party "act *in part* upon an erroneous belief." *Rogers,* 312 Mich App at 96 (emphasis added) (holding defendant showed sufficient mistake of fact even though there was some evidence he doubted he was child's biological father when signing affidavit).

3. Procedure

§10.50 Once the court determines that the affidavit is sufficient, it will order blood or genetic tests at the expense of the claimant, MCL 722.1437(5), and must "determine whether to revoke the acknowledgment of parentage." *Helton v Beaman*, 304 Mich App 97, 102, 850 NW2d 515 (2014), *result affirmed by order,* 497 Mich 1001, 861 NW2d 621 (2015). See SCAO form CC 434.

The party filing for revocation has the burden of proving by clear and convincing evidence that the acknowledged father is not the father of the child. MCL 722.1437(5).

Although a court is no longer required to consider the equities of the case when revoking an acknowledgment of parentage, it may refuse to revoke an acknowledgment if it is in the best interests of the child. *See* MCL 722.1443(4); *Helton,* 304 Mich App at 112–114, 124. Caselaw was unsettled regarding the factors a court could consider when determining whether revoking an acknowledgment of parentage is in the child's best interests. *See, e.g., In re Moiles*, 495 Mich 944, 843 NW2d 220 (2014) (vacating lower court's holding that acknowledgment of parentage "is not a paternity determination as that term is used in [MCL 722.1443(4)]"); *Helton* (splitting three ways on which factors to consider with lead opinion applying best interests factors in MCL 722.23, concurrence applying best interests factors in MCL 722.1443(4), and dissent applying no best interests

factors). The RPA specifically provides that the best interests factors in MCL 722.1443(4) apply when a court is deciding whether to revoke an acknowledgment of parentage. *See also Helton v Beaman*, 497 Mich 1001, 861 NW2d 621 (2015) ("an order revoking an acknowledgment of parentage … is subject to a best interest analysis under MCL 722.1443(4)").

D. Motion to Set Aside Affiliated Father's Paternity Determination

§10.51 A child's mother, alleged father, or affiliated father may move to set aside paternity if the determination resulted from the affiliated father's failure to participate in the proceedings establishing his paternity. MCL 722.1439(1). See SCAO forms CC 437 and CC 438. An *alleged father* is a man who could have fathered the child. MCL 722.1433(c). An *affiliated father* is "a man who has been determined in a court to be the child's father." MCL 722.1433(b). An affiliated father designation need not arise from a proceeding under the Paternity Act; rather, it can result from "any judicial order establishing a *determination* in court that a man is a child's father." *Glaubius v Glaubius*, 306 Mich App 157, 169, 855 NW2d 221 (emphasis added) (2014). However, for a court to have "determined" paternity within the meaning of MCL 722.1433(b), "there must have been a dispute or question about the issue of paternity and an actual resolution of the matter by the trial court, culminating in a judicial order establishing the man as the child's father." 306 Mich App at 170 (divorce judgment did not change defendant's status from *presumed father* to *affiliated father* where paternity was uncontested and judgment merely adhered to presumption of legitimacy rather than specifically addressing whether defendant was child's father).

If an affiliated father participated in the proceedings determining paternity, it seems that the order of filiation cannot be set aside under the RPA. *See Glaubius,* 306 Mich App at 166 (RPA contains "no express provision" for such circumstance).

E. Actions to Set Aside a Genetic Father Determination

§10.52 A child's mother, a genetic father, an alleged father, or a prosecuting attorney may seek an order determining that a genetic father is not a child's father by filing a complaint in an original action or a motion in an existing action. MCL 722.1438(1), (5). A *genetic father* is a man whose paternity was determined solely through genetic testing under the Paternity Act, the SSPA, or the GPA. MCL 722.1433(e) (amended and relettered from (d) by 2024 PA 29 (eff. sine die)). An *alleged father* is a man who could have fathered the child. MCL 722.1433(c). The action must be filed by the later of three years after the child's birth or one year after the genetic father's paternity was established. MCL 722.1438(1). The filing party must sign an affidavit stating facts establishing one of the following:

- the genetic tests were inaccurate
- the man's genetic material was unavailable to the mother
- the child's father is a man with DNA identical to the genetic father

MCL 722.1438(2).

If the affidavit is sufficient, the court must order blood- or tissue-typing or DNA profiling. The filing party has the burden of proving by clear and convincing evidence that the genetic father is not the child's father. MCL 722.1438(3). If the court issues an order determining that the genetic father is not the child's father, the state registrar must remove the genetic father and may amend the child's birth certificate. MCL 722.1438(4).

V. The Genetic Parentage Act

§10.53 The GPA, MCL 722.1461 et seq., provides another avenue by which parties may voluntarily establish paternity when the child is born out of wedlock. *See* 2014 PA 365. The GPA applies only if the mother or the alleged father is receiving services from a Title IV-D agency. MCL 722.1467(1)(a); *see* MCL 552.602(*ll*) (defining *Title IV-D agency*), 722.1463(a) (defining *alleged father*). In addition, it cannot be used if the child's father has signed an acknowledgment of parentage, if paternity was otherwise established in Michigan or another state, or if the child is subject to a pending adoption in Michigan or another state. MCL 722.1465.

Under the GPA, a man may be considered the biological father if

- the mother, child, and alleged father submit to blood- or tissue-typing or DNA profiling by a qualified person to ascertain whether the alleged father is likely the child's father;
- the typing or profiling shows that the probability of paternity is 99 percent or higher; and
- the mother and alleged father sign the requisite DHHS form agreeing to submit the test.

MCL 722.1467(1). If two or more persons are determined to have a probability of paternity of 99 percent or higher, additional testing must be conducted until all but one of the alleged fathers is eliminated, unless the dispute involves alleged fathers with identical DNA. MCL 722.1467(2).

Paternity is established if the genetic testing described in MCL 722.1467(1) determines that the man is the biological father. MCL 722.1469(1). If paternity is established,

- the mother receives initial custody of the child until the parties' custodial rights are otherwise determined by the court or by the parties' written agreement acknowledged by the court;
- the court may enter orders regarding child support, custody, or parenting without further adjudication; and
- the child has the same status to the biological father as if born or conceived during a marriage.

MCL 722.1469; *see also* MCL 722.1473 (by agreeing to submit genetic test, parents consent to personal jurisdiction regarding support, custody, and parenting time).

The Title IV-D agency subsequently files a genetic paternity determination form and a summary report with the state registrar and provides copies to the parents. MCL 722.1471(1)–(2). Once these documents are filed with the registrar, the father of a Michigan-born child may be included on the birth certificate, unless another man is already listed as the father. MCL 722.1471(3).

VI. The Summary Support and Paternity Act

§10.54 Under the SSPA, MCL 722.1491 et seq., a Title IV-D agency can establish paternity for a child whose paternity has not already been established if the child is receiving public assistance or if the child's mother or alleged father has applied for Title IV-D services. MCL 722.1495(1). See MCL 552.602(*ll*) and MCR 3.230(A)(2)(a), defining *Title IV-D agency*, and MCL 722.1492(a), defining *alleged father*. MCR 3.230 provides procedural rules to incorporate the SSPA to establish a parent's paternity or support obligation through a summary action. The agency must file with the court in the county where the mother, child, or alleged father lives a statement signed by either the agency or verified by one of the parties and serve a copy of the statement and a notice of intent to establish paternity on the parties. MCL 722.1495(1) (statement requirements), (2) (notice of intent requirements), (4) (service requirements); *see also* MCR 3.230(B). The parties have 21 days to either submit a written request for genetic testing or produce proof of a paternity exclusion; otherwise, the alleged father is established as the child's legal father. *See* MCL 722.1495(2)(b)(ii)–(iii), (d); MCR 3.230(G)(2). Subject to proper service, once the statement and notice are filed with the court, the court can establish paternity, issue a support order, establish custody or parenting time, and grant other relief. MCL 722.1495(3); MCR 3.230(E), (H).

If genetic testing is timely requested, the agency arranges for the collection, which must occur within 60 days of the request. MCL 722.1496(1). The agency must notify the parties and the court of the test results and submit a proposed order that either

- declares the alleged father as the child's father if the testing shows a 99 percent or higher probability of paternity or
- declares the alleged father not to be the child's father.

MCL 722.1496(3). If the court is satisfied that the statutory procedures were followed, the court must enter the order. *Id.* A party who fails to submit to genetic testing may be held in contempt, arrested, or otherwise compelled to appear for testing and may be ordered to pay the costs of the proceeding. MCL 722.1497(3).

If proof of a paternity exclusion is submitted, the court must provide the parties with notice and an opportunity to be heard. MCL 722.1496(5). If the court finds the proof does not exclude the alleged father as the child's father, it must order the parties and child to have genetic testing. MCL 722.1496(5)(b).

If the alleged father admits paternity or neither of the parties request genetic testing, the agency must submit a proposed order to the court establishing the alleged father as the child's father and ordering support. MCL 722.1497(1); MCR 3.230(G)(2). If the court is satisfied that the statutory procedures were followed, the court must enter the order. MCL 722.1497(1); MCR 3.230(H)(2). If the mother does not admit the alleged father's paternity, the court must not enter an order unless genetic testing determines that the probability is 99 percent or higher that the alleged father is the child's father. MCL 722.1497(2); MCR 3.230(G)(3).

Any order under the SSPA must also include temporary or permanent custody and parenting time provisions. MCL 722.1495(6).

VII. The Child Custody Act

§10.55 The Child Custody Act of 1970, MCL 722.21 et seq., is no longer used to determine paternity. A putative father may not seek custody or parenting time under the Child Custody Act unless there is first an acknowledgment of paternity or an order of filiation under the Paternity Act. *Hoshowski v Genaw*, 230 Mich App 498, 584 NW2d 368 (1998); *Afshar v Zamarron*, 209 Mich App 86, 530 NW2d 490 (1995); *see also In re MGR*, 323 Mich App 279, Note 2, 916 NW2d 662 (2018), *rev'd on other grounds,* 504 Mich 852, 928 NW2d 184 (2019) (court applied definition for *putative father* as "a man reputed, supposed, or alleged to be the biological father of a child" from *Girard v Wagenmaker*, 173 Mich App 735, 740, 434 NW2d 227 (1988), *rev'd on other grounds,* 437 Mich 231, 470 NW2d 372 (1991)); *Demski v Petlick*, 309 Mich App 404, 873 NW2d 596 (2015) (not error for trial court to enter custody and parenting time orders in conjunction with order of filiation after determining child was born out of wedlock). The hearing on paternity issues may be sufficient to meet the evidentiary hearing requirement to determine child custody. *Demski* (bench trial on paternity under RPA sufficient to determine child custody).

Under MCL 722.27b(1), a grandparent may seek grandparenting time if, among other circumstances, the child's parents have never been married, they are not residing in the same household, and paternity has been established. The court may not permit a parent of a father who has never been married to the child's mother to seek an order for grandparenting time unless the father has completed an acknowledgment of parentage, an order of filiation has been entered under the Paternity Act, or the father has been judicially determined to be the father. Further, the court may not permit the parent of a putative father to seek an order for grandparenting time unless the putative father has provided substantial and regular support or care in accordance with the putative father's ability to provide the support or care. MCL 722.27b(2). For further discussion of grandparenting time, see §§4.19–4.21.

VIII. Divorce Proceedings

A. In General

§10.56 The general rule is that the court does not have the power to litigate the rights of persons other than the husband and the wife. *Yedinak v Yedinak*, 383 Mich 409, 175 NW2d 706 (1970). There is no statutory authority for determining the paternity of a third party as part of a divorce action. *Pruitt v Pruitt*, 90 Mich App 230, 282 NW2d 785 (1979).

However, the court may determine the husband's paternity rights during the divorce proceeding. *Serafin v Serafin*, 401 Mich 629, 258 NW2d 461 (1977); *Atkinson v Atkinson*, 160 Mich App 601, 408 NW2d 516 (1987). A presumed father, in a divorce action, may challenge his paternity of a child born during the course of the marriage even if he failed to raise the issue within three years of the child's birth. *Taylor v Taylor*, 323 Mich App 197, 916 NW2d 652 (2018). A divorce court must have in personam jurisdiction over the husband to make a paternity determination. *Gonzales v Gonzales*, 117 Mich App 110, 323 NW2d 614 (1982).

There is a strong presumption, rebuttable only by clear and convincing evidence, that any child conceived or born to a married couple before the commencement of a suit for divorce is legitimate. *Raleigh v Watkins*, 97 Mich App 258, 293 NW2d 789 (1980); *Johnson v Johnson*, 93 Mich App 415, 286 NW2d 886 (1979). A husband or wife is not prohibited from testifying regarding a child's paternity. *Serafin*.

B. Res Judicata

§10.57 A finding of fact in a divorce decree that a child was born of the parties' marriage establishes the child's paternity. *Hackley v Hackley*, 426 Mich 582, 395 NW2d 906 (1986). *But see Glaubius v Glaubius*, 306 Mich App 157, 855 NW2d 221 (2014) (where paternity was uncontested in divorce, divorce judgment did not change defendant's status from presumed father to affiliated father under RPA). Before the RPA's enactment, caselaw held that if a child is determined to be a child of the marriage in a divorce judgment, the doctrine of res judicata bars relitigation of paternity, even if the issue was not contested in the divorce. *See, e.g.*, *In re Cook Estate*, 155 Mich App 604, 400 NW2d 695 (1986) (mother, whose deceased child was declared to be child of her marriage in divorce judgment, was barred from later asserting that her former husband was not child's biological father). Under the RPA, however, a challenge to paternity may be made at any stage of the proceeding in a support, a custody, or a parenting time action. MCL 722.1443(1); *see also* MCL 722.1441(5); *Glaubius,* 306 Mich App at 175 ("in the particular circumstances described in the [RPA], the Legislature intended to authorize postjudgment challenges to paternity, including for cases in which paternity was or could have been litigated"). Accordingly, res judicata does not bar a postdivorce paternity challenge under the RPA. *Glaubius.* See also §10.15.

C. Rights and Responsibilities of the Nonbiological Parent

1. In General

§10.58 Generally, parties cannot be ordered to pay child support for unrelated children that they supported as their own if

- they have not adopted the children,
- the parental rights of the natural parents have not been terminated, and
- there has been no guardianship proceeding.

Tilley v Tilley, 195 Mich App 309, 489 NW2d 185 (1992); *see also Hawkins v Murphy*, 222 Mich App 664, 565 NW2d 674 (1997).

2. Estoppel

§10.59 A man who knowingly marries a pregnant woman and assumes the status of the child's father, even though he is not, may be estopped from denying paternity. *Johnson v Johnson*, 93 Mich App 415, 286 NW2d 886 (1979); *see also Nygard v Nygard*, 156 Mich App 94, 401 NW2d 323 (1986) (man estopped from denying paternity when he persuaded mother not to place baby up for adoption with promises of marrying her and raising child).

However, the doctrine of equitable estoppel has not been extended to cover situations where there is no marriage. *See Van v Zahorik*, 460 Mich 320, 597 NW2d 15 (1999). In *Van,* the supreme court declined to apply the doctrine against a natural parent where the parties were unmarried and the child was born out of wedlock. *See also Killingbeck v Killingbeck*, 269 Mich App 132, 711 NW2d 759 (2005).

See §5.4 for discussion of the doctrine of estoppel in child support cases.

3. The Equitable Parent Doctrine

§10.60 In some divorce cases, a husband who is not the biological father has been afforded parental rights and obligations under the equitable parent doctrine. *Atkinson v Atkinson*, 160 Mich App 601, 408 NW2d 516 (1987). Under this doctrine, "a person who is not the biological father of a child may be considered a parent when he desires such recognition and is willing to support the child as well as wants the reciprocal rights of custody or visitation afforded to a parent." *Id.* at 610.

Previously, the doctrine has not been applied when the parties are unmarried and the child is born out of wedlock. *Van v Zahorik*, 460 Mich 320, 597 NW2d 15 (1999). In *Van,* the petitioner sued for parenting time rights even though the parties had never married and blood tests determined that he was not the biological father of the respondent's two children. The supreme court affirmed the appellate court's refusal to extend the doctrine to unmarried couples because that would contravene the public policy of this state. *See also Killingbeck v Killingbeck*, 269 Mich App 132, 711 NW2d 759 (2005).

However, in *Pueblo v Haas*, 511 Mich 345, 999 NW2d 433 (2023), the Michigan Supreme Court ruled that a former partner of a same-sex couple who is seek-

ing custody of a child to whom they did not give birth and with whom they do not share a genetic connection is entitled to make a case for equitable parenthood and has standing to bring an action under the Child Custody Act, MCL 722.21 et seq. A plaintiff must establish by a preponderance of the evidence that the parties would have been married before the child's conception or birth but for Michigan's unconstitutional marriage ban. Courts should consider the factors in *In re Madrone*, 350 P3d 495 (Or App 2015), to determine whether a plaintiff has met the burden of proof.

See §5.5 for discussion of the equitable parent doctrine in child support cases.

IX. Child Protective Proceedings

§10.61 In a child protective proceeding, a child's parents are the mother, the father, as defined by law, or both. It is important to distinguish between a "legal father," who has rights recognized by law, and a man claiming to be a father who does not have such rights. To be a legal father, a man must fit into one of the following categories:

- A man who is married to the child's mother at any time from the child's conception to the child's birth.
- A man who has legally adopted the child.
- A man who has been determined to be the child's legal father in an order of filiation or judgment of paternity as a result of an action under the Paternity Act.
- A man who has been determined by a judge to have parental rights.
- A man who has been determined to be the child's legal father by the proper filing of an acknowledgment of parentage.

MCR 3.903(A)(7).

A *putative father* is an alleged biological father of a child without a legal father. MCR 3.903(A)(24); *see also In re MGR*, 323 Mich App 279, Note 2, 916 NW2d 662 (2018), *rev'd on other grounds,* 504 Mich 852, 928 NW2d 184 (2019) (court applied definition for *putative father* as "a man reputed, supposed, or alleged to be the biological father of a child" from *Girard v Wagenmaker*, 173 Mich App 735, 740, 434 NW2d 227 (1988), *rev'd on other grounds,* 437 Mich 231, 470 NW2d 372 (1991)). If a legal father exists, a putative father may not be identified or participate in a child protective proceeding unless the presumption of a child's legitimacy is rebutted. *Family Indep Agency v Jefferson (In re KH)*, 469 Mich 621, 677 NW2d 800 (2004).

If no legal father exists, a court may take testimony on the identity of the natural father in a "putative father hearing." *See* MCR 3.921(D)(1). If the court has probable cause to believe that a particular man is the child's natural father, it must direct that notice be served on the man "in any manner reasonably calculated to provide notice." *Id.* Notice by publication may be used if the putative father cannot be located after diligent inquiry. The notice must include the child's name, the name of the child's mother, the date and place of the child's birth, the fact that a

petition has been filed with the court, the time and place of the hearing, and a statement that the natural father's failure to attend the hearing constitutes a denial of interest in the child, a waiver of notice of all further proceedings, a waiver of his right to the appointment of an attorney, and could result in termination of his parental rights. MCR 3.921(D)(1)(a)–(d).

Once notice has been properly served, the court may make any one of the following findings:

- notice has been properly provided
- a preponderance of the evidence established that the putative father is the child's natural father and has 14 days to establish a legal relationship with the child (which may be extended for good cause)
- there is sufficient probable cause to believe that another reasonably identifiable man is the child's father
- the natural father of the child cannot be determined after a diligent search

MCR 3.921(D)(2). If after proper notification the child's natural father fails to appear or fails to establish a legal relationship with the child pursuant to the court's order, the court may find that he waives the right to all subsequent notice, including notice of termination proceedings and the right to an attorney. MCR 3.921(D)(3); *see also Department of Human Servs v Davis (In re LE)*, 278 Mich App 1, 24, 747 NW2d 883 (2008) (putative father's failure to timely establish legal relationship with child was evidence of failure to provide proper care and custody).

It is very important to establish the identity, location, and parental rights of the father of a child subject to child protective proceedings. Early identification and involvement of a noncustodial legal father who is actively involved in a child's life may allow him to serve as a safe and permanent placement for a child. On the other hand, an absent and uninvolved legal father should be located, made a respondent to the petition, and, if appropriate, have his parental rights terminated. Early identification and location of a putative father and determination of his parental rights prevents later delays in proceedings and disruption of permanency plans.

For further discussion, see Michigan Judicial Institute, *Child Protective Proceedings Benchbook: A Guide to Abuse and Neglect Cases* (4th ed 2024), *Michigan Absent Parent Protocol: Identifying, Locating, and Notifying Absent Parents in Child Protective Proceedings*, and *Michigan Family Law* ch 25 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed).

X. Interstate Adjudication of Paternity

A. Other States' Determinations

§10.62 The establishment of parentage under the law of another state has the same effect and may be used for the same purpose as a Michigan acknowledgment of paternity or order of filiation. MCL 722.714b, *amended by* 2024 PA 28 (eff. sine die).

B. The Uniform Interstate Family Support Act

1. In General

§10.63 The UIFSA, MCL 552.2101 et seq., allows a Michigan court to serve as either the initiating or responding tribunal in interstate and international proceedings brought under a support enforcement act to determine parentage as well as support. MCL 552.2305(2)(a).

A person residing in a foreign country subject to the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance may file a petition "in a tribunal of this state in a proceeding involving an obligee, obligor, or child residing outside the United States" for determination of parentage of a child. MCL 552.2701(d); *see also* MCL 552.2702, .2705(1). "In the proceeding, the law of this state applies." MCL 552.2705(1). MCL 552.2102(cc) defines "tribunal" as "a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage of a child."

Initiating state. As an initiating state, Michigan forwards proceedings filed in Michigan to another state or foreign country for that state's or foreign country's action. MCL 552.2102(k), .2304.

Responding state. As a responding state, Michigan acts on proceedings initiated in another state or foreign country. MCL 552.2102(w). A responding court in Michigan may render a judgment to determine parentage and may issue, enforce, and modify a child support order. MCL 552.2305(2)(a).

When a Michigan court is acting as a responding tribunal, it must apply Michigan procedural and substantive law and Michigan rules on choice of law. MCL 552.2303(a).

See §§5.53–5.67 for a more detailed discussion of the UIFSA and *Michigan Family Law* §§6.25–6.30 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for a complete discussion of the UIFSA, including its support enforcement provisions.

2. The Complainant

§10.64 An individual petitioner or a support enforcement agency may commence a proceeding under the UIFSA by (1) filing a petition in a Michigan court for forwarding to a responding court in another state or foreign country or (2) filing a petition or a comparable pleading directly in a court of another state or foreign country that can obtain personal jurisdiction over the respondent. MCL 552.2301(2).

On request, a support enforcement agency in Michigan, the Friend of the Court, or the prosecutor (or another party permitted by statute) must provide services to a resident petitioner or a foreign petitioner meeting the UIFSA's requirements. MCL 552.2307(1)(a)–(b). An agency may also provide services to a nonresident petitioner. MCL 552.2307(1)(c).

3. Other Requirements

§10.65 Petition requirements. To establish a support order, determine parentage, or register and modify an out-of-state or foreign support order, the petitioner must file a petition that sets forth the information required in MCL 552.2311. The court must seal identifying information in the petition if a party alleges under oath that the health, safety, or liberty of a child or a party would be jeopardized by disclosure. MCL 552.2312.

Physical presence. A nonresident party is not required to be physically present in a responding Michigan court for parentage and support to be established, enforced, or modified. MCL 552.2316(1).

Nonparentage defense. A party whose parentage of a child has been previously determined by law may not plead nonparentage as a defense to a proceeding under the UIFSA. MCL 552.2315.

Admissibility of acknowledgment of paternity. "A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child." MCL 552.2316(10).

See *Michigan Family Law* §6.25 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed) for a discussion of the act the UIFSA replaced, the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 et seq., which remains in effect, presumably for instances when the UIFSA has not been adopted in another state and for dealing with foreign jurisdictions not subject to the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

11
Adoption

Summary of Adoption

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

A comprehensive discussion of adoption is found in Michigan Judicial Institute, *Adoption Proceedings Benchbook* (3d ed 2024). Adoption proceedings are governed by the Michigan Adoption Code, MCL 710.21 et seq.

SCAO forms should be used in adoptions. *See* SCAO forms PCA 301–PCA 356c.

Types of adoption. §§11.2–11.3.

The types of adoption include: agency placement (where a child-placing agency, the Department of Health and Human Services (DHHS), or the court selects prospective adoptive parents and transfers physical custody); direct placement (where a parent or guardian personally selects prospective adoptive parents (not related to the child within the fifth degree by consanguinity or affinity) and transfers physical custody); step-parent; guardian; relative; and adult.

Temporary placements. §§11.4–11.7.

Who may make:

- in direct placement, a parent or guardian with legal and physical custody
- in agency placement, a child-placing agency with written authorization signed by the parent or guardian and a witness

A transfer of custody may be made

- if there is a preplacement assessment of the prospective adoptive parent, finding that the person is suitable to be a parent of an adoptee
- if the prospective adoptive parent who is a Michigan resident agrees to reside with the child in Michigan until formal placement occurs
- if the prospective adoptive parent who is not a Michigan resident submits to Michigan jurisdiction and agrees to obtain approval in compliance with the interstate compact on the placement of children before the child is sent, brought, or caused to be sent or brought into a "receiving" state
- if a child-placing agency or attorney assists the parent
- if the parent, the guardian, or an agency representative signs a witnessed statement evidencing the transfer
- if the prospective adoptive parent signs a similar statement

Note that temporary placement allows the adoptive parents to take a child home from the hospital without becoming foster parents.

For SCAO temporary placement forms, see PCA 329, PCA 333, PCA 335, PCA 336.

Reports. §11.6.

Report to the court following temporary placement—within two days after the transfer of custody, to the court in the county where the child's parent or guardian or the prospective adoptive parent resides, or where the child is found.

Custody disputes arising out of temporary placement. §11.7.

The Adoption Code controls.

Petitions for disposition filed by or in the name of a parent or guardian—the court immediately issues an ex parte order directing the prospective adoptive parent to return the child within 24 hours, or the court appoints an attorney for the child or refers the matter to the DHHS. If the DHHS or attorney does not file a child protective proceeding within 14 days, the court must order the child returned to the parent or guardian. During the referral period, the court must remove the child from the prospective adoptive parent and make an appropriate temporary disposition.

Petitions filed by the prosecutor, a prospective adoptive parent, or an agency—the court holds a hearing within 14 days to determine custody.

The court may also

- appoint a guardian and make a temporary disposition while the guardianship is pending, on a petition by the prospective adoptive parent or another person interested in the child's welfare
- order the child's return to an agency with legal custody
- appoint a guardian ad litem for the child

Adoption procedure. §§11.8–11.15.

Adult adoptees—see §11.41.

Petition for adoption.

The petition must be filed in the county where the petitioner resides or the adoptee is found, where the parent's rights were terminated or are pending termination (in very limited circumstances), or, if there has been a temporary placement, in the court that received the transfer report.

In adoptions that involve a child who has been committed to the DHHS/Michigan Children's Institute (MCI) and more than one person or family desires to adopt the child and has submitted an adoption application to a child-placing agency, the adoption must be filed in the county where the parent's parental rights were terminated or are pending termination. If both parents' parental rights were terminated, but at different times and in different courts, the petition must be filed in the county where rights were first terminated.

Interested parties—see §11.9.

After or with the petition, but before the hearing, the petitioner, the DHHS, a court employee, or an agency must file

- a copy of the family assessment or "home study"

- any release or order terminating parental rights that bears on the consenting person's authority to execute the consent (except in cases of parental consent)
- any order committing the child to an agency or the DHHS
- proof of any guardian's appointment and the authority to consent or release
- the consent
- the adoptee's birth certificate or proof of date and place of birth (a judge may waive by written order)
- an investigative report ordered when the petition is filed
- an affidavit verifying the facts if a petition to terminate the noncustodial parent's rights because of nonsupport or noncommunication is filed
- any additional facts the court considers necessary

In direct placement adoptions, the petitioner must also file a verified statement concerning counseling services, a statement from the attorney and/or agency disclosing fees, and a preplacement assessment or "home study."

Court investigation. §§11.11–11.12.

The court must order court personnel, an agency, or the DHHS to make an investigation that considers the adoptee's best interests (see §11.12), family background, and reasons for the adoption. The report must be filed within three months.

Alternatively, the court may use a preplacement assessment and order additional investigation or, on the petitioner's motion, waive a full investigation if the adoptee has been in foster care with the petitioner for at least 12 months and a foster family study was prepared or updated within the last 12 months.

A child may not be placed for adoption with or adopted by a prospective adoptive parent when there is reliable information that that person has been convicted of various kinds of sex crimes involving children.

Formal placement. §11.13.

Within 14 days after the receipt of all required material, the court must review the material and decide if the adoption is appropriate. The period may be extended.

If the court is satisfied (1) that the consent is genuine and from the person with legal authority and (2) that the adoptee's best interests are served by the adoption, it enters an order

- terminating the rights of the parent or agency that gave consent
- making the child a ward of the court (except in stepparent adoptions)
- approving placement in the home of the prospective adoptive parent
- ordering supervision and reports by the court, an agency, or the DHHS

Final order of adoption. §§11.14–11.15.

There is a period for six months (three months if the adoptee is less than one year old when the petition is filed) between formal placement and an order of adoption in which the agency visits the family and reports to the court on the status of the child.

Once this supervisory period expires, the court may enter an adoption order. The court may extend the supervisory period up to 18 months if that is in the adoptee's best interests or for a longer period to allow a parent to appeal or seek rehearing of a termination of parental rights.

If no adoption order is entered within 18 months after formal placement, the court holds a hearing to determine whether an adoption order should be entered or the petition denied.

If the court fails to issue an order of adoption, it must state reasons on the record or in writing.

A rehearing petition must be filed within 21 days after an order is entered. The court may grant a petition for good cause based on the record, pleadings filed, or a hearing. Reasons for the grant or denial must be in writing or on the record.

If a rehearing is granted, the court may take new evidence and affirm, modify, or vacate the order. Reasons must be in writing or on the record. The order must be entered within 21 days after the rehearing.

If an application for leave to appeal has been filed with the supreme court, the court may not order an adoption until at least one of the following occurs:

- the application for leave is denied
- the supreme court affirms the termination of parental rights

Further, if a motion challenging an institutional guardian's withholding of consent to adopt has been filed, the court may not order an adoption until one of the following occurs:

- the motion is decided and no appeal of right to the court of appeals has been filed
- the motion is decided, an appeal of right to the court of appeals has been filed, that court has issued an opinion, and the period for filing an application for leave to the supreme court has expired
- the supreme court denies the application for leave, or the supreme court grants the application and issues an opinion

Consents and releases. §§11.16–11.28, 11.43.

Release—releases rights to an agency or the DHHS for the purpose of adoption.

Consent—consents to termination of rights for placement with a specific adoptive parent.

A consent must be executed by

- each parent or the surviving parent, unless parental rights have been terminated, the child has been released, the parent or child has a guardian, or the parent with legal custody is married to the petitioner
- the adoptee if older than 14
- a representative of the DHHS or an agency if the child has been released or permanently committed to it by a court order

- any court or tribal court with custody
- any guardian of the child or the parent with authority to execute the consent
- the representative of another state or country's agency or court with authority to consent

If a consent or a release is executed by the parents or a guardian:

- Unless it meets the requirements for an out-of-court execution, it must generally be executed before a judge or referee, and a verbatim record of testimony related to the execution must be made.
- Before the execution, the parents' legal rights and the fact that they are permanently relinquishing their parental rights to the child must be fully explained.
- For the release of a child more than five years old, the court must determine that the child is best served by the release.
- It must be accompanied by a verified statement by the parent (in a consent or release to direct placement) related to counseling, payments, other agreements, etc.
- It may be executed out of court if
    - it is signed after the 72-hour waiting period beginning after the child's birth in front of and witnessed by the parent's or guardian's adoption attorney and a child-placing-agency caseworker;
    - it is accompanied by a verified statement and a statement acknowledging each of the parental rights the parent or guardian is relinquishing;
    - after explanation, the parent or guardian initials certain statutorily required paragraphs in the document;
    - it contains the required witnesses' contact information and information on where to submit a revocation request; and
    - it contains specific statutory language directly above the parent's or guardian's signature.

On the in-court execution of a release, the court immediately enters an order terminating the rights of the executing parent or guardian. If the consent or release was executed out of court, the court must wait 5 days after the release was signed, excluding weekends and holidays, before issuing an order terminating parental rights. If both parents' rights are being terminated, the court must commit the child to the DHHS or an agency.

Revoking an in-court release—If petitioned, the court may grant a hearing to consider whether to revoke a release. It may not be revoked if the child was placed for adoption unless the child was placed as provided in MCL 710.41(2) pending a rehearing or an appeal of a termination of parental rights.

Rehearings—A petition for rehearing may be brought at any time before the order of adoption if it is brought by the agency and the person executing the release. It must be brought within 21 days after the release if it is brought only by the person who executed the release, without the agency. Rehearing is granted only for good cause.

Revoking an out-of-court release—A parent or guardian may either (1) submit a written revocation request to the adoption attorney or to a caseworker at the child-placing agency that accepted the release within 5 days, excluding weekends and holidays, after it was signed or (2) file a petition to revoke the release within 5 days, excluding weekends and holidays, after it was signed. The court may deny revocation. Unless the child placing agency or adoptive parent(s) agree to the revocation, there must be a hearing in which a judge makes specific determinations regarding the revocation request, the release, and the child's best interests.

Revoking an in-court consent—A consent becomes irrevocable after entry of an order terminating the rights of parents or those *in loco parentis*. However, a parent or guardian can petition for rehearing or file an appeal within 21 days.

Revoking an out-of-court consent—A parent or guardian may either (1) submit a written revocation request to the adoption attorney or to a caseworker at the child placing agency that accepted the consent within 5 days, excluding weekends and holidays, after it was signed or (2) file a petition to revoke the consent within 5 days, excluding weekends and holidays, after it was signed. The court may deny revocation. Unless the adoptive parent (or parents) agree to revocation, there must be a hearing in which a judge makes specific determinations regarding the revocation request, the consent, the parent's or guardian's fitness and immediate ability to care for the child, and the child's best interests.

When consent is required from a court, a tribal court, an agency, or the DHHS and the institution refuses, a person may file a petition to adopt and a motion requesting that the court find the withholding of consent to be arbitrary or capricious. See §11.43.

Involuntary termination. §§11.29–11.40.

Putative fathers.

A child born out of wedlock may not be placed for adoption (except for temporary placements) until the court terminates the father's parental rights. A father's statement denying any interest in custody may be filed at any time after conception. The adoption code treats putative or alleged fathers who do not have a legal relationship with the child differently from "legal" fathers who are or were married to the mother or who have established a custodial relationship with the child.

A pregnant mother may file an ex parte verified petition indicating an intent to consent or release, naming the putative father, and requesting that the court notify him. The court will then issue a notice of intent to consent or release.

A notice of intent to consent or release must be served by personal service or certified mail on the putative father (see §11.33 for specific categories of persons). If service cannot be made because the father's whereabouts or identity is unknown after diligent inquiry, the petitioner must file proof of efforts to identify or locate. At the hearing, if the court finds that reasonable efforts were made, it must proceed. If not, the court must adjourn the hearing and order further efforts or substituted service.

A petition to terminate may be filed when a child is born out of wedlock, the mother wishes to consent or release (or joins in an adoption petition brought by her husband), and the father's consent or release cannot be obtained.

A hearing must be held as soon as practicable. The court (1) determines whether the child was born out of wedlock, (2) determines the identity of the father, and (3) determines or terminates the father's rights.

Grounds for termination:

- The father had notice and denies an interest in custody.
- The father's identity or location is unknown.
- The father was served with a notice of intent to consent or release and failed to timely file a notice of intent to claim paternity.
- The father appears and requests custody, the court finds he has failed to support the mother or the child or establish a custodial relationship with the child, and it would not be in the child's best interests to grant custody. (If the father has established a support or custodial relationship, his rights can only be terminated through a stepparent adoption or under the Juvenile Code.)

If the court does not terminate the father's parental rights, it must terminate the child's temporary placement, return the child to the mother or guardian, unless the mother's rights were terminated, and deny the adoption order.

Stepparent adoption.

Applies when the biological parents are divorced or unmarried (but the father has either acknowledged paternity or established a support or custodial relationship) and the custodial parent joins in a petition with the spouse.

The court may terminate a noncustodial parent's parental rights if (1) the noncustodial parent, having the ability to do so, has failed for at least two years to provide substantial and regular support, or has failed to comply with a support order, and (2) the noncustodial parent has failed to substantially and regularly communicate with the child for at least two years.

Identifying and nonidentifying information. §§11.46–11.54.

Nonidentifying information. §11.47.

Certain information must be provided to a prospective adoptive parent before a child is placed for adoption. The information generally relates to the time and place of birth, the child's health and genetic history, the age and sex of siblings, etc.

Identifying information. §11.48.

This information is compiled before adoption but, depending on the wishes of the parties, not always provided to a prospective adoptive parent. It is maintained by the agency, the DHHS, or the court. It includes the child's name before placement, the names of the biological parents when their parental rights were terminated and their most recent addresses, and the names of any biological siblings.

Release of information to adult adoptees. §11.50.

Nonidentifying information is provided within 63 days of a request.

Identifying information:

If parental rights were terminated on or after May 28, 1945, and before September 12, 1980:

- If both parents consent to the release of information or are deceased, all information is released.
- If one parent consents to the release of information or is deceased, only that parent's name and address, the child's name, and the names of any biological siblings at the time of termination are released.
- If there is no consent, information is released only if the court finds good cause (balancing the adoptee's, the biological parents', and the state's interests).

If parental rights were terminated before May 28, 1945, or on or after September 12, 1980, but not under the Safe Delivery of Newborns Law, MCL 712.1 et seq.:

- All information is released unless a former parent has filed a statement currently in effect with the central adoption registry denying consent, in which case that parent's name and address may not be released.
- A denial of consent is not effective after a parent's death.
- When identifying information may not be released, the adoptee may petition for the appointment of a confidential intermediary.

If parental rights were terminated under the Safe Delivery of Newborns Law, MCL 712.1 et seq., information may be released only if the former parent filed a statement with the central adoption registry consenting to the release.

Release of information to biological parents and adult siblings. §11.51.

- Nonidentifying information is provided within 63 days of a request.
- Identifying information must be released within 63 days if the adult adoptee has given consent. If there is no consent, the adult adoptee's name and address must be given to a confidential intermediary.

Confidential intermediaries. §11.52.

A confidential intermediary may be requested by an adult adoptee, an adoptive parent of a minor adoptee, an adult child of a deceased adoptee, or a former family member.

The court contacts the adoption registry to see if a denial of consent is on file; if not, the court appoints an intermediary, who makes a reasonable search for the person being sought.

If the person is found, the intermediary may release information only on that person's written authorization. If the person refuses, the intermediary reports that to the petitioner and the court.

If the former family member is not contacted within six months, the adult adoptee may petition the court to release information.

The court must extend the search period, appoint a new intermediary, or release information if it finds good cause. Findings must be made on the record.

Medical information. §11.53.

If a court, an agency, or the DHHS receives physician-verified medical or genetic information with a request to transmit it to the adoptee because of a serious threat to the adoptee's life, it must be transmitted within seven days.

Information about non–life-threatening conditions must be put in the adoption files and released only if the adult adoptee or the adoptive parents of a minor adoptee request it.

If the court receives information about a life-threatening condition for which a biological relative could give aid and the adoptee requests the information to be sent to biological relatives, it must be sent to the biological parents and adult siblings within seven days.

I. In General

A. Governing Law

§11.1 Adoptions fall under the jurisdiction of the family division of the circuit court. MCL 600.1021(1)(b). Adoption proceedings are governed by the Michigan Adoption Code, MCL 710.21 et seq., and the Michigan Court Rules, except as modified by MCR 3.800–.811. *See* MCR 3.800. SCAO forms should be used in adoptions. *See* SCAO forms PCA 301–PCA 356c.

If a foreign language interpreter is "necessary for a person to meaningfully participate in the case or court proceeding," the court will appoint an interpreter (either in response to a request or sua sponte) for a party or a testifying witness. MCR 1.111(B)(1). The court may appoint an interpreter for a person other than a party or a witness who has a "substantial interest" in the proceeding. MCR 1.111(B)(2).

Adoption may be accomplished either through an agency placement involving the DHHS or a private child placing agency or by a direct placement by the parent or guardian (subject to court approval). An agency or an attorney may facilitate an adoption.

A comprehensive discussion of adoption may be found in Michigan Judicial Institute, *Adoption Proceedings Benchbook* (3d ed 2024). The petition for adoption and accompanying documents, except for the home study/preplacement assessment, are all SCAO forms. The SCAO adoption forms are also very helpful for practitioners to review; they contain all the necessary statutory language and a reference to the particular section of the code or court rules relied on. In addition, the various counties each have websites containing helpful forms and information.

B. Agency Placement Adoptions

§11.2 *Agency placement* means a placement in which a child placing agency, the DHHS, or a court selects the adoptive parent for the child and transfers physical custody of the child to the prospective adoptive parents. MCL 710.22(d).

Agency placements may involve the parent or guardian in the selection of the adoptive parent. MCL 710.23b. The second step is the final approval of the adoption by the court, usually after the child has been placed in the adoptive home under supervision for six months. MCL 710.56(1). In private agency placements in which the adoptee is not a ward of the court or MCI, the birth parents release their parental rights to the agency and the agency makes the placement.

C. Direct Placement Adoptions

§11.3 *Direct placement* "means a placement in which a parent or guardian selects an adoptive parent for a child, other than a stepparent or an individual related to the child within the fifth degree by marriage, blood, or adoption, and transfers physical custody of the child to the prospective adoptive parent." MCL 710.22(o).

A parent or guardian who has legal and physical custody of a child is allowed to directly place the child for adoption by making a temporary placement under MCL 710.23d or a formal placement under MCL 710.51. A temporary placement becomes a formal placement when the court orders the termination of the parent's or guardian's rights and approves the placement pursuant to MCL 710.51. A formal placement does not have to be preceded by a temporary placement. MCL 710.23a(1).

In direct placement adoption, the parent or guardian must personally select a prospective adoptive parent and may not delegate that duty. MCL 710.23a(2).

II. Temporary Placements

A. In General

§11.4 In direct placement adoptions, a temporary placement can be made but is not required. In addition, with a parent or guardian's written and witnessed authorization, a child placing agency or the DHHS may make a temporary placement. If the parent is an unemancipated minor, the authorization must also bear the witnessed signature of a parent or guardian of the minor parent (see PCA 329). MCL 710.23b.

Any temporary placement with a prospective adoptive parent requires a preplacement assessment (or "home study") finding that the prospective adoptive parent is suitable to be a parent of an adoptee. MCL 710.23d(1)(a).

Under MCL 710.23d(1), a temporary placement must meet certain requirements:

- In a direct placement, an adoption attorney or child placing agency must assist the parent or guardian.
- The parent, guardian, or representative of the child placing agency must sign a witnessed statement evidencing the transfer of physical custody of the child to the adoptive parents (see PCA 330 or PCA 331).
- The adoptive parent must sign a witnessed statement evidencing the transfer of physical custody of the child (see PCA 332).

The parent's or guardian's statement must state

- the date of the transfer of physical custody;
- that the placement is temporary and is for the purposes of adoption by the prospective adoptive parent;
- that unless the parent or guardian and the prospective adoptive parent agree otherwise, the prospective adoptive parent has authority to consent to medical, educational, and related services;
- that the parent or guardian retains all other parental rights and that the temporary placement may be revoked;
- that the person making the transfer has read a preplacement assessment of the adoptive parent that was made or updated within one year before the transfer and found the adoptive parent suitable (a child placing agency mak-

ing a transfer must verify that the agency has given the parent or guardian an opportunity to review the assessment); and

- the name and address of both parents of the child, including any putative father.

MCL 710.23d(1)(c).

The prospective adoptive parent's statement must include

- the date of the transfer;
- the name and address of the prospective adoptive parent;
- if the prospective adoptive parent is a Michigan resident, an agreement that the prospective adoptive parent will reside with the child in Michigan until formal placement occurs;
- an agreement that the prospective adoptive parent will obtain approval in compliance with the interstate compact on the placement of children before the child is sent, brought, or caused to be sent or brought into a "receiving" state as defined by that act;
- an attestation that the prospective adoptive parent submits to Michigan jurisdiction; and
- an attestation that the prospective adoptive parent (1) understands that the temporary placement will not become a formal placement until the parents consent or release their rights and the court terminates parental rights and approves the placement and (2) will relinquish the child within 24 hours after being served with an order to return the child.

MCL 710.23d(1)(d).

B. Interested Parties

§11.5 The interested parties in a hearing related to temporary placement are

- a parent or guardian who made or authorized the temporary placement
- the parent or guardian of an unemancipated minor parent of the adoptee
- a child placing agency that was authorized to make the temporary placement
- a parent or putative father of the adoptee who did not authorize temporary placement
- the prospective adoptive parent
- the prosecutor
- a guardian ad litem, if one has been appointed

MCL 710.24a(5); *see also In re MGR*, 323 Mich App 279, Note 2, 916 NW2d 662 (2018), *rev'd on other grounds,* 504 Mich 852, 928 NW2d 184 (2019) (court applied definition for *putative father* as "a man reputed, supposed, or alleged to be the biological father of a child" from *Girard v Wagenmaker*, 173 Mich App 735, 740, 434 NW2d 227 (1988), *rev'd on other grounds,* 437 Mich 231, 470 NW2d

372 (1991)). The court may require additional parties to be served in the interests of justice. MCL 710.24a(6).

C. Required Reports

§11.6 Confirming transfer of physical custody. No later than two business days after the transfer of physical custody, the adoption attorney or child placing agency must submit a report confirming the transfer to the court in the county where the child's parent or guardian or the prospective adoptive parent resides, or where the child is found. The report must contain the temporary placement or transfer statements of the parties and

- the date of the transfer;
- the name and address of the parent, guardian, or child placing agency;
- the name and address of the prospective adoptive parent;
- the name and address of both parents, even if only one parent is making the temporary placement, including any putative father; and
- the authorization required by MCL 710.23b, if applicable.

MCL 710.23d(2). *See* PCA 330, PCA 331.

Follow-up or disposition report. Within 30 days after the transfer, another report is due to the same court from the adoption attorney or the child placing agency stating either that a petition for adoption of the child has been filed or that the child has been returned to the agency or person with legal custody (see PCA 333). MCL 710.23d(3). This report is not necessary if the petition has been filed in the same court, which it usually is. In that instance, the court is aware that the petition has been received.

D. Petition for Disposition

§11.7 If the follow-up report is not received within 45 days or if the petition is not filed, the court must investigate. If an adoption petition has not been filed and the child has not been returned to a parent or another person with legal custody, the prosecutor must be notified (see PCA 334). The prosecutor must then file a petition for the disposition of the child, to determine who has legal custody of the child (see PCA 335). MCL 710.23d(4).

Revoking temporary placement. A parent or guardian may revoke a temporary placement by filing a petition for disposition (PCA 337). MCL 710.23d(5). On request, the adoption attorney or child placing agency who assisted in making the temporary placement must assist the parent in filing this petition. *Id.* A prospective adoptive parent with whom the child was temporarily placed may also file a petition for disposition of the child, indicating that the person is unwilling or unable to proceed with the adoption (see PCA 335). MCL 710.23d(6).

A child placing agency may file a petition for disposition in any of the following situations:

- The parent or guardian wants to regain custody, and the parent or guardian authorized the agency to make the temporary placement. MCL 710.23d(5).
- The agency cannot proceed because of the unavailability of a parent or guardian to execute a release. MCL 710.23d(7).
- The agency has legal custody of the child and decides not to proceed with the adoption, and the adoptive parent refuses to return the child to the agency. *Id.*

PCA 335.

Any custody dispute arising out of a temporary placement looks to the Adoption Code for its exclusive remedy. MCL 710.23e(7).

- *On receiving a petition for disposition filed by, or in the name of, the parent or guardian,* the court must immediately issue an ex parte order directing the prospective adoptive parent to return the child within 24 hours after receipt of the order (see PCA 337), unless the court appoints an attorney to represent the child or refers the matter to the DHHS. Either may file a child protective proceeding. If such a petition is not filed within 14 days of the appointment or referral, the court must order the child returned to the parent or guardian with legal custody. During the referral period, the court must remove the child from the home of the adoptive parent and make a temporary disposition appropriate for the welfare of the child. MCL 710.23e(2), (3).
- *If the prosecutor, the prospective adoptive parent, or a child placing agency files a petition,* the court must hold a hearing to determine the custody of the child no later than 14 days after the filing of the petition. MCL 710.23e(1). The notice must be personally served at least three days before the hearing or served by mail at least seven days before. A putative father whose identity or whereabouts (if he did not join in the placement) are unknown need not be served. MCR 3.805.
- *Pursuant to a petition filed by the prospective adoptive parent or another individual interested in the welfare of the child,* the court may appoint a guardian and make a temporary disposition until an order of guardianship is entered. MCL 710.23e(4).

See PCA 336 for the court's order following a disposition hearing.

In general, the court may also order the return of a child to a child placing agency that has obtained legal custody of the child or appoint a guardian ad litem for the child or the minor parent of the child. MCL 710.23e(5), (6).

III. Basic Adoption Procedures

A. Filing the Verified Petition

1. In General

§11.8 An adoption proceeding is commenced when the prospective adoptive parent files an adoption petition. The petition may be filed by a single

person, a married couple, or, in certain circumstances, a married person individually. MCL 710.24(1), (2).

An adoption petition should be filed with the family division of the circuit court for the county

- where the petitioner resides or the adoptee is found;
- where the parent's parental rights were terminated or are pending termination (if both parents' parental rights were terminated at different times and in different courts, the petition should be filed in the court where parental rights were first terminated);
- if there has already been a temporary placement, where the report described in MCL 710.23d(2) was filed.

MCL 710.24(1).

If more than one individual desires to adopt the child and has submitted an adoption application to a child placing agency (*see* MCL 710.22(e)), the adoption must be filed in the county where the parent's parental rights were terminated or are pending termination. If both parents' parental rights were terminated, but at different times and in different courts, the petition must be filed in the county where rights were first terminated. MCL 710.24(3).

The statute sets out specific information to be included in the verified petition, including identifying information regarding the petitioner and the child (see PCA 301). MCL 710.24(4).

Adoption proceedings involving an Indian child are governed by the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 et seq. See chapter 13 for a discussion of the ICWA and the MIFPA in general. For adoptions following involuntary termination of parental rights, see §§13.56–13.62. For voluntary adoptions, see §§13.64–13.76.

2. Interested Parties

§11.9 The interested parties in a petition for adoption are all of the following:

- the petitioner or petitioners
- the adoptee if the adoptee is over 14
- a minor parent, an adult parent, or a surviving parent of a minor adoptee unless (1) a court of competent jurisdiction has terminated the parent's rights, (2) a court has appointed a guardian of the adoptee with specific authority to consent to adoption, (3) a court has appointed a guardian of the parent with specific authority to consent to adoption, (4) the parent has released their rights, and/or (5) the parent has consented to the granting of the petition
- the DHHS or a child placing agency to which the adoptee has been or is proposed to be released or committed by court order

- the parent, guardian, or guardian ad litem of an unemancipated minor parent of the adoptee
- the court with permanent custody of the adoptee
- any court with continuing jurisdiction over the adoptee
- a child placing agency of another state or country that has the authority to consent to adoption
- the guardian or guardian ad litem of an interested party

MCL 710.24a(1). If the adoptee is an Indian child, the interested parties include the child's tribe, the Indian custodian, if any, and, if these parties or the child's parents are unknown, the Secretary of the Interior. MCR 3.800(B)(2). The court may require additional parties to be served in the interests of justice. MCL 710.24a(6).

A grandparent, even one who has court-ordered grandparenting time rights, is not an interested party to a petition for adoption. *In re Toth*, 227 Mich App 548, 577 NW2d 111, *cert denied,* 525 US 1018 (1998).

A guardian of the adoptee or of a parent may not be appointed solely to defeat that parent's status as an interested party. MCL 710.24a(7).

The court may permit a child to attend their own adoption hearing. MCL 710.23a(5).

3. Required Documentation

§11.10 After or with the filing of the petition, the petitioner, the DHHS, a court employee or agent, or the agency, as appropriate, must file

- a copy of any release or order terminating parental rights that bears on the authority of any person executing a consent to adopt (except in cases of parental consent);
- a copy of the order of commitment if a commitment was made to a child placing agency or the DHHS;
- proof of any guardian's appointment and an authorization to consent to or release the child for adoption;
- a copy of the required consent to adopt (if the consent is required from a child placing agency, a court, a tribal court, or the DHHS, that consent must generally be filed with the adoption petition, unless a decision was made to withhold consent and the petitioner has filed a motion alleging the decision was arbitrary and capricious, see MCL 710.43(1)(b), (c), or (d), .45);
- a copy of the adoptee's birth certificate or other proof of date and place of birth (this requirement may be waived by a written order of the judge);
- the investigative report ordered when the petition was filed;
- an affidavit verifying the facts if a petition seeking to terminate a noncustodial parent's rights because of nonsupport or noncommunication has been filed under MCL 710.51(6); and

- any additional facts that the court considers necessary.

MCL 710.26(1).

In a direct placement, the petitioner must also attach to the petition a verified statement concerning notice of counseling services and whether the petitioner has received counseling and a preplacement assessment showing suitability that was prepared or updated within the previous year, copies of all other preplacement assessments, and verification that there are no others. MCL 710.24(5), (6).

The assessment, prepared by an agency, must include certain personal information concerning the proposed adoptive parent and the suitability of the adoptive home. *See* MCL 710.23f.

If a child placing agency finds that an individual is not suitable to be an adoptive parent, the individual may seek a review of the assessment by the court. The request for review is made after filing the adoption petition. The court may order an investigation and report, and a hearing is scheduled. If the court finds at the hearing by clear and convincing evidence that the conclusion of unsuitability is not justified, the child may be placed with the individual. If the court finds that the conclusion of unsuitability is justified, the child may not be placed with the individual. MCL 710.23f(9).

See §11.44 regarding required documentation concerning compensation connected with the adoption.

B. Court Investigation and Approval

§11.11 Before an adoption may take place, the court must direct that court personnel, the supervising agency, or the DHHS make a full investigation. The investigation is to consider (1) the best interests of the adoptee, (2) the adoptee's family background, and (3) the reasons for the adoptee's placement away from the biological parents. The report must be filed within three months after the order for investigation. MCL 710.46.

Although MCL 710.46 requires a full investigation, as an alternative, the court may use the preplacement assessment prepared at the request of an individual seeking to adopt, see MCL 710.23f, and may order an additional investigation. Alternatively, the court may waive the full investigation on the petitioner's motion if the adoptee has been placed for foster care with the petitioner for at least 12 months and a foster family study was completed or updated not more than 12 months before the adoption petition was filed. Generally, the court will investigate stepparent, relative, and adult adoptions. Adoption petitions filed by agencies or the DHHS or direct placement adoptions will have accompanying preplacement or family assessments (home studies) that are used in place of the investigation.

C. The Best Interests of the Adoptee

§11.12 A child may not be placed with prospective adoptive parents or an order of adoption issued if there is reliable information that a prospective adoptive parent has been convicted of crimes involving the accosting, enticing, or solic-

iting of a child for immoral purposes; child sexually abusive activity or materials; or criminal sexual conduct. MCL 710.22a.

D. Order for Formal Placement of the Adoptee

§11.13 Within 14 days of the receipt of the necessary documentation, the court must review all the material and decide whether the adoption seems appropriate. MCL 710.51(1). The specified time may be extended to a total of 28 days if a hearing is necessary before terminating anyone's rights to the child or if other good cause is shown. MCL 710.51(2).

The court must be satisfied (1) that the consent to the adoption is genuine and that the person giving consent has the legal authority and (2) that the best interests of the adoptee will be served by the adoption. MCL 710.51(1). See MCL 710.22(g) regarding the best interests factors.

If the court is satisfied, it then enters an order

- terminating the rights of the parents or entity that gave consent;
- making the child a ward of the court (except in stepparent adoptions);
- approving the placement of the child in the home of the prospective adoptive parents; and
- ordering supervision of the placement by the court, a child placing agency, or the DHHS, who must report on the adjustment of the child in the home as the court orders.

MCL 710.51–.52. *See* PCA 320.

If the adoption involves a placement from another state or country that prohibits the giving of consent to adopt at the time of placement, the sending agency must demonstrate that it has authority to consent to the adoption when the final order is entered. The court's order then approves and orders supervision of the placement. MCL 710.51(4).

During the period before an order of adoption is entered, the court, its employees, a child placing agency, or the DHHS must supervise the child and make updated reports regarding the child's adjustment, as ordered by the court. MCL 710.52(1). In a direct placement adoption, the child placing agency that investigated the placement or, in the court's discretion, another child placing agency must supervise the child during this period. MCL 710.52(2).

E. The Final Order of Adoption

1. Six-Month Supervision Period

§11.14 There is a six-month supervision period between formal placement and the order of adoption. This is not a period in which the parent who consented can change their mind. A parent's parental rights terminate when they consent or, if the termination is involuntary, when the order is entered terminating parental rights. During this period, the agency supervises and reports to the court. The court may waive the six-month period if the waiver is in the adoptee's best interests, on the motion of the petitioner. MCL 710.56(1).

The six-month period may be extended if, after a hearing, the court finds that the best interests of the adoptee will be served. The additional period is not to exceed 18 months from the time of formal placement. *Id.* The waiting period may also be extended if the child was formally placed after a termination of parental rights under MCL 710.41(2), to allow the parent to seek a rehearing or to pursue an appeal. MCL 710.56(1). An extension under MCL 710.41(2) may exceed 18 months. *Id.* If a petition for rehearing or an appeal as of right from an order terminating parental rights has been filed, the statutory requirements concerning the exhaustion of rights must be met or the court of appeals must affirm the order terminating parental rights before the final order of adoption may take effect. MCL 710.56(2).

Note that if the adoptee is less than one year old when the adoption petition was filed, the court may enter an adoption order three months after formal placement unless the court decides circumstances make the adoption undesirable. On the motion of the petitioner, the court may waive the three-month period, or any portion of that period, if it is in the adoptee's best interests. MCL 710.56(1).

If, within 18 months of formal placement, an adoption order has not been entered, the court must hold a hearing and determine whether an order of adoption should be entered or the petition denied. MCL 710.56(1). If an application for leave to appeal has been filed with the supreme court, the court may not order an adoption until at least one of the following occurs:

- the application for leave is denied or
- the supreme court affirms the termination of parental rights.

MCL 710.56(3). Further, if a motion objecting to an institutional guardian's withholding of consent to adopt has been filed under MCL 710.45, the court may not order an adoption until one of the following occurs:

- the motion is decided and no appeal of right to the court of appeals has been filed;
- the motion is decided, an appeal of right to the court of appeals has been filed, that court has issued an opinion, and the period for filing an application for leave to the supreme court has expired; or
- the supreme court denies the application for leave, or the supreme court grants the application and issues an opinion.

MCL 710.56(4).

Once the supervisory period expires, the court may enter an adoption order. MCL 710.56(1). Before finalizing the adoption, the court must make findings on the record determining that the adoptee is not subject to any pending rehearing proceedings, reconsideration proceedings, or appellate activity. *In re Jackson*, 498 Mich 943, 872 NW2d 221 (2015); *see also* MCR 3.808. After an adoption order is entered, the adoptive parent becomes known as the adoptee's parent, is treated as if the person bore the adopted child, becomes liable for all parental duties, and is entitled to parental rights over the child. MCL 700.2114(2), 710.60(1). The adoptive parent's parental rights include the right to custody, control, services, and

earnings of the adopted child. MCL 722.2; *see Liebert v Derse*, 309 Mich 495, 504, 15 NW2d 720 (1944) (reversing trial court's dismissal of adoptive father's petition for return of his adopted child and holding "in the absence of a showing that [the adoptive father] is not a suitable person to have custody of his [adopted child], he is legally entitled to such custody").

PCA 321 and PCA 321b are the SCAO forms for the order.

2. Denial of a Petition; Rehearing

§11.15 If the court fails to issue an order of adoption, it must state the reason on the record or in writing. MCL 710.63.

A petition for a rehearing must be filed within 21 days after entry of an order. The petitioner must give all interested parties notice of the filing before a petition is granted and the order modified or set aside. MCL 710.64(1); MCR 3.806(A). The court may grant rehearing only for good cause and must base its decision whether to grant a rehearing on the record, the pleading filed, or a hearing on the petition. Reasons for the grant or denial must be in writing or on the record. Pending a decision or rehearing, the court may stay other orders or enter new orders in the minor's best interests.

If a rehearing is granted, the court may, after notice, take new evidence and may affirm, modify, or vacate the decision. Reasons must be stated in writing or on the record. MCR 3.806(B)–(D). The court has 21 days after a rehearing to enter its order. MCL 710.64(2).

IV. Consents and Releases

A. Consent or Release

§11.16 A birth parent may voluntarily relinquish parental rights for the purpose of adoption by executing an adoption consent or release. *See* MCL 710.22(*l*), (u). All adoptions require the consent of the parents or someone acting *in loco parentis,* at least at the time of the formal placement. *See* MCL 710.51. Before executing a consent or release, the parent must be notified that the child support obligation will continue until a court modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated. MCR 3.804(C)(1)–(2). However, a child's guardian does not have the authority to consent to the child's adoption until the parents' parental rights have been terminated, the parents have consented to the adoption, or the parents release their rights to the child without any intention of exercising any parental rights over the child. *Eby v Labo (In re Handorf)*, 285 Mich App 384, 776 NW2d 374 (2009), *clarified by* 485 Mich 1048, 777 NW2d 130 (2010).

A *consent* is "a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent." MCL 710.22(*l*). In general, consents are governed by MCL 710.43–.44. A *release* is the document relinquishing rights to a child placing agency or the DHHS, which in turn places the child with the adoptive parents. MCL 710.22(u). In general, releases are governed by MCL 710.28–.29.

Note that a release gives the parental rights to the child to an *agency* for subsequent placement with a family, while a consent results in an immediate placement with an *identified family. See* SCAO forms PCA 305, PCA 305a, PCA 306, PCA 307, PCA 308, PCA 308a, PCA 309. Also note, in a child protective proceeding, it is not appropriate to accept a release from one parent to terminate that parent's parental rights when there is no intent to terminate the parental rights of the remaining parent. *See* MCL 710.22(u), .28(1)(a), .29(8). A voluntary termination of parental rights under the Juvenile Code may be appropriate. *See In re Toler*, 193 Mich App 474, 477, 484 NW2d 672 (1992).

The ICWA and the MIFPA apply when an Indian child's parent or an Indian custodian voluntarily consent to a release of parental rights or consent to an adoption under the Adoption Code. See §§13.64–13.83 for further discussion.

B. Interested Parties in a Voluntary Release for Adoption

§11.17 In a proceeding regarding the execution of a voluntary release for adoption, the interested parties are

- the adoptee if the adoptee is over five years of age,
- the DHHS or child placing agency to which the adoptee is proposed to be released, and
- the person executing the release of parental rights.

MCL 710.24a(3). If the child is an Indian child, the interested parties will also include the child's tribe, Indian custodian, if any, and, if these parties or the child's parents are unknown, the Secretary of the Interior. MCR 3.800(B)(2). The court may require additional parties to be served in the interests of justice. MCL 710.24a(6).

A guardian of the parent may not be appointed solely to defeat that parent's status as an interested party. MCL 710.24a(7).

C. Who May Execute

§11.18 A consent must be executed by

- each parent of the child to be adopted or the surviving parent, unless parental rights have been terminated, the child has been released for adoption, the parent or child has a guardian, or a parent with legal custody is married to the petitioner;
- the adoptee if the adoptee is over 14 years of age;
- the authorized representative of the DHHS or a child placing agency to which the child has been permanently committed by a court order;
- the authorized representative of the DHHS or a child placing agency to which the child has been released;
- any court or tribal court with permanent custody of the child;
- any guardian of the child who has obtained authority to execute the consent from the court that appointed the guardian;

- any guardian of the parent with similar authority; or
- the authorized representative of a child placing agency or the court of another state or country with authority to consent.

MCL 710.43. Guardians may not consent to a ward's adoption unless the child's parents' parental rights have been terminated, the parents have consented to the adoption, or the parents released their rights to the child without any intention of exercising any parental rights over the child. *Eby v Labo (In re Handorf)*, 285 Mich App 384, 776 NW2d 374 (2009), *clarified by* 485 Mich 1048, 777 NW2d 130 (2010).

A release must be executed by

- each parent of the child to be adopted or the surviving parent,
- the authorized representative of a child placing agency to which the child has been committed by a court order or released, or
- a guardian of the child or of the parent with authority to execute the release.

MCL 710.28.

D. Requirements for Execution

1. Executions in Court

§11.19 **By parents or guardians.** Unless the consent or release meets the requirements for an out-of-court execution (discussed in §11.21), it generally must be executed before a judge or a referee of the court, and a verbatim record of testimony related to the execution of the consent or release must be made. MCL 710.29(1), .44(1). If the biological parent is in prison or in the military, the consent or release may be executed and acknowledged before an individual legally authorized to administer oaths. MCL 710.29(2), .44(2). The consent or release must be accompanied by a verified statement signed by the parent or guardian containing information required by statute. MCL 710.29(6), .44(5). See §11.20.

The consent or release may not be executed until after any investigation the court considers proper. MCL 710.29(7), .44(6). In all situations, it must be fully explained to the parents that, by the consent or release, they permanently relinquish their parental rights to the child. *Id.* Furthermore, for a release, if the child is over the age of five, the court must also first determine that the child is best served by the release. MCL 710.29(7).

By the DHHS or a child placing agency. If the child is a legal ward of a child placing agency or the DHHS, an authorized representative of the agency may execute the consent or release before an individual authorized by law to administer oaths. MCL 710.29(3), .44(3).

2. Verified Statement

§11.20 A consent or release, whether executed in court or out of court, must be accompanied by a verified statement signed by the parent or guardian. MCL 710.29(6), .44(5). *See* PCA 338 and PCA 339. In general, the verified statement must contain assertions regarding the following:

- the parent's receipt of a list of support groups and, if a child placing agency is involved, of written information prepared by the adoption facilitator regarding its services
- the receipt or waiver of counseling
- the fact that only lawful payments, itemized on a verified accounting filed with the consent or release, have been received or promised
- the fact that there are no collateral or separate agreements affecting the validity and finality of the consent or release
- the desirability of keeping the child placing agency or the DHHS informed of any health problems that the parent develops that might affect the child
- the desirability of keeping the child placing agency or the DHHS informed of the parent's current address for medical or social history inquiries

MCL 710.29(6), .44(5).

The ICWA and the MIFPA apply when an Indian child's parent or an Indian custodian voluntarily consent to a release of parental rights or consent to an adoption under the Adoption Code. In direct placement adoptions, "consent by a parent or guardian shall be accompanied by a verified statement signed by the parent or guardian that contains all of the [information as set out under MCL 712B.13(6)(a)–(f)]." MCL 712B.13(6). See §§13.64–13.83 for further discussion of voluntarily consenting to a release of parental rights or a consent to an adoption of an Indian child.

3. Out-of-Court Executions

§11.21 A parent or guardian may execute a consent or release out of court if the following requirements are met:

- The consent or release must be signed after the 72-hour waiting period beginning after the child's birth in front of and witnessed by the parent's or guardian's adoption attorney and a child placing agency caseworker. If the parent is an unemancipated minor, the consent or release must also be signed by the minor's parent or guardian.
- The consent or release must be accompanied by a verified statement, see §11.20, and a statement acknowledging each of the parental rights the parent or guardian is relinquishing.
- The parent or guardian must initial paragraphs in the consent or release stating that the person
  - read or was read each of the parental rights and understood these rights;
  - is signing freely and voluntarily and has been advised that they cannot be forced to sign;
  - has not been given or promised compensation in exchange for signing;

- understands that by signing, they are giving up and authorizing the court to permanently terminate all of the parental rights, unless the court allows the consent or release to be revoked;
- understands, after explanation, that they are not required to sign and may make a temporary placement or continue a temporary placement of the child until signing;
- may request to revoke the release or consent by submitting a timely written request;
- must appear in court if requesting a revocation of the consent or release;
- has been advised of the manner in which they may request to revoke the consent or release; and
- acknowledges that the court may grant or deny a timely revocation request depending on fitness, immediate ability to care for the child, and the child's best interests.

See SCAO forms PCA 354 and PCA 355.

- The consent or release must contain the required witnesses' contact information and information on where to submit a revocation request. A request may be submitted by USPS, overnight delivery, fax, or email, and it may not be conveyed by telephone or text message.
- The consent or release must contain specific language directly above the parent's or guardian's signature:

> I acknowledge that I am signing this out-of-court *[consent / release]* freely and voluntarily, after my parental rights have been explained to me and any questions I may have about it have been fully answered. I understand the rights I am giving up and that an order terminating my parental rights, when entered by the court, is a permanent termination of all of my parental rights.

MCL 710.29(5), .44(6), (8).

The adoption attorney and a caseworker from the child placing agency must completely explain to the parent or guardian their legal rights and that the person will permanently relinquish parental rights by signing the consent or release. MCL 710.29(7), .44(6).

An out-of-court consent may be signed before filing an adoption petition. MCL 710.44(8)(g).

4. Executions in Another State or Country

§11.22 The Michigan adoption court must determine that a consent or release executed in another state or country was executed in accordance with the law of that state or country or the laws of this state before proceeding. MCL 710.29(4), .44(4).

E. Order Terminating Parental Rights

§11.23 **Release.** If the parent or guardian executes the release in court, the court must immediately issue an order terminating the rights of that parent or guardian. If the parent or guardian signed an out-of-court release, the court must wait 5 days after the release was signed, excluding weekends and holidays, before issuing an order terminating the parental rights. If the rights of both parents are terminated, the court must issue an order committing the child to the child placing agency to which the child was released or to the DHHS. MCL 710.29(8).

Consent. In general, the procedures after a consent are those required for a formal placement. Not later than 14 days after receipt of the investigation report, the court examines the report and enters an order terminating the rights of the parents or the person acting *in loco parentis* if the court is satisfied that the consent to adoption is genuine, the persons who signed the consent have the legal authority to do so, and the best interests of the adoptee will be served by the adoption. MCL 710.51(1). Note, however, that if the parent or guardian signed an out-of-court consent, the court must wait 5 days after the consent was signed, excluding weekends and holidays, before issuing an order terminating the parental rights. MCL 710.44(6).

In direct placement adoptions, the adoption petitioners generally have an adoption petition on file in the court in which the consent is to be given. Once the birth parents consent to the adoption and their parental rights are terminated, the court enters an order placing the child with prospective adoptive parents. The preplacement assessment is used in place of the investigation.

On entry of the order, the child becomes a ward of the court (except in stepparent adoptions) and is placed with the prospective parents. MCL 710.51(3).

The 14-day limit may be extended for an additional 14 days if a hearing must be held before entering an order terminating the rights of a parent or for other good cause shown. MCL 710.51(2).

F. Revoking a Release

1. In-Court Releases

§11.24 Under MCL 710.29(11), the court may grant a hearing to consider whether a release should be revoked on the petition of the persons who executed the release and the DHHS or child placing agency to which the child was released. The release may not be revoked if the child has been placed for adoption unless the child was placed as provided in MCL 710.41(2) pending a rehearing or an appeal of a termination of parental rights. The court must make a verbatim record of testimony regarding a petition to revoke a release.

2. Rehearings

§11.25 Under MCL 710.64(1), the court may grant a rehearing of "any order" if the petition for rehearing is filed within 21 days of entry of the order. These provisions have been interpreted to mean that a petition brought by the person who executed the release and the agency may be brought at any time up

to the point of adoption, but a petition only by the person who executed the release must be brought within 21 days. *In re Hole*, 102 Mich App 286, 301 NW2d 507 (1980); *In re Baby Girl Fletcher*, 76 Mich App 219, 256 NW2d 444 (1977). The 21-day limit set by MCL 710.64 does not preclude a subsequent rehearing by a putative father who received no notice and alleges fraud. *In re Kozak*, 92 Mich App 579, 285 NW2d 378 (1979).

The decision whether to permit a rehearing or to modify or set aside a release is in the sound discretion of the trial court. *Id.*; *Puryear v Catholic Human Servs (In re Burns)*, 236 Mich App 291, 599 NW2d 783 (1999); *In re DeBoer*, 76 Mich App 641, 257 NW2d 200 (1977).

A rehearing may be granted only for good cause. MCR 3.806(B). In general, a release for adoption may not be rendered void unless it is proved that it was involuntarily executed. *In re Jackson*, 115 Mich App 40, 320 NW2d 285 (1982). Allegations that a mother was emotionally upset and under medication were not sufficient; since the court had carefully investigated and fully explained to the parents their legal rights, there was no reason to believe that the release was not given freely and knowingly. *In re Blankenship*, 165 Mich App 706, 418 NW2d 919 (1988); *see also Puryear* (family court did not abuse its discretion, on rehearing, in denying parent's request to vacate release of his parental rights where he claimed he had change of heart; release was knowingly and voluntarily made, complied with statutory requirements, and court relied on child's best interests in determining whether to vacate release).

The court must enter an order within 21 days of any hearing. MCL 710.64.

3. Out-of-Court Releases

§11.26 A parent or guardian wishing to revoke the out-of-court release may do either of the following:

1. Submit a written request to revoke the release to the adoption attorney or to a caseworker at the child placing agency that accepted the release within five days, excluding weekends and holidays, after the release was signed. On receipt of a timely request for revocation, the adoption attorney or child placing agency must help the parent or guardian file the petition to revoke the release.
2. File a petition to revoke the release within five days, excluding weekends and holidays, after the release was signed.

MCL 710.29(12).

A timely petition does not guarantee an immediate return of the child to the parent or guardian as the court may deny the request for revocation. MCL 710.29(13). Unless the child placing agency or adoptive parent (or parents) agrees to the revocation, the court must hold a hearing in which a judge determines

- whether the revocation request was proper and timely;

- whether good cause exists to determine that the release was involuntarily signed (the release is invalid if the court finds it was signed involuntarily and the child must be returned to the parent or guardian); and
- if the court finds the release was signed voluntarily, whether the child's best interests will be served by returning the child to the parent or guardian, continuing the adoption proceeding, or other disposition appropriate to the child's welfare under MCL 712A.18–.18s.

MCL 710.29(14).

G. Revoking a Consent

1. In-Court Consents

§11.27 On entry of an order terminating the rights of parents or persons *in loco parentis,* a consent may not be withdrawn. MCL 710.51(3). However, the parent can still petition for a rehearing or file an appeal within 21 days. MCL 710.64, .65. Granting a rehearing is discretionary.

In *In re Nord*, 149 Mich App 817, 386 NW2d 694 (1986), the petitioner unsuccessfully sought to have her consent set aside because of fraud. Applying the standard of review used in release cases, the court of appeals found no abuse of discretion where the trial court had held an extensive hearing and issued a "well reasoned opinion." *Id.* at 823.

2. Out-of-Court Consents

§11.28 A parent or guardian wishing to revoke the out-of-court consent may do either of the following:

1. Submit a written request to revoke the consent to the adoption attorney or to a caseworker at the child placing agency that accepted the consent within five days, excluding weekends and holidays, after the consent was signed. On receipt of a timely request for revocation, the adoption attorney or child placing agency must help the parent or guardian file the petition to revoke the consent.
2. File a petition to revoke the consent within five days, excluding weekends and holidays, after the consent was signed.

MCL 710.44(9).

A timely petition does not guarantee an immediate return of the child to the parent or guardian as the court may deny the request for revocation. MCL 710.44(10), (11). Unless the adoptive parent (or parents) agrees to the revocation, the court must hold a hearing in which a judge determines

- whether the revocation request was proper and timely;
- whether good cause exists to determine that the consent was involuntarily signed (the consent is invalid if the court finds it was signed involuntarily and the child must be returned to the parent or guardian); and

- if the court finds the consent was signed voluntarily, whether the child's best interests will be served by returning the child to the parent or guardian, continuing the adoption proceeding, or other disposition appropriate to the child's welfare under MCL 712A.18–.18s.

MCL 710.44(11).

When considering the child's best interests, the court must determine if the parent or guardian is fit and immediately able to care for the child. MCL 710.44(12). If the parent or guardian is unfit and not able to immediately able to care for the child, the court must deny revocation. *Id.* If the parent or guardian is fit and immediately able to care for the child, the court must determine the child's best interests by evaluating the following factors:

> (a) The child's age and length of time the parent or guardian seeking revocation has had physical custody of the child so that significant love, affection, and other emotional ties exist between the parent or guardian and the child and whether during that time the child has lived in a stable, satisfactory environment.
>
> (b) The capacity and disposition of the prospective adopting individual or individuals and the parent or guardian seeking revocation to give the child love, affection, and guidance, and to educate and create a milieu that fosters the child's religion, racial identity, and culture.
>
> (c) The capacity and disposition of the prospective adopting individual or individuals and the parent or guardian seeking revocation to provide the child with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the state law in place of medical care, and other material needs.
>
> (d) The permanence as a family unit of the prospective adopting individual or individuals and the parent or guardian seeking revocation.
>
> (e) The moral fitness of the prospective adopting individual or individuals and the parent or guardian seeking revocation.
>
> (f) The mental and physical health of the prospective adopting individual or individuals and the parent or guardian seeking revocation.
>
> (g) The home, school, and community record of the child.
>
> (h) The child's reasonable preference, if the child is 14 years of age or less and if the court considers the child to be of sufficient age to express a preference.
>
> (i) The ability and willingness of the prospective adopting individual or individuals to adopt the child's siblings.
>
> (j) Any other factor considered by the court to be relevant to a particular prospective adoptive placement or to a revocation of an out-of-court consent.

Id.

V. Involuntary Termination of a Biological Parent's Rights

A. In General

§11.29 This section discusses two instances when a biological parent's rights to a child may be involuntarily terminated under the Michigan Adoption Code:

1. The termination of a putative father's rights, which includes when there is no objection to the child's being placed for adoption as well as when the father opposes the adoption and seeks custody. MCL 710.36, .37, and .39.
2. The termination of a noncustodial parent's rights under MCL 710.51(6), which governs stepparent adoptions.

The termination of parental rights under the Juvenile Code for neglect or abuse is discussed in Michigan Judicial Institute, *Child Protective Proceedings Benchbook: A Guide to Abuse and Neglect Cases* (4th ed 2024).

B. Termination of a Putative Father's Parental Rights

1. Need for Termination

§11.30 If a child is born out of wedlock, the child may not be placed for adoption until the court has terminated the parental rights of the father. This does not affect a temporary placement. MCL 710.31.

A father's statement denying any interest in custody may be executed any time after the child is conceived. *See* MCR 3.801(A).

2. Notice During the Mother's Pregnancy of Intent to Consent or Release

§11.31 The putative father can be notified of the pregnancy and the mother's adoption plan during the pregnancy or after the birth of the child before the hearing on the petition to identify the father and determine or terminate his parental rights. PCA 316. A woman pregnant out of wedlock who intends to release the child for adoption or consent to the adoption of the child may file a verified ex parte petition with the court indicating

- her intent to place the expected child for adoption,
- the alleged putative father or fathers, and
- a request that the putative father or fathers be notified.

On the filing of the petition, the court issues a notice of intent to consent or release to the putative father or fathers. MCL 710.34 specifies what must be included in the notice. PCA 314 is used for this purpose.

Notice must be personally served on the putative father or fathers by any officer or person authorized to serve process of the court. MCL 710.34; MCR 3.802(A)(1). The putative father must then file a notice of intent to claim paternity to preserve his rights. MCL 710.33. Failure to do so constitutes a waiver of his right to notice in the future. *See* MCL 710.34(2)(d).

3. Notice After the Child Is Born: Petition for Hearing to Identify Father and Determine or Terminate His Parental Rights

§11.32 Pursuant to MCL 710.36, a petition to identify the child's father and determine or terminate his rights may be filed when

- the child is claimed to be born out of wedlock,

- the mother executes or proposes to execute a consent or release for the adoption of the child or the mother joins in a petition for adoption of the child with her spouse, and
- the biological father's consent or release cannot be obtained.

See PCA 310. But see §2.4 regarding gender neutrality in statutes after *Obergefell v Hodges*, 576 US 644 (2015).

4. Notice

§11.33 If notice of the intent to consent or release was served on the putative father, proof of service or the putative father's verified acknowledgment of service must be filed with the court. MCL 710.36(2).

Notice of the hearing to terminate rights must be served on

- any person the court has reason to believe may be the father, MCL 710.36(3)(c) (which would include the mother's husband, if she was married when the child was born), who has not been served with a notice of intent pursuant to MCL 710.34;
- a putative father who has filed a notice of intent to claim paternity pursuant to MCL 710.33 or MCL 710.34; and
- a putative father who has not been served a notice of intent to consent or release at least 30 days before an expected date of confinement specified in the notice.

In light of the putative father's due process rights, the statutes regarding service must be strictly construed. *In re Kozak*, 92 Mich App 579, 285 NW2d 378 (1979) (allegations of significant fraud by mother in failing to notify putative father were basis for hearing and possible overturning of adoption).

Service is made by personal service, see MCR 5.105(B)(1), or by certified mail, return receipt requested. MCR 3.802(A)(2).

If service cannot be made because the father's identity or location is still unknown after diligent inquiry, the petitioner must file proof, by an affidavit or by declaration under MCR 1.109(D)(3), of the efforts to identify or locate the father; no further service is necessary before the hearing to terminate his rights. MCR 3.802(B)(1). The form used is PCA 315, Declaration of Inability to Identify/Locate Father.

At the hearing, evidence must be given regarding the attempts to locate or identify the father. If the court finds that reasonable attempts have been made, it must proceed. If not, it must adjourn the hearing and order further attempts to identify or locate the father or direct some type of substituted service other than publication. MCR 3.802(B)(2).

Incarcerated parties. If the putative father is incarcerated, he must be given adequate notice of the proceedings and an opportunity to respond and to participate. See MCR 2.004 and §11.31. The protections of MCR 2.004 apply only to parents incarcerated by the Michigan Department of Corrections. *Family Indep*

Agency v Davis (In re BAD), 264 Mich App 66, 690 NW2d 287 (2004). A parent incarcerated under county jurisdiction or in another state cannot cite this court rule in a domestic relations matter.

5. The Hearing

§11.34 On receipt of a petition for a hearing to identify the father and determine or terminate his parental rights (PCA 310), the court must, as soon as practical, hold a hearing to

- determine whether the child was born out of wedlock,
- determine the identity of the father, and
- determine or terminate the rights of the father.

MCL 710.36(1).

The Adoption Code defines *born out of wedlock* as a child conceived and born to a woman who was not married from the conception to the date of birth of the child or that the court has determined, though born during a marriage, is not the issue of that marriage. MCL 710.22(h).

At the hearing, the court will receive evidence regarding the identity of the child's father. In place of the live testimony, the child's mother may provide, and the court must receive, an affidavit or a verified written declaration indicating the identity and whereabouts of the child's father. The court must permit an amendment of an affidavit or verified written declaration if the court determines that the affidavit or verified written declaration is insufficient. If the amended affidavit or verified statement is insufficient, the court may have the mother provide live testimony. Considering all the evidence, the court must enter a finding that identifies the father or declares that the father's identity cannot be determined. MCL 710.36(6).

6. Grounds for Termination

a. In General

§11.35 The Adoption Code sets out when a putative father's rights may be terminated in MCL 710.37 and .39. These statutes break down into three situations:

1. The putative father has had notice and has not asserted parental rights.
2. The putative father's identity or location is unknown.
3. The putative father appears and requests custody and the court finds that he has failed to support the mother or the child or establish a custodial relationship with the child and that it would not be in the child's best interests to grant custody.

The court must also notify the parent that even after parental rights are involuntarily terminated, the child support obligation will continue until a court modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated. MCR 3.809(A).

b. The Putative Father Has Had Notice and Has Not Asserted Parental Rights

§11.36 The putative father's rights may be permanently terminated if he has

- been timely served with notice of the mother's intent to consent to or release the child for adoption,
- had notice of the hearing to determine the father's identity and to determine or terminate his rights, or
- waived notice of hearing,

and he

- has submitted a verified affirmation of paternity and a denial of interest in custody,
- has filed a disclaimer of paternity,
- fails to appear at the hearing after receiving notice of the hearing,
- appears and denies interest in custody of the child, or
- has failed to file an intent to claim paternity after receiving notice at least 30 days before the confinement date specified in the notice of the mother's intent to execute a consent or release.

MCL 710.37(1).

The decision to permit a putative father to revoke a denial of paternity rests within the sound discretion of the trial court; the court may order revocation on the putative father's showing of good cause. *In re Koroly*, 145 Mich App 79, 377 NW2d 346 (1985) (no right to revoke denial of paternity after putative father denied paternity and signed waiver allowing adoption).

c. The Putative Father's Identity or Location Is Unknown

§11.37 The father's rights may be terminated if evidence is given indicating that the father's identity or location is unknown, despite reasonable efforts, and the court finds

- that the father cannot be identified and that he has not provided for the child's care or the mother's support during pregnancy or confinement or
- that, though the father's identity is known, his location is unknown and that he has not supported the mother, shown any interest in the child, or provided for the child's care for at least 90 days before the hearing.

MCL 710.37(2).

d. The Putative Father Appears and Requests Custody

§11.38 If the father appears at the hearing and requests custody, the court must inquire into his fitness and ability to properly care for the child and shall determine whether the best interests of the child will be served by granting

custody to him. The court determines whether the putative father comes within paragraph (1) or (2) of MCL 710.39; *In re MGR*, 323 Mich App 279, 916 NW2d 662 (2018), *rev'd on other grounds,* 504 Mich 852, 928 NW2d 184 (2019) (putative father is considered to have appeared if via telephonically to contest custody at the Section 39 hearing). If the father cannot demonstrate that he has "provided substantial and regular support or care in accordance with [his] ability," MCL 710.39(2), his rights may be terminated if, after an inquiry into his fitness and ability to properly care for the child, the court determines that it would not be in the child's best interests to grant custody to the putative father, MCL 710.39(1).

The *best interests of the child* means the sum total of the 11 factors set out at MCL 710.22(g). See the discussion below. Note that the father must request custody to properly object to the termination of his parental rights under MCL 710.39(1). Failure to do so is tantamount to a denial of custody and permits termination by the court. *HAJ v HR (In re TMK)*, 242 Mich App 302, 617 NW2d 925 (2000).

Termination under this standard requires an examination of the father's fitness and ability to properly care for the child. *In re Barlow*, 404 Mich 216, 229, 273 NW2d 35 (1978) (putative father's youth, unmarried status, and plan to have his mother and sisters assist with child's care were not factors to support termination of his rights under "best interests" standard; father should not have to prove that his plan for child was superior to that in prospective but undetermined adoptive family); *see also In re BWJ*, No 363607, ___ Mich App ___, ___ NW3d ___ (Mar 30, 2023) (court of appeals remanded to trial court with directions for trial court to provide adequate best interests factor analysis under MCL 710.22(g) and set forth its factual findings and conclusions of law to enable appellant review of trial court's ruling); *Scarcliff v Lang (In re Lang)*, 236 Mich App 129, 600 NW2d 646 (1999) (putative father's incarceration did not preclude him from providing support nor prevent him from attempting to contact child); *Johnson v Byron (In re Zimmerman)*, 277 Mich App 470, 746 NW2d 306, *aff'd in part and vacated in part,* 480 Mich 1143, 746 NW2d 111 (2008) (father's casual drug use, unstable relationships, and dependency were less significant than his employment stability, parenting history, and plans for a more stable future).

The best interests of the child. If the father comes within paragraph (1) of MCL 710.39, and the court finds he has failed to support the mother or the child or establish a custodial relationship with the child, his parental rights may only be terminated after the court finds that it is not in the child's best interests to grant custody to him.

To determine the best interests of the child, the following factors are considered:

> (*i*) The love, affection, and other emotional ties existing between the adopting individual or individuals or … the putative father and the adoptee.
>
> (*ii*) The capacity and disposition of the adopting individual or individuals or … the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

> (*iii*) The capacity and disposition of the adopting individual or individuals or … the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (*iv*) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (*v*) The permanence as a family unit of the proposed adoptive home, or … the home of the putative father.
>
> (*vi*) The moral fitness of the adopting individual or individuals or … of the putative father.
>
> (*vii*) The mental and physical health of the adopting individual or individuals or … of the putative father, and of the adoptee.
>
> (*viii*) The home, school, and community record of the adoptee.
>
> (*ix*) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.
>
> (*x*) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.
>
> (*xi*) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

MCL 710.22(g).

e. The Putative Father Has Established a Support or Custodial Relationship

§11.39 If the father has established a custodial relationship with the child or has "provided substantial and regular support or care in accordance with [his] ability," MCL 710.39(2), for the mother during pregnancy or for either the mother or the child after the child's birth for 90 days before he was served notice of the hearing, his rights may be terminated only under MCL 710.51(6) (stepparent adoption) or the neglect provisions of the Juvenile Code, MCL 712A.2. MCL 710.39(2). The statute requires a showing of "substantial and regular" support or care in accordance with the father's ability to provide it. Stepparent adoption proceedings are discussed in §11.40. The neglect proceedings are set forth in Michigan Judicial Institute, *Child Protective Proceedings Benchbook: A Guide to Abuse and Neglect Cases* (4th ed 2024).

A putative father who did not receive notice of the pregnancy or birth will not have established a support or custodial relationship, and his rights are determined by MCL 710.39(1). *LAF v BJF (In re RFF)*, 242 Mich App 188, 617 NW2d 745 (2000); *HAJ v HR (In re TMK)*, 242 Mich App 302, 617 NW2d 925 (2000).

If the court does not terminate the father's parental rights, it must

- terminate the child's temporary placement;
- return the child to the mother or guardian unless the mother's parental rights are terminated; and

- deny the adoption order and dismiss the proceeding.

MCL 710.39(3). Then, the mother's or guardian's release or consent (or proposed release or consent) relinquishing rights to the child cannot be used against the mother or guardian in any proceeding under MCL 722.21–.31. MCL 710.39(4). The effect is to place the parties in the same position they would have been in if the mother had not made an adoption plan.

C. Stepparent Adoptions

§11.40 Petitions for stepparent adoption are the most common type of adoption petition filed. MCL 710.51(6) applies when the parent has custody of a child through a court order and is married to the petitioner for adoption. It applies

- if the biological parents of the child are divorced,
- if the biological parents are unmarried but the father has acknowledged paternity, or
- if the biological parents are unmarried and the putative father meets the conditions of MCL 710.39(2) by establishing a support or custodial relationship.

MCL 710.51(6) does not make a distinction between legal and physical custody. A "parent is only entitled to petition for termination under MCL 710.51(6) if the petitioning parent, at the time of the petition, has custody of the child at issue according to a court order." *In re AGD*, 327 Mich App 332, 933 NW2d 751 (2019) (trial court properly dismissed petition under MCL 710.51(6) as petitioner mother, although she had custody of minor child, did not have custody according to court order).

The court, on notice and a hearing, may issue an order terminating the rights of the other parent (the noncustodial parent or the putative father) if both of the following occur:

- The noncustodial parent, having the ability to do so, has failed for at least two years to provide substantial and regular support, or failed to comply with a support order.
- The noncustodial parent has failed to substantially and regularly communicate with the child for at least two years.

MCL 710.51(6). *See* PCA 302 and PCA 304.

The court looks to the two years immediately before the petition is filed. *In re Caldwell*, 228 Mich App 116, 576 NW2d 724 (1998). The court may consider "circumstances beyond the applicable two-year statutory period" for additional information about the respondent's relationship with the child. *In re Hill*, 221 Mich App 683, 693, 562 NW2d 254 (1997) (respondent's failure to pay confinement expenses, blood-testing fees, and other medical expenses required by support order entered 10 years before petition was filed was sufficient to support termination). If a modified support order is in effect, however, arrearages under the prior support order are insufficient to support termination if the respondent complied

with the modified support order. *In re Talh*, 302 Mich App 594, 840 NW2d 398 (2013). In *Talh,* the respondent complied with a modified support order of $0 per month for 23 months before the petition was filed. Citing *Hill,* the petitioners argued that the respondent's rights should be terminated because he failed to support the child for nearly 9 years before the order was modified and had accrued $5,000 in arrearages during that time. The *Talh* court disagreed, noting that in *Hill,* the respondent failed to comply with the support order in effect when the petition was filed. In contrast, the respondent in *Talh* had complied with the support order in effect (i.e., the modified support order). 302 Mich App at 598–599. In addition, a child support order stating that support is $0.00 or that support is reserved will be treated in the same manner as if no support order has been entered. MCL 710.51(6)(a).

There is no "incarcerated parent" exception to the support and communication inquiries. *Caldwell.*

The custodial parent is not a necessary party to the petition, and the custodial parent's spouse may successfully obtain adoption over the noncustodial parent's objection even if the custodial parent is dead at the time of the hearing. *In re Stowe*, 162 Mich App 27, 412 NW2d 655 (1987).

A stepparent who is unsuccessful in proceedings under MCL 710.51(6) may seek termination of the noncustodial parent's rights under the Juvenile Code, MCL 712A.2(b). *In re Huisman*, 230 Mich App 372, 584 NW2d 349 (1998).

Providing support. If a child support order is in effect, the petitioner need not establish ability to pay but only a substantial failure to comply with the support order for at least two years before the filing of the petition. *Moore v Newton (In re Newton)*, 238 Mich App 486, 606 NW2d 34 (1999); *Caldwell; see also In re Martyn*, 161 Mich App 474, 411 NW2d 743 (1987) (trial court has discretion whether to consider parent's reasons for not complying with support order). A judgment that reserves the issue of child support without setting any dollar amount is not a support order for the purposes of MCL 710.51(6). *Eickhoff v Eickhoff (In re SMNE)*, 264 Mich App 49, 689 NW2d 235 (2004). Therefore, the court is permitted to inquire into the respondent's ability to pay when considering a stepparent adoption.

The failure to make even token support payments, to move for modification of the support order, or to communicate with or visit the children for two years was clear and convincing evidence sufficient to support a termination of parental rights in *In re Meredith*, 162 Mich App 19, 412 NW2d 229 (1987).

The Michigan Supreme Court summarily reversed the termination of parental rights of a noncustodial mother who was on welfare, stating that the petitioner had met neither of the requirements of MCL 710.51(6) for termination. *In re Rose*, 432 Mich 934, 442 NW2d 634 (1989). The trial court had read the "regular and substantial support" language to require at least token financial assistance from the mother, who was on public assistance, and found that even though the parent might not have been able to afford to visit her child, she could have pursued alternative means of contact. In *In re NRC*, No 362915, ___ Mich App ___, ___ NW3d ___ (Mar 16, 2023), the respondent's child support payments were

often untimely, and the respondent failed to regularly pay the arrearage amount. However, the respondent made many of the child support payments and only had $146 in arrearage at the time the petition was filed. *Id.* The court of appeals stated the standard of MCL 710.51(6)(a) is substantial compliance (not absolute compliance), which requires a party to have made a considerable amount of payments under the child support order. Therefore, the petitioner failed to meet the burden of MCL 710.51(6)(a), and the trial court did not err in granting the respondent's motion for a directed verdict. *Id.*

Failure to communicate. One telephone call and two visits in two years constitutes a substantial failure to visit, contact, or communicate with the child. *In re Simon*, 171 Mich App 443, 431 NW2d 71 (1988).

A parent who is imprisoned for the two years before the petition is filed but who has the ability to communicate with the child and fails to do so likewise falls within the scope of MCL 710.51(6). *Caldwell; In re Halbert*, 217 Mich App 607, 552 NW2d 528 (1996).

Trial by jury. There is no right to a trial by jury. *Rodriguez v Colon (In re Colon)*, 144 Mich App 805, 377 NW2d 321 (1985).

Appointment of counsel. The decision whether to appoint an attorney for an indigent noncustodial parent in a stepparent adoption rests with the court. *In re Sanchez*, 422 Mich 758, 375 NW2d 353 (1985). Of import is the noncustodial parent's ability to present a case effectively, considering the relative strengths of the parties and the presence of issues of procedural, factual, legal, and evidentiary complexity. *Id.* The trial court must balance the need for fairness to the natural parent with the need for prompt adoption proceedings.

Terminating the respondent's parental rights before the investigation and report required by the Michigan Adoption Code were filed was not reversible error. The respondent was given both notice and a hearing. *In re DaBaja*, 191 Mich App 281, 477 NW2d 148 (1991).

Interested parties. The interested parties in a petition to terminate the rights of a noncustodial parent pursuant to MCL 710.51(6) are

- the petitioner,
- the adoptee if the adoptee is over 14 years of age, and
- the noncustodial parent.

The court may require additional parties to be served in the interests of justice. MCL 710.24a(6).

An adult adoptee and the parent whose rights were terminated may petition for the rescission of a stepparent adoption. See §11.42.

VI. Adult Adoptees

A. In General

§11.41 When the adoptee is an adult, the court may enter an order of adoption after all of the following occur:

- The adoptee consents to the adoption; no other consent is required. MCL 710.43(3).
- The written report of the investigation required by the court is filed. MCL 710.46(2).
- Notice has been served on the interested parties required in MCL 710.24a.

MCL 710.56(5).

The consent is executed pursuant to MCL 710.44. It may not be executed until after any investigation the court has ordered and until the court or referee has fully explained to the adoptee that the adoptee is consenting to permanently acquire the adopting parent or parents as legal parents as though the adoptee had been born to them. MCL 710.44(7).

The interested parties in an adult adoption are the same as for any adoption (see §11.9). See *In re Munson*, 210 Mich App 500, 534 NW2d 192 (1995), which held that a noncustodial biological parent of an adult adoptee was not an interested party in an adoption petition for the purposes of joinder or consent. However, the biological mother clearly had had notice of the pending adoption.

B. Rescission of Stepparent Adoption Orders

§11.42 An adult adoptee who was adopted by a stepparent and the biological parent whose rights were terminated may petition to rescind a stepparent's adoption and restore the biological parent's parental rights. MCL 710.66(1). Stepparent adoptions are the only adoptions that can be rescinded. The adoptee and the parent must file a verified rescission petition with the court of the county in which the adoption was confirmed. *Id. See* PCA 349. At or after the filing of the petition but before the hearing, the petitioners must file a copy of the adoptee's new certificate of live birth, if the DHHS established one. MCL 710.66(3). The court may order an investigation. MCL 710.66(4).

The court must conduct a hearing on the rescission petition after the petitioners serve notice on the interested parties, who are

- the petitioners,
- the stepparent who adopted the adult adoptee, and
- the spouse of the parent whose rights were terminated.

MCL 710.24a(4), .66(4). The court may require additional parties to be served in the interests of justice. MCL 710.24a(6).

Certified copies of the rescission order are given to the petitioners, and a copy must be sent to the DHHS. MCL 710.66(5).

The rescission is effective from the date of the order. MCL 710.66(4).

VII. Challenging an Institutional Guardian's Withholding of Consent (a "Section 45" Hearing)

§11.43 If a person wishes to adopt a child and the court or agency responsible for the child refuses to consent to the adoption, the aggrieved person

may file a petition to adopt and a motion requesting that the court determine that the institution's withholding of consent is arbitrary and capricious. MCL 710.45.

This provision applies when consent is required from a court, a tribal court, a child placing agency, or the DHHS pursuant to MCL 710.43(1)(b)–(d).

The motion must contain information regarding both the specific steps taken to obtain the required consent and the specific reasons the petitioner believes the decision to withhold consent was arbitrary and capricious. MCL 710.45(2). The petitioner must establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious. MCL 710.45(7). Discovery is often the process by which a petitioner may obtain access to evidence needed to meet this burden of proof. *In re CADP*, 341 Mich App 370, 990 NW2d 386 (2022) (petitioners' subpoenas were not overbroad and confidential nature of information in MCI's records can be adequately protected by protective order and in camera inspection). MCR 3.800(A) states that the Michigan Court Rules apply to adoption proceedings, and nothing in that chapter of the court rules limits a petitioner's right to discovery. Therefore, the discovery rules apply to section 45 hearings.

The court must provide notice of the motion to all interested parties, including

- the petitioner or petitioners;
- the adoptee, if over 14 years of age;
- a minor parent, adult parent, or surviving parent of an adoptee, unless the rights of the parent have been terminated, a guardian of the adoptee with specific power to consent to adoption has been appointed, a guardian of the parent with specific authority to consent to adoption has been appointed, the rights of the parent have been released, or the parent has consented to the granting of the petition;
- the DHHS or a child placing agency to which the adoptee has been, or is proposed to be, released or committed;
- a parent, guardian, or guardian ad litem of an unemancipated minor parent of the adoptee;
- the court with permanent custody of the adoptee;
- a court with continuing jurisdiction over the adoptee;
- a child placing agency of another state or country that has authority to consent to adoption;
- the guardian or guardian ad litem of any interested party, including the adoptee; and
- an applicant who received consent to adopt.

MCL 710.24a(1), .45(5).

On the filing of the petition and motion, the court may waive or modify the statutory full investigation of the petition. It must decide the motion within 91 days after filing unless good cause is shown. MCL 710.45(6).

The petitioner must establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious. MCL 710.45(7). On such a finding, the court may

- terminate the rights of the entity that withheld consent;
- enter further orders as appropriate; and
- grant the petitioner's costs of preparing, filing, and arguing the motion, including reasonable attorney fees.

MCL 710.45(8). If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court must issue a written decision. *Id.*; *see also In re ASF*, 311 Mich App 420, 876 NW2d 253 (2015). In *In re TEM*, 343 Mich App 171, 996 NW2d 850 (2022), the court of appeals affirmed the trial court's finding that the MCI superintendent's decision to deny consent was not arbitrary and capricious because the superintendent's decision was supported by thorough evaluation of relevant factors and adequate investigation. To determine whether the MCI superintendent's decision to withhold permission to adopt is arbitrary and capricious, the question is not whether there are good reasons to grant permission to adopt. The inquiry is whether there is any good reason to withhold consent. *Id.*

It is difficult to meet the burden of proof in section 45 hearings. *See, e.g., ASF; Coppess v Atwood (In re Keast)*, 278 Mich App 415, 750 NW2d 643 (2008). In *Coppess,* the family court clearly erred in finding that the children's grandparents established by clear and convincing evidence that the decision by the superintendent of the MCI to deny consent to adopt was arbitrary and capricious. The superintendent's decision was overwhelmingly supported by the documentation provided to him, as well as by his independent investigation. Similarly, the petitioning grandparents in *ASF* were unable to show that the superintendent's decision was arbitrary and capricious because his reasons for denying consent were supported by the evidence. The court rejected the petitioners' argument that the superintendent's consideration of their ages violated MCL 722.957(1). *ASF.* The superintendent did not withhold consent to adopt solely based on the petitioners' advanced ages. The evidence supported that his denial was also based on health concerns, the petitioners' wavering commitment to the minor's long-term care, and the suitability of other relatives as adoptive parents, with the potential for the petitioners to remain in the minor's life as grandparents. *Id.*

If the consent was required of a court under MCL 710.43(1)(c), the motion must be heard by a visiting judge. MCL 710.45(9).

The court's decision on a motion challenging an institutional guardian's withholding of consent is appealable by right to the court of appeals. MCL 710.45(10); *see ASF* (cross-appeal may be heard even if court of appeals dismisses initial MCL 710.45(10) appeal). The court may not order an adoption if a motion under MCL 710.45 has been filed, until one of the following occurs:

- the motion is decided and no appeal of right to the court of appeals has been filed;
- the motion is decided, an appeal of right to the court of appeals has been filed, that court has issued an opinion, and the period for filing an application for leave to the supreme court has expired; or
- the supreme court denies the application for leave, or the supreme court grants the application and issues an opinion.

MCL 710.56(4).

VIII. Compensation Under the Adoption Code

A. In General

§11.44 The court must approve all fees and expenses, and the parties may not accept or retain amounts beyond those approved by the court. MCL 710.54(10). Before a final order of adoption is entered, the petitioner must file a sworn statement with the court describing any money or other consideration paid to any party in an adoption proceeding (see PCA 341). Only fees for services made in connection with the adoption require court approval under MCL 710.54. *In re MJG*, 320 Mich App 310, 906 NW2d 815 (2017); *see also In re BGP*, 320 Mich App 338, 906 NW2d 228 (2017).

Except for fees and charges approved by the court, a person may not give, offer, or receive any money or thing of value, directly or indirectly, in connection with

- placing a child for adoption,
- registering or recording information on the existence of a child available for adoption or the existence of a person interested in adopting a child,
- a release,
- a consent, or
- a petition for adoption.

MCL 710.54(1); *see Doe v Kelley*, 106 Mich App 169, 307 NW2d 438 (1981), *cert denied,* 459 US 1183 (1983) (upholding constitutionality of this provision).

Except for a child placing agency's preparation of a preplacement assessment or an adoption petition investigation, a person may not be compensated for

- assisting a parent or guardian in evaluating a potential adoptive parent;
- assisting a potential adoptive parent in evaluating a parent, a guardian, or an adoptee;
- referring a prospective adoptive parent to a parent or guardian; or
- referring a parent or guardian to a prospective adoptive parent.

MCL 710.54(2).

An adoptive parent may pay the reasonable and actual charges for

- the services of the child placing agency;
- medical expenses for the biological mother or the adoptee;
- counseling services for the parent, guardian, or adoptee (and must pay for certain counseling services, see below);
- the mother's living expenses before the birth and up to six weeks after the birth;
- the cost of gathering required information about an adoptee and the adoptee's biological family;
- legal representation for the biological parents and court costs; and
- related travel expenses.

MCL 710.54(3). These payments may not be made contingent on the placement of the child for adoption, release of the child, consent to the adoption, or cooperation in completion of the adoption. MCL 710.54(6).

The adoptive parent must pay for the cost of preparing the preplacement assessment and any additional investigation, MCL 710.54(4), and the parent's or guardian's adoption-related counseling unless counseling is waived, MCL 710.54(5).

B. Required Verified Statements

§11.45 At least seven days before formal placement of the child, the following must be filed with the court:

- The petitioner must file a verified accounting that itemizes all payments or disbursement of money or anything of value in connection with the adoption and that states the date and amount of each payment, the name and address of each recipient, and the purpose of each payment. Receipts must be attached. *See* PCA 347.
- The attorney for each petitioner must file a verified statement that itemizes the services performed and any fees received. *See* PCA 346.
- The attorney for each parent of the adoptee must file a verified statement that itemizes the services performed and any fee received. *See* PCA 346.
- An adoption attorney representing any party in a direct placement adoption must also include statements that the person did not request or receive any compensation for services listed under MCL 710.54(2). *See* PCA 346.
- The child placing agency or the DHHS must file a verified statement that itemizes the services performed and any fees received for the adoption of the child and that states that it did not request or receive any compensation for services listed under MCL 710.54(2). *See* PCA 345.

MCL 710.54(7).

The birth parent must also file a verified accounting regarding payments received (see PCA 348).

The verified statements and accountings must be updated at least 21 days before entry of the final order of adoption. MCL 710.54(8). However, "[a]ny verified statement filed pursuant to MCL 710.54(7) need not be filed again unless, at the time of the update required by MCL 710.54(8), any such statement does not reflect the facts at that time." MCR 3.803(A)(2).

The order placing the child may be entered before the end of the 7-day period required by MCL 710.54(7), and the final order of adoption may be entered before the end of the 21-day period required by MCL 710.54(8). MCR 3.803(B).

IX. Identifying and Nonidentifying Information

A. In General

§11.46 Before an adoption, information regarding the child and the child's family is compiled. The requirements regarding identifying and nonidentifying information do not apply to a stepparent adoption or to an adoption in which the petitioner is related within the fifth degree by marriage, blood, or adoption. MCL 710.27(6).

B. Nonidentifying Information

§11.47 Before a child is placed for adoption, certain nonidentifying information regarding the child and the child's family must be provided to a prospective adoptive parent. MCL 710.27(1). The statute is quite detailed, but it generally requires the following information:

- The time and place of the child's birth.
- The health and genetic history of the child and the child's biological parents and family.
- A description of the child and the child's family, including
  - the child's first name given at birth;
  - the age and sex of any siblings;
  - the child's enrollment and performance in school;
  - the child's racial, ethnic, and religious background;
  - a general description of the child's parents, including their ages when their parental rights were terminated and how long they had been married when the child was placed for adoption;
  - the child's relationships with relatives, foster parents, or other individuals;
  - the family's educational, occupational, professional, athletic, or artistic achievements; and
  - the family's hobbies, special interests, and school activities.
- Information regarding any judicial order terminating parental rights, including the length of time between the termination of parental rights and adoptive placement and whether the termination was voluntary or court ordered.

- Any information necessary to determine the child's eligibility for state or federal benefits.

C. Identifying Information

§11.48 Certain identifying information must also be compiled, to be maintained by the child placing agency, the DHHS, or the court. It is not provided to the adoptive parents. MCL 710.27(4). This information is

- the child's name before placement,
- the names of the biological parents when their parental rights were terminated and their most recent addresses, and
- the names of any biological siblings when parental rights were terminated.

MCL 710.27(3).

The statute does not prevent a parent or guardian and a prospective adoptive parent from exchanging identifying information or meeting. MCL 710.27(7).

An adoptee, an adult biological sibling, a biological parent, an adoptive parent, or any other person biologically related to an adoptee may request at any time that their current address be placed in the adoption files. MCL 710.68a(3).

D. Release of Court Records of Adoption Proceedings

§11.49 Records of adoption proceedings are kept in separate locked files and may not be opened for inspection or copying except on order of the court for good cause. After 21 days following entry of a final order of adoption, the records may not be copied or inspected except on a sworn petition, which the court must grant or deny generally within 63 days after the petition is filed. MCL 710.67(1). Exceptions to these restrictions include records requested under MCL 710.68 (nonidentifying and identifying information) and inspections by the child advocate (previously named children's ombudsman). MCL 710.67(1), *amended by* 2023 PA 295 (eff. Feb 13, 2024).

E. Release of Information to Adult Adoptees

§11.50 Nonidentifying information is to be given to an adult adoptee within 63 days of the request. MCL 710.68(1).

Whether identifying information concerning a biological parent may be disclosed depends on consents and denials filed by the biological parents with the central adoption registry. MCL 710.27a(1). Note that a former parent's consent or denial may be updated or revoked at any time. MCL 710.27a. When identifying information may not be released, the adoptee may petition for the appointment of a confidential intermediary (see §11.52). The adoptee may also obtain information about which courts and agencies handled the adoption. MCL 710.68(3), (4).

Adoptions in which the former parents' rights were terminated on or after May 28, 1945, and before September 12, 1980. If both former parents have consented to the release of information or are deceased, all identifying information is released to the adult adoptee. If only one of the former parents has consented or is

deceased, that parent's name at the time of the termination of parental rights and most recent name and address, as reported, as well as the name of the child before placement and the names of the biological siblings at the time of termination are released. MCL 710.68(6).

If no consents are on file, information may be released only if the court finds good cause. *In re Dixon*, 116 Mich App 763, 323 NW2d 549 (1982). The good-cause determination "requires a balancing of the adoptee's interests, the biological parents' interest, and the state's interest." *Id.* at 768. For the adoptee, good cause can be shown by compelling medical or psychological reasons. *Id.* at 770. However, mere curiosity does not alone constitute good cause.

Adoptions in which parental rights were terminated before May 28, 1945, or on or after September 12, 1980, but not under the Safe Delivery of Newborns Law, MCL 712.1 et seq. All identifying information must be released to an adult adoptee unless a former parent has filed a statement currently in effect with the central adoption registry that denies consent to the release of such information. If a denial of consent is in effect, the name of the parent at the time parental rights were terminated and the most recent name and address may not be released for that parent. A denial of consent is not effective after the former parent's death. MCL 710.68(7).

Adoptions in which parental rights were terminated under the Safe Delivery of Newborns Law, MCL 712.1 et seq. Identifying information may be released to the adult adoptee only if the former parent filed a statement with the central adoption registry consenting to the release. MCL 710.68(7).

Siblings' consent to the release of information. An adult former sibling may file a statement with the central adoption registry consenting to the release of the sibling's name and address to the adoptee, a statement providing notice that a former parent is deceased, or both. MCL 710.27a(2), (3). The information may be released on the adult adoptee's request. MCL 710.68(8).

Native American adoptees. The ICWA, 25 USC 1901 et seq., the MIFPA, MCL 712B.1 et seq., and the guidelines issued by the Bureau of Indian Affairs evidence a clear intent that state courts should assist adult Indian adoptees in establishing tribal membership by releasing information. If the adult Indian adoptee's living biological parents have consented to the release of identifying information, the court may release the information directly to the adoptee. If the adult Indian adoptee's living biological parents have not consented, the court may release the information directly to the appropriate tribe, not to the adoptee, with the request that the information be kept confidential. *In re Hanson*, 188 Mich App 392, 470 NW2d 669 (1991) (under ICWA). See §§13.59–13.60 and 13.72–13.73 for a discussion of an adult adoptee's right to tribal affiliation information.

F. Release of Information to Biological Parents and Adult Siblings

§11.51 The adoptee's biological parents and adult siblings may request adoption information under MCL 710.68.

- Nonidentifying information, see MCL 710.27(1), (2), must be provided within 63 days. MCL 710.68(1).
- Identifying information must also be released within 63 days if the adult adoptee has given written consent. MCL 710.68(2).
- If the adult adoptee has not given consent, the adult adoptee's name and address must be given to a confidential intermediary appointed under MCL 710.68b. See PCA 342 and §11.52.

MCL 710.68.

At least for pre-1980 adoptions, absent the adoptee's written consent, the petitioners must demonstrate good cause for the release of the information. *In re Creed*, 126 Mich App 32, 337 NW2d 41 (1983).

Former parents and former adult siblings may obtain information about which courts and agencies handled the adoption. MCL 710.68(3), (4).

G. Confidential Intermediaries

§11.52 A request may be made in the court in which the adoption order was entered to appoint a confidential intermediary. The petitioner may be an adult adoptee, an adoptive parent of a minor adoptee, an adult child of a deceased adoptee, or a former family member. The intermediary's role is to search for and contact a former family member or an adult adoptee. MCL 710.68b(2). The procedure under this statute involves the following steps:

1. The court contacts the central adoption registry to determine whether there is a denial of consent on file from the person being sought. *Id.*
2. If not, the court appoints a confidential intermediary who has completed training and filed an oath of confidentiality with the court. For the text of the oath, see MCL 710.68b(3).
3. The confidential intermediary makes a reasonable search for the person sought by the adoptee. MCL 710.68b(4).
4. If the individual is located, the intermediary may release information only if the individual consents in writing. If the individual refuses to authorize the release, that refusal must be reported to the petitioner and the court. *Id.*
5. If the former family member has not been contacted within six months of the appointment, the adult adoptee may petition the court for the release of information. MCL 710.68b(6).
6. The court must extend the search period, appoint a new confidential intermediary, or release information to the adoptee if the court finds good cause to release the information. The court's findings must be made on the record. *Id.*

See PCA 344.

The confidential intermediary's oath includes a provision that they will not charge or accept any fee for services, except for reimbursement for actual expenses

incurred or as authorized by the court. MCL 710.68b(3)(d). The court is authorized to approve a reasonable fee. MCL 710.68b(5).

Practice Tip

- *The court may want to familiarize itself with the types of expenses and fees being charged in its jurisdiction so that a petitioner can be advised before the confidential intermediary is appointed. In appropriate circumstances, the use of court personnel to fulfill the confidential intermediary's role does not appear to be prohibited.See MCL 710.68b(2), (3).*

H. Disclosure of Medical Information

§11.53 If a court, an agency, or the DHHS receives written information concerning a physician-verified medical or genetic condition of an adoptee's biological relative and a request that the information be transmitted to the adoptee because of the serious threat it poses to the adoptee's life, that entity must send a written copy of the information to an adult adoptee or to the adoptive parents of a minor adoptee within seven days. MCL 710.68(10)–(14).

If the physician-verified medical or genetic information is not life-threatening, the information must be placed in the adoption files and is released only if the adult adoptee or the adoptive parents of a minor adoptee request the information. MCL 710.68(12).

If the court receives information concerning a life-threatening medical or genetic condition for which a biologically related person could give life-saving aid and if the adoptee requests that the information be sent to biological relatives, the information must be sent to the adoptee's biological parents or adult biological siblings within seven days. MCL 710.68(13).

I. The Child Advocate

§11.54 The child advocate may inspect closed adoption records in connection with an investigation authorized under the Office of the Child Advocate Act (formerly known as the Children's Ombudsman Act), MCL 722.921 et seq., *amended by* 2023 PA 303 (eff. Feb 13, 2024), but may not disclose the information obtained from the inspection. The advocate may contact individuals if more information is needed. MCL 710.67(4).

X. Birth Records

§11.55 When the court orders an adoption, it must prepare a report of adoption that (1) includes the facts necessary to locate and identify the certificate of live birth of the adoptee and to establish a new certificate of live birth and (2) identifies the adoption order. The original birth certificate issued before the adoption will be sealed unless opened by court order. MCL 333.2832; *see also* MCL 710.67, .68.

XI. Adoption Attorneys—Direct Placement Adoptions

§11.56 An adoption attorney is an attorney acting as counsel in an adoption proceeding or case. MCL 710.22(b). *See* OAG No 6844 (Apr 6, 1995) (legislative imposition of additional requirements on attorneys who do direct placement adoptions is unconstitutional).

As an adoption facilitator, the adoption attorney must comply with the provisions of MCL 722.124c, .124d, and .956, by providing clients with needed services, referrals, information pamphlets, directories, and public information forms. The attorney may not refuse to provide services to potential adoptive parents solely because of their age, race, religious affiliation, disability, or income. MCL 722.957.

An attorney or law firm is prohibited from providing legal services to both a parent or guardian and to a prospective adoptive parent. MCL 710.55a.

In either a direct or an agency placement adoption, the adoption attorney (or other facilitator) must provide a biological parent who is a minor with an opportunity to discuss with separate counsel the legal ramifications of consent, release, and the termination of parental rights. This opportunity must be offered before the execution of a consent or release or the termination of parental rights. MCL 710.55a(2).

An attorney may not charge for assisting a biological parent in evaluating a potential adoptive parent (or vice versa) or for referring a biological parent to a potential adoptive parent (or vice versa). Finder's fees are also prohibited. MCL 710.54(2).

12
Guardianships and Conservatorships

Summary of Guardianships and Conservatorships

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Guardianships of Incapacitated Individuals. §12.3.

An *incapacitated individual* is

> an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.

Who may petition.

An individual in their own behalf, or any person interested in the individual's welfare, may petition the court for a finding of incapacity and appointment of a guardian. If serving as a guardian, the parent or spouse of an incapacitated individual can appoint a successor guardian by will or other writing.

Standard for appointment.

The court may appoint a guardian if it is satisfied by clear and convincing evidence that the individual is incapacitated and that the appointment is necessary to provide continuing care and supervision of the incapacitated individual, with each finding supported separately on the record. The court may order an examination by a physician or mental health professional appointed by the court for use in determination of incapacity. The alleged incapacitated person has the right to secure an independent evaluation.

Guardian ad litem.

Unless the allegedly incapacitated individual has counsel of their own choice, the court shall appoint a guardian ad litem to represent the person in the proceeding.

Who may serve.

A person must be competent to serve as a guardian. MCL 700.5313(2) sets forth priorities for order of appointment. If no person meets the criteria listed in MCL

700.5313(2), the court may appoint a relative in the order of preference in MCL 700.5313(3). If no relatives are suitable or willing to serve, the court may appoint any suitable person. The court also can appoint a *professional guardian,* but only if the appointment is in the legally incapacitated individual's best interests and there is no other person who is competent, suitable, and willing to serve. *See* MCL 700.5106(2). Effective February 21, 2024, MCL 700.5301c, *added by* 2024 PA 1, now allows the court to appoint standby guardians under the Estates and Protected Individuals Code (EPIC). Previously, the appointment of a standby guardian was only in the Mental Health Code for the developmentally disabled. A court may not appoint as guardian an agency that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual. A guardian who is appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary guardian in Michigan if (1) a guardian has not been appointed in Michigan and (2) a petition for the guardian's appointment is not pending in Michigan.

Powers and duties of guardian.

The court grants a guardian only such powers as are necessary to provide for the demonstrated needs of that individual, and the guardianship must be designed to encourage the incapacitated individual's maximum self-reliance and independence.

The powers and duties of a guardian of an incapacitated individual are covered in MCL 700.5314.

A guardian may initiate a divorce action on behalf of an incompetent spouse. However, the better practice would be to have a conservator appointed.

Termination.

The authority of the guardian of an incapacitated individual terminates if either the guardian or the ward dies or if the guardian becomes incapacitated, resigns, or is removed.

Guardianships of individuals with developmental disabilities. §12.4.

Developmental disability is defined as follows:

> (a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:
>
> (i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
>
> (ii) Is manifested before the individual is 22 years old.
>
> (iii) Is likely to continue indefinitely.
>
> (iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:
>
> (A) Self-care.
>
> (B) Receptive and expressive language.
>
> (C) Learning.
>
> (D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided.

Standard for appointment.

A guardianship for an individual with developmental disabilities is used only as is necessary to promote and protect the well-being of the individual, should take into account the abilities of the individual with developmental disabilities, should be designed to encourage the development of maximum self-reliance and independence in the individual with developmental disabilities, and should be ordered only to the extent necessitated by the actual mental and adaptive limitations of the individual with developmental disabilities.

Powers and duties of guardian.

The authority, duties, and responsibilities of a guardian of an individual with developmental disabilities fall into two basic types: guardianship of the individual and guardianship of the estate. These two types are further divided into two categories: plenary and partial. Partial guardianship is preferred. A partial guardian cannot be appointed to a term greater than five years. In limited situations, a guardian may also be appointed by will.

A guardian of the individual has custody of the individual with developmental disabilities and the duty to provide for their care from the estate or other sources and to make a reasonable effort to secure education, medical, or other services that will help the individual with developmental disabilities develop maximum independence. The guardian may not place the individual in a facility without a court order or prior court authorization. The guardian must report to the court on an annual basis.

Much like a conservator of a minor, a guardian of the estate is authorized to take possession of and manage the finances of the individual with developmental disabilities. The guardian of the estate must prepare annual accounts that detail income and expenditures of the estate.

Termination.

For either type, the authority of the guardian is terminated when a petition to terminate the guardianship is granted; when the guardian's term expires; or, if there was not a previously appointed guardian and if the appointment is testamentary, when a minor ward reaches the age of majority.

Conservatorships and other protections for adults. §§12.5–12.6.

A *conservator* is "a person appointed by a court to manage a protected individual's estate." The court may appoint a conservator or make another protective order for an adult if it determines that the person "is unable to manage property and business affairs effectively … [and] has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money." The basis for a conservator's appointment or other protective order must be established by clear and convincing evidence.

Guardianships of minors.

Powers of full and limited guardians. §12.14, §12.16.

Full guardians have all the powers and responsibilities of custodial parents, except they are not legally obligated to support the ward out of their own funds and are not liable to third parties for the ward's acts.

Limited guardians—same, except that they may not consent to the ward's marriage, adoption, or release for adoption.

Initial appointment of the full guardian of a minor. §§12.8–12.13.

Who may petition—"any person interested in the welfare of a minor," or a minor if aged 14 or older.

Venue—where the minor resides or is present.

Notice of the hearing must be given to

- the minor if aged 14 or older
- if known by the petitioner, each person who had the principal care and custody of the minor during the 63 days before filing
- the parents of the minor; if neither is living, any grandparents and the minor's adult presumptive heirs
- the nominated guardian
- a guardian or a conservator appointed in another state to make decisions for the minor if known by the petitioner

Additional special persons who may need to be notified are the following:

- if the minor is receiving Veterans Administration benefits, the Administrator of Veterans' Affairs
- if the minor is an *Indian child* under the Michigan Indian Family Preservation Act (MIFPA), the minor's tribe, the Indian custodian, and, if the Indian child's parent or Indian custodian or tribe is unknown, the Secretary of the Interior
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary

- any person who has filed a demand for notice

A guardian may be appointed only if

1. the parental rights of both parents or the surviving parent have been terminated or suspended by prior court order, divorce, separate maintenance, death, judicial determination of mental incompetency, disappearance, or confinement in a place of detention;
2. the parent(s) have allowed the minor to reside with another person and have not given that person legal authority for the minor's care and maintenance, and the minor is not residing with the parents when the petition is filed; or
3. the minor's biological parents never married each other; the parent with custody dies or is missing and the other parent does not have legal custody; and the proposed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

Who may be appointed—a person whose appointment would serve the minor's welfare; the court must appoint a person nominated by the minor aged 14 or older unless the appointment is contrary to the minor's welfare. The appointment of professional guardians is subject to restrictions. *See* MCL 700.5106(2).

Investigation, attorney, guardian ad litem, and lawyer–guardian ad litem.

The court may order an investigation and report by the Department of Health and Human Services (DHHS) (formerly the Family Independence Agency) or court staff.

The court may appoint a lawyer–guardian ad litem (LGAL) to represent the minor if the minor's interests are not being represented (the court must consider the minor's preference if aged 14 or older).

The court may appoint a guardian ad litem.

Evidence.

- The court may receive and rely on all material and relevant evidence, even though it might not be admissible under the Michigan Rules of Evidence.
- Interested persons can examine and controvert reports; in the court's discretion, they may cross-examine individuals making the reports.
- Except for the attorney-client privilege, privilege does not prevent receipt and use of materials prepared for a court-ordered examination, etc.

Standard for appointment.

The court must make the appointment upon a finding that

- a qualified person seeks appointment
- venue is proper
- required notices have been given
- requirements of MCL 700.5204 have been met (defining situations in which a full guardian may be appointed)
- the minor's welfare will be served by the appointment

If no such findings, the court may dismiss the petition or make any other disposition that will serve the welfare of the minor.

Limited guardians. §§12.16–12.18.

The provisions for full guardians outlined above apply, with the following exceptions:

Who may petition—only the custodial parent or parents.

The court may make an appointment if

- the parent(s) with custody consent
- the parent(s) voluntarily consent to the suspension of their parental rights
- the court approves a limited guardianship placement plan that has the consent of the parent(s) and the proposed guardian

The limited guardianship placement plan must state

- why the parents are requesting the appointment of a limited guardian
- parenting time sufficient for the parents to maintain a parent-child relationship
- the length of the limited guardianship
- who will provide financial support for the child
- any other agreements between the parties

Temporary guardians. §12.15.

Temporary guardians may be appointed during proceedings for the appointment of a guardian or if a guardian is not properly performing their duties. In the latter case, the appointment may not exceed six months. A temporary guardian may also be appointed in accordance with an application to appoint a guardian serving in another state to serve as a guardian in Michigan.

Review of guardianships. §§12.19–12.22.

The court reviews as necessary; at least annually for a ward under six.

Factors in the review:

- the parents' compliance with the limited guardianship placement plan
- whether the guardian has provided for the minor's welfare
- the necessity of continuing the guardianship
- the guardian's willingness and ability to continue to provide for the minor's welfare
- effect on the minor if the guardianship continued
- other factors relevant to the minor's welfare

The court may order an investigation by the DHHS or court staff.

After the investigation, the court may do the following:

- Continue the guardianship.

- Conduct a hearing. After the hearing, the court may continue the guardianship or order modification of the limited guardianship placement plan or, for a full guardianship, order a court-structured plan.
- Take actions permitted following petitions for termination (see below).

Removal or resignation of the guardian. §§12.23–12.24.

The authority of a guardian terminates without court order on the minor's death, adoption, marriage, or attaining majority. It terminates with court order on the guardian's death, resignation, or removal.

Petition for removal or resignation.

Any person interested in the minor's welfare or the minor if aged 14 or older may petition for removal; the guardian may petition to resign.

The court may appoint an LGAL if the minor's interests are inadequately represented.

After the hearing, the court may terminate the guardianship or make other appropriate orders.

Termination of guardianships.

Full guardianships. §12.26.

According to MCL 700.5208(1), only the parent or parents of the minor may petition for termination. *See also* MCR 5.404(H)(5), Petition for Termination by a Party Other Than a Parent.

The court may order an investigation, use "the community resources in behavioral sciences and other professions" and consider their recommendation, appoint a guardian ad litem or attorney for the child, or take other necessary action.

After a hearing, the court may

- terminate the guardianship and enter orders to facilitate the reintegration of the minor into the parental home or
- continue the guardianship for not more than one year and order compliance with the applicable plan.

After continuation but before the continuation period ends, the court may hold a hearing and then do one of the following:

- If the child has resided with the guardian for at least one year, and the parents' actions have resulted in substantial disruption of the parent-child relationship, continue the guardianship if the court finds by *clear and convincing evidence* that continuation is in the best interests of the minor.
- Appoint an attorney to represent the minor or refer the matter to the DHHS, either of whom may file a child protection complaint.

See §12.26 for the best interests standard to be applied.

Limited guardianships. §12.27.

A limited guardian may petition the court to resign under MCR 5.404(H). The parents may then petition for a new limited guardian. MCR 5.404(H)(4). If the court does not approve the parents' petition for a new limited guardian, or the parents do not petition, the court may proceed as with petitions to terminate the guardianship. MCR 5.404(H)(4). The parent or parents with the right to custody of the minor may petition to terminate the limited guardianship at any time. MCL 700.5208(1).

After notice and a hearing, the court must terminate the limited guardianship if it finds that the parents have substantially complied with the limited guardianship placement plan.

If no such finding, the court has the options described above under "Full guardianships."

A limited guardianship may also be terminated on a petition for resignation by the limited guardian.

Conservatorships and protective proceedings for minors. §§12.30–12.33.

Who may petition:

- the minor, if at least 14 years old
- any person interested in the minor's estate, affairs, or welfare including the parent, guardian, or custodian
- a person who would be adversely affected by ineffective management of the property or affairs of the individual to be protected

Standard for appointment—the court may appoint a conservator or make another protective order if the minor owns money or property, has business affairs, or needs protection to gain funds necessary for support and education.

Venue—the place where the minor resides or, if the minor does not reside within the state, where the minor has property.

Notice must be given to

- the minor if aged 14 or older
- the minor's presumptive heirs
- if known, the person named as attorney in fact under a durable power of attorney
- the nominated conservator
- a government agency paying benefits to the minor or before which an application for benefits is pending
- a guardian or a conservator appointed in another state to manage the protected person's finances if known by the petitioner

Additional special persons who may need to be notified are the following:

- if the minor has no presumptive heirs, the Attorney General

- if the minor is an *Indian child* under the MIFPA, the minor's tribe, the Indian custodian, and, if the Indian child's parent or Indian custodian or tribe is unknown, the Secretary of the Interior
- if an interested person is a resident and citizen of a foreign country, the consul of the foreign nation
- if the minor is receiving Veterans Administration benefits, the Administrator of Veterans' Affairs
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary
- any person who has filed a demand for notice

The court may appoint a guardian ad litem or an attorney to represent the minor.

Evidence—generally same rules as for guardianships. But note that MCR 5.404(F) (allowing reliance on all relevant and material evidence, even if not admissible under the rules) does not apply to conservatorships.

The court may pass over a person with priority for appointment with good cause. Priorities for appointment as conservator are

1. a conservator or guardian appointed or recognized by the court in another jurisdiction where the protected individual resides
2. the nominee of a minor 14 years old or older who has sufficient mental capacity to make an intelligent choice
3. the protected individual's spouse
4. an adult child of the protected individual
5. the protected individual's parent or the person nominated in the parent's will
6. a relative with whom the protected individual has resided for more than six months before the filing of the petition
7. someone nominated by the person who is caring for or paying benefits to the protected individual
8. anyone else that the court determines is suitable and qualified

I. Overview

A. In General

§12.1 EPIC confers on probate courts legal and equitable jurisdiction over guardianships, conservatorships, and protective proceedings, MCL 700.1302(c); the family division of the circuit court has ancillary jurisdiction over cases involving guardians or conservators commenced on or after January 1, 1998, MCL 600.1021(2)(a). Note that if a foreign language interpreter is "necessary for a person to meaningfully participate in the case or court proceeding," the court will appoint an interpreter (either in response to a request or sua sponte) for a party or a testifying witness. MCR 1.111(B)(1). The court may appoint an interpreter for a person other than a party or witness who has a "substantial interest" in the proceeding. MCR 1.111(B)(2).

This overview briefly sets out some general information on guardianships and other protective proceedings. The rest of the chapter focuses on proceedings involving minors, on the assumption that those are the matters most likely to be handled by the family division.

B. Guardianships of Minors

§12.2 A *guardian* is "a person who has qualified as a guardian of a minor or a legally incapacitated individual under a parental or spousal nomination or a court appointment and includes a limited guardian." MCL 700.1104(n).

A minor most often becomes subject to a guardianship when the parents are unable to provide care because of death, incapacity, or some other reason. The guardianship may be full or limited. MCL 700.5204, .5205. The guardian may be appointed by the court, MCL 700.5213, or in certain circumstances by will or other writing, MCL 700.5202. When determining whom to appoint as guardian for a minor, the court looks to whether the person will serve the minor's welfare. MCL 700.5212. For a fuller discussion of full and limited guardians for minors, see §§12.7–12.27.

The guardian's powers and duties are set forth in MCL 700.5215. See §12.14. The court may review a guardianship at any time and must annually review those involving minors under age six. MCL 700.5207; *see also* MCR 5.404(G). See §§12.19–12.22. The authority of the guardian of a minor terminates when the guardian dies, resigns, or is removed by order of the court or when the minor dies, is adopted, marries, or reaches the age of majority. MCL 700.5217; *see also* MCR 5.404(H). See §§12.23–12.27.

Practice Tip

- *The Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., and the MIFPA, MCL 712B.1 et seq., govern a foster care placement of an Indian child. The MIFPA defines a foster care placement as "[a]ny action removing an Indian child from the parent or Indian custodian, and where the parent or Indian custodian cannot have the child returned upon demand but parental rights have not been terminated, for temporary placement in … (A) [a] [f]oster home or institution[,] (B) [t]he home of a guardian or limited guardian under [MCL 700.5201–.5219,*

or] (C) [a] juvenile guardianship under [MCL 712A.1–.32]." MCL 712B.3(b)(i); see also 25 USC 1903(1); MCR 3.002(2)(a). Overviews of the ICWA and MIFPA appear in chapter 13. Sections 13.40–13.48 address involuntary foster care proceedings. Section 13.63 addresses guardianships following involuntary proceedings. Voluntary proceedings, including guardianships, are discussed in §§13.64–13.69 and 13.77.

C. Guardianships of Incapacitated Individuals

§12.3 An *incapacitated individual* is

> an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.

MCL 700.1105(a). This definition does not include individuals with developmental disabilities, see §12.4. *Neal v Neal (In re Neal)*, 230 Mich App 723, 584 NW2d 654 (1998) (guardianship proceedings for developmentally disabled person must be brought under Mental Health Code).

An individual in their own behalf, or any person interested in the individual's welfare, may petition the court for a finding of incapacity and appointment of a guardian. MCL 700.5303. If serving as a guardian, the parent or spouse of an incapacitated individual can appoint a successor guardian by will or other writing. MCL 700.5301; *see also* MCR 5.405(C).

Before beginning a guardianship proceeding, the court must provide the person intending to file the petition with a list of alternatives to the appointment of a full guardian, including a limited guardian, a conservator, a protective order, a living will, a patient advocate designation, a durable power of attorney (with or without limitations on purpose, authority, or time period), a do-not-resuscitate order, or a physician orders for scope of treatment form, and an explanation of each alternative. MCL 700.5303(2).

The court may appoint a guardian if it is satisfied by clear and convincing evidence that the individual is incapacitated and that the appointment is necessary to provide continuing care and supervision of the incapacitated individual, with each finding supported separately on the record. MCL 700.5306(1). The court may order an examination by a physician or mental health professional appointed by the court for use in determination of incapacity. MCL 700.5304. The alleged incapacitated person has the right to secure an independent evaluation. MCL 700.5304(2).

Unless the allegedly incapacitated individual has counsel of their own choice, the court shall appoint a guardian ad litem to represent the person in the proceeding. MCL 700.5303(3). Note that the person commencing guardianship or protective proceedings is prohibited from recommending a particular person to act as guardian ad litem. MCL 700.5108. The guardian ad litem must make determinations and inform the court on

- whether there are one or more appropriate alternatives to the appointment of a full guardian, including a limited guardian, a conservator or other protective order, a patient advocate designation, a durable power of attorney, and a do-not-resuscitate order;
- the estimated amount of the individual's liquid assets, if the court is to consider appointing a conservator;
- whether any actions should be taken in addition to appointing a guardian;
- whether a disagreement related to the petition might be resolved through court-ordered mediation;
- whether the individual objects to a do-not-resuscitate order being executed on their behalf;
- whether the individual objects to having a physician orders for scope of treatment form executed on their behalf; and
- whether the individual wishes to be present at the hearing, contest the petition, have limits placed on the guardian's powers, or object to a particular person's being appointed guardian.

MCL 700.5305(1)(h).

A person must be competent to serve as a guardian. MCL 700.5313(1). The court must appoint a person as guardian if the person is "suitable and willing to serve" and meets the at least one of the remaining requirements (set forth in order of priority) of MCL 700.5313(2). If no person meets this criteria, the court may appoint a relative in the order of preference set out in MCL 700.5313(3). If no relatives are suitable or willing to serve, the court may appoint any suitable person. MCL 700.5313(4). The court also can appoint a *professional guardian,* defined in MCL 700.1106(w), *amended by* 2024 PA 1 (eff. Feb 21, 2024), as the provider of guardianship services for a fee for three or more individuals unless the service provider is related to all but two of the individuals, only if the appointment is in the incapacitated individual's best interests and no other person is competent, suitable, and willing to serve. MCL 700.5106(2), .5313(4). Effective February 21, 2024, MCL 700.5301c, *added by* 2024 PA 1, now allows the court to appoint standby guardians under EPIC to ensure legally incapacitated individuals are not endangered by a guardianship gap due to their guardians' illnesses, absences, or deaths. Previously, the appointment of a standby guardian was only in the Mental Health Code for the developmentally disabled. To depart from the statutory provisions and appoint a professional guardian under MCL 700.5313(4), the court must find by a preponderance of the evidence that none of the persons listed in MCL 700.5313(2) or (3) are suitable or willing to serve. *In re Guardianship of Gerstler*, 324 Mich App 494, 922 NW2d 168 (2018) (probate court erred appointing professional guardian when ward's adult daughter had priority to serve and there was no evidence to suggest that she was incompetent, unsuitable, and unwilling to serve). A court may not appoint as guardian an agency that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual. MCL 700.5313(1).

A guardian who is appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary guardian in Michigan if (1) a guardian has not been appointed in Michigan and (2) a petition for a guardian's appointment is not pending in Michigan. The appointment takes place on the filing of an application for appointment, an authenticated copy of letters of the appointment in the other state, and an acceptance of the appointment. MCL 700.5301a(1). *See* SCAO forms PC 685m and PC 685o. The temporary guardian will be made full guardian after the filing of a proof of service of notice of the appointment, with the right to object, on all interested parties. MCL 700.5301a(2). The notice must be served by mail within 14 days of the appointment. MCR 5.108(B)(2)(b). If an objection is filed to the appointment of the foreign guardian, the appointment continues until a Michigan court enters an order removing the guardian. MCL 700.5301a(3).

The court grants a guardian only such powers as are necessary to provide for the demonstrated needs of that individual, and the guardianship must be designed to encourage the incapacitated individual's maximum self-reliance and independence. MCL 700.5306(2). Generally, the court may not grant a guardian any of the same powers held by an existing patient advocate. MCL 700.5306(2), (5). However, the court may modify the terms of a guardianship to grant to a guardian the power or duty of making medical or mental health treatment decisions for an incapacitated individual if the court finds that the patient advocate is not acting consistent with the ward's best interests. MCL 700.5306(5). If the court finds by clear and convincing evidence that the individual is incapacitated, that the person who has the care and custody of the incapacitated individual denied another person access to the incapacitated individual, and that the incapacitated individual desires contact with the other person or that contact with the other person is in the incapacitated individual's best interests, the court may appoint a limited guardian to supervise access with the other person. MCL 700.5306(6). If the ward's property needs protection, the court must include restrictions in the letters of guardianship or order the guardian to furnish a bond. MCL 700.5313(1).

The powers and duties of a guardian of an incapacitated individual are covered in MCL 700.5314. A court order must specify the extent to which these powers and duties apply. *Id.* Duties include seeking court approval before the sale of real property and reporting periodically to the court. MCL 700.5314(b), (j); *see also* MCR 5.409. Powers may include the ability to give any necessary consent or approval so the ward may receive medical, mental health, or other professional care, counsel, treatment, or service. MCL 700.5314(c). Note, a guardian does not have the power to consent to or provide approval for inpatient hospitalization unless the court order expressly grants the guardian this power. *Id.* A guardian may also have the power to execute, reaffirm, and revoke a do-not-resuscitate order, a nonopioid directive form, or a physician orders for scope of treatment form provided certain conditions are met. MCL 700.5314(d), (f), (g). The authority of the guardian of an incapacitated individual terminates if either the guardian or the ward dies or if the guardian becomes incapacitated, resigns, or is removed. MCL 700.5308. A petition to remove the guardian is brought under MCL 700.5310.

MCR 2.201(E) and 3.202(A) "specifically allow a guardian or conservator to bring an action for divorce on behalf of a mentally incompetent spouse." *Burnett v Burnett (In re Estate of Burnett)*, 300 Mich App 489, 495, 834 NW2d 93 (2013); *see also Houghton v Keller*, 256 Mich App 336, 662 NW2d 854 (2003). The situation also may arise in a pending divorce action where a party's capacity to make informed decisions comes into question. In *Redding v Redding*, 214 Mich App 639, 543 NW2d 75 (1995), the circuit court in a divorce action appointed a guardian ad litem on the stipulation of the parties. The court of appeals held that the circuit court could not appoint a guardian ad litem because guardianships were within the exclusive jurisdiction of the probate court. The Family Division of the Circuit Court, however, now has ancillary jurisdiction over cases involving guardians and conservators for cases commenced after January 1, 1998. MCL 600.1021(2)(a).

In *Persinger v Holst*, 248 Mich App 499, 639 NW2d 594 (2001), the court held that an attorney cannot justifiably be deemed an insurer of a client's mental competency. A lawyer who is uncertain if the client is capable of making informed decisions, however, may be faced with an ethical dilemma. MRPC 1.14 provides:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority or mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Nonetheless, a lawyer may be concerned that revealing the client's condition in order to seek the appointment of a guardian may present a conflict of interest or violate MRPC 1.6 (protecting the confidences and secrets of a client). Only a few opinions of the State Bar of Michigan's Standing Committee on Professional Ethics have addressed the ethnical concerns related to incapacitated clients. In RI-51 (June 4, 1990), the attorney was appointed to represent an indigent defendant in a criminal matter. The attorney believed that the client was incompetent, and that his request for new counsel was either frivolous or made with the intent to delay trial. The committee opined that an attorney should seek independent corroborating reports from professionals or seek the appointment of a guardian if the lawyer believes the client is incompetent. In RI-76 (Mar 8, 1991), the committee opined that a conflict of interest was not created between the lawyer who would collect a contingency fee upon acceptance of a settlement offer and the client who rejected the settlement if an independent adjudicator determined the client's disability and whether the settlement should be accepted. Where the client had a history of mental illness and the lawyer reasonably believed that the client could not adequately act in the client's own interest, the lawyer could seek the appointment of a guardian.

A joint committee of the American Bar Association and the American Psychological Association is currently working on a protocol for attorneys representing clients whose capacity comes into question. The State Bar of Michigan also

maintains an Ethics Helpline for lawyers and judges only at 877-558-4760 to provide informal, advisory opinions from staff attorneys regarding ethics issues.

D. Guardianships of Individuals with Developmental Disabilities

§12.4 Guardianships of individuals with developmental disabilities are governed by the provisions of the Mental Health Code and MCR 5.730–.748 and MCR 5.406. MCL 330.1100a(27) defines *developmental disability* as follows:

> (a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:
>
> (i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
>
> (ii) Is manifested before the individual is 22 years old.
>
> (iii) Is likely to continue indefinitely.
>
> (iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:
>
> (A) Self-care.
>
> (B) Receptive and expressive language.
>
> (C) Learning.
>
> (D) Mobility.
>
> (E) Self-direction.
>
> (F) Capacity for independent living.
>
> (G) Economic self-sufficiency.
>
> (v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.
>
> (b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided.

A guardianship for an individual with developmental disabilities is used only as is necessary to promote and protect the well-being of the individual, should take into account the abilities of the individual with developmental disabilities, should be designed to encourage the development of maximum self-reliance and independence in the individual with developmental disabilities, and should be ordered only to the extent necessitated by the actual mental and adaptive limitations of the individual with developmental disabilities. MCL 330.1602(1).

Under the Mental Health Code, the authority, duties, and responsibilities of a guardian of an individual with developmental disabilities fall into two basic types: guardianship of the individual and guardianship of the estate. These two types are further divided into two categories: plenary and partial. Partial guardianship is preferred, although a plenary guardian may be appointed if the court finds by clear and convincing evidence that the individual lacks any capacity to care for themself

and the estate. MCL 330.1602(2), .1618. The court must specify the duration of the term of the guardian in its order, and a partial guardian cannot be appointed to a term greater than five years. MCL 330.1626. In limited situations, a guardian may also be appointed by will. MCL 330.1642.

A guardian of the individual has custody of the individual with developmental disabilities and the duty to provide for the care from the estate or other sources and to make a reasonable effort to secure education, medical, or other services that will help the individual with developmental disabilities develop maximum independence. MCL 330.1631(1). The guardian may not place the individual in a facility without a court order or prior court authorization. MCL 330.1623. The guardian must report to the court on an annual basis. MCL 330.1631(2).

Much like a conservator of a minor, a guardian of the estate is authorized to take possession of and manage the finances of the individual with developmental disabilities. The guardian of the estate must prepare annual accounts that detail income and expenditures of the estate. These accounts are filed with and reviewed by the court. MCL 330.1631(2), (4).

For either type, the authority of the guardian is terminated when a petition to terminate the guardianship is granted, MCL 330.1637; when the guardian's term expires, MCL 330.1626; or, if there was not a previously appointed guardian and if the appointment is testamentary, when a minor ward reaches the age of majority, MCL 330.1642.

E. Protective Proceedings

1. Conservatorships

§12.5 A *conservator* is "a person appointed by a court to manage a protected individual's estate." MCL 700.1103(j), *amended by* 2024 PA 1 (eff. Feb 21, 2024). Appointment of a *professional conservator,* defined as the provider of conservatorship services for a fee to three or more individuals, is limited to when (1) the appointment is in the individual's best interests, (2) there is no other competent suitable person willing to serve, and (3) the fiduciary signs a bond. MCL 700.1106(v), *amended by* 2024 PA 1 (eff. Feb 21, 2024), .5106(2), (3). To depart from the statutory provisions and appoint a public conservator under MCL 700.5409(1)(h), the court must find by a preponderance of the evidence that none of the persons listed in MCL 700.5409(1)(a)–(g) are suitable and willing to serve. *In re Guardianship of Gerstler*, 324 Mich App 494, 922 NW2d 168 (2018) (probate court erred appointing professional conservator when ward's adult daughter had priority to serve and there was no evidence to suggest that she was incompetent, unsuitable, and unwilling to serve).

A petition for the appointment of a conservator is brought by the individual to be protected (including a minor if 14 or older), a person interested in that individual's estate or welfare (including the minor's parent, guardian, or custodian), or a person who would be adversely affected by ineffective management of the property or affairs of the individual to be protected. MCL 700.5404(1). The person commencing protective proceedings is prohibited from recommending a particular person to act as guardian ad litem. MCL 700.5108. A guardian ad litem, a physi-

cian, a mental health professional, or a visitor appointed in a protective proceeding must consider and report to the court whether there is an appropriate alternative to conservatorship and, if not, whether it is desirable to limit the duration and scope of the conservator's authority. MCL 700.5305, .5406(4).

When determining whether to make an appointment for a conservator, the court looks to whether the protected person owns money or property that requires management or protection. MCL 700.5401(2). The powers and duties of a conservator are detailed in MCL 700.5423–.5426. The conservator must make an inventory and account of the estate and must report periodically to the court. MCL 700.5417, .5418; *see also* MCR 5.409. All sales and mortgages of real property by a conservator must receive prior court approval. MCL 700.5423(3).

If the protected individual has not been adjudged disabled, the authority of the conservator in a minor conservatorship terminates automatically when the minor reaches the age of majority. MCL 700.5426(2), .5431. It can also be terminated by order of the court if it becomes no longer necessary. The court may remove a conservator for good cause, after a full hearing, or accept the resignation. MCL 700.5414.

2. Other Protective Orders

§12.6 EPIC defines a *protective proceeding* as a proceeding under the provisions of MCL 700.5401 et seq. MCL 700.1106(z), *amended by* 2024 PA 1 (eff. Feb 21, 2024). The court may appoint a conservator or make another protective order for a minor if the minor owns money or property, has business affairs, or needs protection to gain funds necessary for support and education. MCL 700.5401(2). The court may appoint a conservator or make another protective order for an adult if it determines that the person "is unable to manage property and business affairs effectively … [and] has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money." MCL 700.5401(3). The basis for a conservator's appointment or other protective order must be established by clear and convincing evidence. MCL 700.5406(7). A *protected individual* is a minor or other individual for whom a conservator is appointed or other protective order is made pursuant to MCL 700.5401 et seq. MCL 700.1106(y), *amended by* 2024 PA 1 (eff. Feb 21, 2024).

II. Full Guardians of Minors

A. Testamentary Appointments

§12.7 A minor's parent may appoint a guardian for the unmarried child in a will or other writing. If both parents are dead or the surviving parent has been determined to be incapacitated, the appointment becomes effective when the guardian files an acceptance in the probate court. If both parents are dead, an effective appointment by the parent who died later has priority. However, if a minor who is 14 years of age or older files a written objection before the nominee accepts or within 28 days after acceptance, the appointment is ineffective. The

court may still appoint the nominee or another suitable person after following the ordinary procedures for appointing a guardian. MCL 700.5202, .5203.

B. Court Appointments

1. Who May Petition

§12.8 Court-appointed guardianship proceedings begin with the filing of a petition (PC 651). MCL 700.5204. Any person interested in the welfare of a minor or a minor who is 14 years old or older may petition the court to appoint a guardian for the minor. MCL 700.5204(1); MCR 5.402(B). The petition may contain multiple prayers for relief. MCR 5.402(A).

A limited guardian may petition to be appointed as a full guardian, but the petition may not be based on a suspension of parental rights accomplished by the order that appointed the limited guardian. MCL 700.5204(3).

Practice Tip

- *Checking with the probate court to see if there is any other litigation regarding the same family members can help ensure that all matters involving one family will be heard by the same judge.*

2. When a Guardian May Be Appointed

§12.9 Under MCL 700.5204(2), the court has the power to appoint a guardian for a minor if at least one of the following exists:

> (a) The parental rights of both parents or the surviving parent are terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention.
>
> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance and the minor is not residing with his or her parent or parents when the petition is filed.
>
> (c) All of the following:
>
> (i) The minor's biological parents have never been married to one another.
>
> (ii) The minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order.
>
> (iii) The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

See Deschaine v St Germain, 256 Mich App 665, 671 NW2d 79 (2003) (grandfather could not obtain guardianship of minor granddaughter because child was not permitted to reside with him at time of her mother's death).

In *In re Guardianship of Versalle*, 334 Mich App 173, 963 NW2d 701 (2020), *leave denied,* 509 Mich 961, 972 NW2d 846 (2022), the petitioner filed petitions seeking to be appointed the guardian of the respondent father's two minor children under MCL 700.5204(2)(b). At the time of filing, the minor children lived with the petitioner. However, at the time of the guardianship petition hearing, the

respondent had moved the children to Texas with him. *Guardianship of Versalle*. The court of appeals held that the guardianship was properly granted even though the minors lived with the respondent at the time of trial. *Id.* Guardianship was properly granted to the petitioner because the respondent permitted the child to live with the petitioner without providing the petitioner authority *at the time the petition was filed. Id.*

Practice Tip

- *The court may appoint a guardian under MCL 700.5204(2)(b) as long as the minor is not residing with the parents when the petition is filed. Before EPIC and revisions to its predecessor, the Revised Probate Code, the petition had to be dismissed if the parent retrieved the child before the hearing.*

3. Venue; Notice

§12.10 Venue. Venue is where the minor resides or is present. MCL 700.5211.

Notice. The petitioner must give notice of the time and place of the hearing on the petition to

- the minor, if 14 years of age or older;
- if known by the petitioner or applicant, each person who had the principal care and custody of the minor during the 63 days before the petition was filed;
- the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor (note that the biological father of a child born out of wedlock need not be served notice of the proceedings unless paternity has been determined, *see* MCR 5.125(B)(4));
- the nominated guardian; and
- if known by the petitioner or applicant, a guardian or a conservator appointed in another state to make decisions regarding the person of a minor.

MCR 5.125(C)(20).

Additional special persons who may need to be notified are the following:

- if the minor is receiving Veterans Administration benefits, the Administrator of Veterans' Affairs
- if the minor is an *Indian child* under the MIFPA, the minor's tribe, the Indian custodian, and, if the Indian child's parent or Indian custodian or tribe is unknown, the Secretary of the Interior (See §§13.35–13.39 for the specific notice requirements for proceedings governed by the MIFPA.)
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary

- any person who has filed a demand for notice under MCL 700.5104

MCR 5.125(A). Note that if the court learns a child may be an *Indian child* after the guardianship is ordered, the court must notify certain persons of the guardianship, the related hearing, and the possible applicability of the ICWA and the MIFPA. MCR 5.402(E)(5).

MCL 700.5104(1) permits an interested person who desires to be notified before an order is made in a guardianship or conservatorship proceeding to file a demand for notice. If a guardianship or protective proceeding is not pending when the demand for notice is filed, the person must pay a filing fee equal to, but separate from, the fee required to commence a guardianship or protective proceeding. The filing fee must be waived if the person shows that they are receiving public assistance, are represented by a legal services program, or are indigent. MCR 2.002. Courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process. MCR 2.002(L). A government agency paying benefits to the protected individual, or before which an application for benefits is pending, is also an interested person. MCL 700.5104(2).

Service. An interested person may be served by mail, personal service, or publication when necessary. If the minor is 14 years old or older, service on the minor must be personal unless another method is justified under the circumstances. MCR 5.402(C).

Incarcerated parties. In an action involving guardianship of a minor child, if a party is incarcerated, they must be given adequate notice of the proceedings and an opportunity to respond and to participate. *See* MCR 2.004.

The party seeking an order regarding a minor child must

- contact the Department of Corrections to confirm the incarcerated party's prison number and location;
- serve the incarcerated person, and file proof of service with the court; and
- state in the petition or motion that a party is incarcerated and provide the party's prison number and location.

MCR 2.004(B). The caption of the petition or motion must state that a telephonic or video hearing is required by MCR 2.004. The court must issue an order requesting that the department or the facility where the party is located allow that party to participate with the court or its designee in a hearing or conference, including a Friend of the Court adjudicative hearing or meeting, by way of a noncollect and unmonitored telephone call or video conference. The order must include the date and time for the hearing, and the prisoner's name and prison identification number, and must be served by the court on the parties and the warden or supervisor of the facility where the incarcerated party resides. MCR 2.004(C). Where the incarcerated respondent in a child protective proceeding was not given the opportunity to be available telephonically at the adjudication, the dispositional hearing, or the first three dispositional review hearings, the prosecutor, the court, and respondent's counsel failed to adhere to the procedures set out in MCR 2.004(B) and (C); therefore, the court of appeals held that the trial court

erred in terminating respondent's parental rights. *In re DMK*, 289 Mich App 246, 796 NW2d 129 (2010). "[E]xcluding a[n incarcerated party from the opportunity to participate] for a prolonged period of the proceedings can[not] be considered harmless error." *Id.* at 255.

The purpose of the telephone call or video conference is to determine

> (1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
>
> (2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
>
> (3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
>
> (4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation by way of additional telephone calls or videoconferencing technology as permitted by the Michigan Court Rules, and
>
> (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.

MCR 2.004(E).

A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings. MCR 2.004(F). This provision does not apply if the incarcerated party actually participates in a telephone call or video conference. *Id.* The opportunity to participate in the proceedings must be offered for each proceeding, and "participation through 'a telephone call' during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the [incarcerated party] was not offered the opportunity to participate." *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 154, 782 NW2d 747 (2010).

The court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts. MCR 2.004(G).

The protections of MCR 2.004 apply only to parents incarcerated by the Michigan Department of Corrections. *Family Indep Agency v Davis (In re BAD)*, 264 Mich App 66, 690 NW2d 287 (2004). A parent incarcerated under county jurisdiction or in another state cannot cite this court rule in a domestic relations matter.

4. Investigation; Attorney; Lawyer–Guardian ad Litem; Guardian ad Litem

§12.11 The court may order an investigation of the proposed guardianship and a written report of the investigation by the DHHS or court staff. MCL 700.5204(1).

Appointment of lawyer–guardian ad litem. If the court determines that the minor's interests are, or may be, inadequately represented, the court may appoint an LGAL to represent the minor. MCL 700.5213(4). The role of the LGAL is defined in MCL 712A.17d, which provides that the LGAL's duty is to the child, not to the court, and that the attorney-client privilege applies. MCL 712A.17d(1)(a). However, the LGAL also has the duty to determine and advocate for the child's best interests. MCL 712A.17d(1)(i). The child's wishes are relevant to the determination of best interests and should be weighed according to the child's competence and maturity. *Id.* The LGAL may file a written recommendation and report, which the court may read but not admit into evidence unless all parties stipulate to the admission. The report may also be used for a settlement conference. MCL 700.5213(5)(a).

Any fee to the LGAL must be approved by the court. See MC 221, Statement of Service and Order for Payment of Court Appointed Representative. After determining the ability to pay, the court may charge costs and reasonable fees of the LGAL against one or more of the parties or against fees allocated for family counseling services. MCL 700.5213(5)(b).

The Michigan Judicial Institute details the duties of LGALs in Michigan Judicial Institute, *Child Protective Proceedings Benchbook: A Guide to Abuse and Neglect Cases* §7.9 (4th ed 2024).

Practice Tip

- *The role of the lawyer–guardian ad litem is to represent the minor and advocate for their wishes, not some more neutral role and not to advocate for what the lawyer–guardian ad litem thinks is in the minor's best interests.*

Appointment of guardian ad litem. At any point in a proceeding, the court may appoint a guardian ad litem. MCL 700.1403(d), .5213(6).

5. Evidence

§12.12 In hearings concerning the guardianship of a minor:

1. The court may receive and rely on all relevant and material evidence, including written reports, to the extent of its probative value, even though the evidence may not be admissible under the Michigan Rules of Evidence.
2. Interested persons can examine and controvert written reports and, in the court's discretion, may cross-examine individuals making the reports when those persons are reasonably available.
3. No assertion of an evidentiary privilege will prevent the receipt and use of materials prepared pursuant to a court-ordered examination, interview, or course of treatment, except for the attorney-client privilege.

MCR 5.404(F)(2)–(4).

6. Standard for Appointment

§12.13 The court must make the guardianship appointment if it determines at the hearing of the petition to appoint a guardian that the following requirements are met:

1. the person seeking appointment is qualified;
2. venue is proper;
3. the required notices have been given;
4. the requirements of MCL 700.5204 (see §12.9) are satisfied; and
5. the minor's welfare will be served by the requested appointment.

MCL 700.5213(2).

If a full guardian is not appointed, the court may dismiss the proceedings or make an alternative disposition that it feels will best serve the child's interests. *Id.* An alternative disposition may include the appointment of a limited guardian under MCL 700.5205, .5206, as long as the parties agree to a placement plan.

Criteria for appointment. In general, a person may be appointed guardian if the appointment would serve the minor's welfare. MCL 700.5212. The court must appoint a person nominated by a minor 14 years old or older unless the court finds that the appointment is contrary to the minor's welfare. *Id.*

C. Powers and Duties of Guardians

§12.14 A guardian has the same powers and responsibilities toward a child as does a custodial parent, except that a guardian is not obligated to support the ward with personal funds and is not liable to third parties for the ward's acts. MCL 700.5215; *see In re ADW*, No 368361, ___ Mich App ___, ___ NW3d ___ (Mar 14, 2024) (ADW's guardian has powers and responsibilities of parent under MCL 700.5215, which includes power to prohibit visits between ADW and ADW's extended relatives). However, under the Juvenile Code, a guardian may be subject to an order for reimbursement of the costs of care or services when a juvenile is placed in care outside of the juvenile's home and under state, county juvenile agency, or court supervision. MCL 712A.18(2).

Specific powers and responsibilities. The guardian must do the following:

- Take reasonable care of the ward's personal effects and start protective proceedings if necessary to protect the ward's property. The guardian may not sell the ward's interest in real property without court authorization.
- Receive money for the ward's support; spend it on the ward's current needs for support, care, and education; and exercise due care to conserve the excess. The money is not to be used to compensate the guardian for services rendered.
- Facilitate the ward's education and social activities and authorize medical or other professional care. The full guardian may consent to the minor ward's marriage and to the ward's adoption or release for adoption.

- File a report with the court each year, within 56 days of the anniversary of the guardian's appointment, and at other times as the court may order. This report must detail the ward's condition, including any medical treatment given to the ward; the assets in the guardian's control; and reasons for continuing the guardianship. The guardian must serve the report on the interested persons. *See* MCR 5.409.
- Give notice to the court within 14 days after a change in the ward's place of residence of the ward's new address.

MCL 700.5215. The guardian must also notify the court of any change in the guardian's address within seven days. MCR 5.205.

By a properly executed power of attorney, a guardian may delegate the powers to another person for up to 180 days; on doing so, the guardian must notify the court of the name, address, and telephone number of the attorney in fact within 7 days. MCL 700.5103.

However, a guardian serving in the U.S. armed forces who is deployed to a foreign nation is not limited to a 6-month delegation of guardian powers. A guardian in the armed forces who is sent to a foreign country may delegate to another person the guardian's powers regarding care, custody, or property of the ward, MCL 700.5103(3), effective until the 31st day after the end of the guardian's deployment.

A guardian has authority to examine and obtain a ward's medical records under the Medical Records Access Act, MCL 333.26261 et seq.

A guardian may execute a do-not-resuscitate order on behalf of a minor ward as provided in MCL 333.1053a. MCL 700.5215(g).

If a minor dies while under guardianship and without a conservator being appointed, the guardian may petition the court to pay burial expenses from the deceased minor's account. MCL 700.5216(2).

III. Temporary Guardians

§12.15 A temporary guardian for a minor may be appointed:

1. During proceedings for the appointment of a guardian if necessary. MCR 5.403(D)(1). The appointment may not exceed six months. MCL 700.5213(3).
2. If it comes to the court's attention that a guardian is not properly performing their duties. MCR 5.403(D)(2). This temporary guardian may be appointed for no more than six months. MCL 700.5213(3). Besides assuming the powers of the suspended guardian, the temporary guardian determines whether a petition to remove the guardian should be filed. If a removal petition is not filed, the temporary guardian is to make recommendations to the court for the protection of the minor after the temporary guardian's term expires. MCR 5.403(D)(2).

3. In accordance with an application to appoint a guardian serving in another state to serve as a guardian in Michigan. MCR 5.403(A); *see* MCL 700.5202a.

Note that a temporary guardian has the same powers as a full guardian. *See Kater v Brausen*, 241 Mich App 606, 617 NW2d 40 (2000) (temporary guardians have standing to bring action for custody); *see also In re Hoggett*, No 358660 (Mich Ct App Aug 25, 2022) (unpublished) (circuit court properly granted appellee grandmother's guardianship petition following appellant mother's suspension of parenting time with minor child).

Notice. For good cause stated on the record and included in the order, the court may shorten the period for notice of a hearing, or dispense with it altogether, except that the minor must always receive notice if the minor is 14 years of age or older. If the appointment followed a hearing in which the notice period was shortened or eliminated, the court must send notice of the appointment to all interested persons. If an interested person objects to entry of the order, the court must hold a hearing on the objection within 14 days. MCR 5.403(B).

Practice Tip

- *Typically, a temporary guardianship is used to address an immediate threat to the well-being of the ward, rather than an emergency of an agency, institution, or third party.*

IV. Limited Guardians

A. In General

§12.16 A limited guardian has all the powers and duties of a full guardian enumerated in MCL 700.5215 (see §12.14), except that a limited guardian may not consent to the ward's adoption, the ward's release for adoption, or the marriage of a minor ward. MCL 700.5206(4).

While any interested person may petition for a full guardianship, MCL 700.5204(1), only the custodial parent or parents may petition for a limited guardianship, MCL 700.5205(1).

The court may appoint a limited guardian if

1. the parent or parents with custody of the child consent to the appointment of a limited guardian,
2. the parent or parents voluntarily consent to the suspension of their parental rights, and
3. the court approves a limited guardianship placement plan that has the consent of the parent or parents and the proposed limited guardian.

Id.

There is no automatic limit on a limited guardian's term. MCL 700.5206(3).

B. Limited Guardianship Placement Plans

§12.17 A limited guardianship placement plan is an agreement setting forth the terms of the limited guardianship. The plan must state

1. the reason the parents are requesting the appointment of a limited guardian,
2. parenting time sufficient for the parents to maintain a parent-child relationship,
3. the length of the limited guardianship,
4. who will provide financial support for the child, and
5. any other agreements between the parties.

MCL 700.5205(2); MCR 5.404(E)(1).

Practice Tip

- *Careful drafting of the limited guardianship placement plan will provide the specifics needed to alert the court and all parties as to what is required for compliance.*

The plan may include a schedule of services to be followed by the parents, the child, and the guardian and any other provisions the court deems necessary for the child's welfare. MCR 5.404(E)(2). A copy of the plan must be attached to the petition for limited guardianship. MCL 700.5205(2). The plan is filled out on a limited guardianship placement plan form developed by the state court administrator (PC 652). The plan form notifies the parents that a substantial failure to comply with the plan without good cause may result in the termination of parental rights.

C. Review and Modification of the Plan

§12.18 The court will review the proposed limited guardianship placement plan and do one of the following: approve the plan; disapprove it; or, on its own motion, modify and approve a modified plan if the parties agree to the modification. MCL 700.5206(1).

The parties may also modify a plan after the court has approved it if the parties agree on the modification and obtain court approval. MCL 700.5206(2). The modification procedure is as follows:

- A proposed modification may be filed without filing a petition.
- The court must examine the proposed plan and act within 14 days to approve or disapprove it.
- If the modification plan is approved, the court endorses it and notifies the interested persons.
- If the court does not approve the modification, the court must either (1) set the proposed plan for a hearing or (2) notify the parties of its objections and that they may schedule a hearing or submit another plan.

MCR 5.404(E)(3).

V. Court Review of Guardianships

A. Timing of the Review

§12.19 The court may review a guardianship for a minor, including a limited guardianship, as it considers necessary and must annually review a guardianship where the minor is under six years of age. MCL 700.5207. The minor must be under six years of age as of the anniversary of the guardian's qualification to trigger the required annual review. The review must commence within 63 days after the guardian's anniversary date. MCR 5.404(G)(1).

B. Factors for Review

§12.20 The court must consider the following factors when conducting the review:

1. the parent's or guardian's compliance with a limited guardianship placement plan or any other court-structured plan,
2. whether the guardian has adequately provided for the minor's welfare,
3. the necessity of continuing the guardianship,
4. the willingness and ability of the guardian to continue to provide for the minor's welfare,
5. the effect on the minor's welfare if the guardianship is continued, and
6. any other factor the court considers relevant to the minor's welfare.

MCL 700.5207(1).

C. Investigation

§12.21 The court may order an investigation by a court employee or agent, the DHHS, or any other person based on the review factors listed in §12.20. MCL 700.5207(2); MCR 5.404(G)(2).

The investigator must file a written report within 28 days after the appointment, including a recommendation regarding continuing or modifying the guardianship and whether a hearing should be scheduled. A report recommending modification must state the nature of the modification. MCR 5.404(G)(2).

D. Judicial Action on the Investigator's Report

§12.22 After a review of the report, the court may (1) enter an order continuing the guardianship or (2) conduct a hearing and continue the guardianship, order a modification of the plan, or take any of the actions described in MCL 700.5209(2) (see §12.26). MCL 700.5207(3); MCR 5.404(G)(3). A limited guardianship placement plan may be modified as a condition to continuing the limited guardianship. MCL 700.5207(3)(b)(i)(B). For a full guardianship, the court may order a court-structured plan designed to resolve conditions identified at the review hearing. MCL 700.5207(3)(b)(ii)(B).

VI. Termination of Guardianships

A. Guardians' Responsibilities and Liabilities

§12.23 Termination of responsibilities. The authority of the guardian terminates on the minor's death, adoption, marriage, or attainment of the age of majority. MCL 700.5217. In these cases, no court order is necessary. MCR 5.404(H)(1). A guardian's responsibilities also terminate on the guardian's death, resignation, or removal on petition. MCL 700.5217. An order of the court is required. MCR 5.404(H)(1).

Liabilities. Termination does not affect the guardian's liability for prior acts or the guardian's obligation to account for the ward's funds and assets. The court must approve the resignation of a guardian before it becomes effective. MCL 700.5217.

B. Removal by Petition or Resignation

§12.24 Any "person interested in a ward's welfare or, if 14 years of age or older, the ward may petition for the removal of a guardian on the ground that removal would serve the ward's welfare." MCL 700.5219(1); *see also* MCR 5.404(H)(5). Alternatively, a guardian may file a petition to resign. *Id.* Either petition may include a request for the appointment of a successor guardian. *Id.*

If the court determines during the proceedings that the minor's interests are inadequately represented, it may appoint a lawyer–guardian ad litem to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years old. MCL 700.5219(4).

After notice and a hearing on the petition, the court may terminate the guardianship or make other appropriate orders. MCL 700.5219(3); MCR 5.404(H)(4), (5).

C. Courts with Concurrent Jurisdiction

§12.25 The court in the county where the ward resides has concurrent jurisdiction with the court that appointed the guardian or where the guardian's acceptance of appointment is filed over resignation, removal, accounting, and other proceedings related to the guardianship. MCL 700.5218(1).

If these two courts are different, a determination based on the best interests of the ward must be made regarding which court should have jurisdiction to hear the petition. MCL 700.5218(2).

A copy of an order accepting a resignation of or removing a guardian must be sent to the appointing court or the court where the guardian's acceptance of appointment is filed. *Id.*

If the guardianship involves an Indian child who does not reside on the reservation and is not a ward of the tribe, the child' Indian tribe has concurrent jurisdiction with the state court over the guardianship proceeding. See §13.27.

D. Full Guardianships

§12.26 Although interested persons, or the minor if 14 or older, may petition for removal of the guardian, only the parent or parents of the minor may petition for termination. MCL 700.5208(1). However, the court may terminate the guardianship after a petition for removal or resignation. MCR 5.404(H)(4), (5). When the parents petition for the termination of a guardianship of a minor, the court may do any of the following:

- order the DHHS or a court employee or agent to conduct an investigation and file a written report regarding the best interests of the minor or give testimony regarding the investigation
- use the community resources in behavioral sciences and other professions in the investigation and study of the best interests of the child and consider their recommendations for the disposition of the petition
- appoint a guardian ad litem or attorney to represent the child
- take any other action necessary

MCL 700.5208(2).

Disposition of the parents' petition. After notice and a hearing, the court may take any of the following options described in MCL 700.5209(2):

1. Terminate the guardianship and enter orders to facilitate the reintegration of the minor into the parents' home, establishing a transition period of up to six months.
2. Continue the guardianship for not more than one year and order the parents to follow a court-structured plan that enables the minor to return to the parental home.

After the guardianship is continued but before the continuation period ends, the court may hold a hearing and then do one of the following:

1. If the child has resided with the guardian for at least one year, and the parents' actions have resulted in a substantial disruption of the parent-child relationship, continue the guardianship if the court finds by clear and convincing evidence that the continuation would serve the best interests of the minor.
2. Appoint an attorney to represent the minor or refer the matter to the DHHS, either of which may file a complaint on behalf of the minor requesting that the family division of the circuit court take jurisdiction under the child protective provisions of the Juvenile Code.

Best interests of the minor. The first three options described above are all conditioned on the action's being in the best interests of the minor. *Best interests of the minor* means the sum total of the following 12 factors:

> (i) The love, affection, and other emotional ties existing between the parties involved and the child.

(ii) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue educating and raising the child in the child's religion or creed, if any.

(iii) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(iv) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(v) The permanence, as a family unit, of the existing or proposed custodial home.

(vi) The moral fitness of the parties involved.

(vii) The mental and physical health of the parties involved.

(viii) The child's home, school, and community record.

(ix) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.

(x) The party's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents.

(xi) Domestic violence regardless of whether the violence is directed against or witnessed by the child.

(xii) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or parenting time.

MCL 700.5101(a).

E. Limited Guardianships

§12.27 A limited guardian may petition the court to resign under MCR 5.404(H). The parents may then petition for a new limited guardian. MCR 5.404(H)(4). If the court does not approve the parents' petition for a new limited guardian, or the parents do not petition, the court may proceed as with petitions to terminate the guardianship.

Termination. The parent or parents with the right to custody of the minor may petition to terminate the limited guardianship at any time. MCL 700.5208(1).

The court must terminate a limited guardianship after notice and a hearing on a petition to terminate if the court determines that the parents have substantially complied with the limited guardianship placement plan. MCL 700.5209(1). The court may enter orders to facilitate the reintegration of the minor into the parental home for a period of up to six months before the termination. *Id.*

If the parents have not substantially complied with the placement plan, the court may take any of the actions described in MCL 700.5209(2) that it determines is in the best interests of the child (see §12.26). If the court chooses to continue the guardianship for not more than one year, it must order the parent(s) to

comply with the limited guardianship placement plan, a court-modified limited guardianship placement plan, or a court-structured plan that enables the child to return to the parental home if the original limited guardianship placement plan was established before December 20, 1990. MCL 700.5209(2)(b)(i).

Best interests of the child. MCL 700.5101(a) sets forth 12 factors that are considered in establishing the best interests of the child. See §12.26.

VII. Guardians' Standing to Seek Custody of Minors

§12.28 Pursuant to the Child Custody Act of 1970, MCL 722.21 et seq., a guardian or limited guardian of a child has standing to bring an action for custody of the child. MCL 722.26b(1). However, the limited guardian does not have standing if there is substantial compliance with the limited guardianship placement plan. MCL 722.26b(2).

In *Newsome v Labby*, 206 Mich App 434, 522 NW2d 872 (1994), the court stated that if a court has suspended parental rights over a child, the full guardians of that child have standing to bring an action for custody. This is true whether or not a reintegration plan has been instituted and the parents have substantially complied with the plan. Given the same circumstances, limited guardians would have no standing.

In *Empson-Laviolette v Crago*, 280 Mich App 620, 760 NW2d 793 (2008), the court of appeals determined that the ICWA, 25 USC 1901 et seq., applies to guardianship proceedings, and allows an Indian child's parent to withdraw consent to foster care placement at any time and regain custody. Reversing the decision below, the court of appeals held that, pursuant to 25 USC 1913(b), the trial court should have terminated the guardianship order and returned the child to the mother's custody. Although the court's decision in *Empson-Laviolette* occurred before the MIFPA was enacted (the MIFPA extended the ICWA's voluntary termination proceedings to include a voluntary consent to a petition for guardianship under MCL 700.5204 and .5205 and a parent's or Indian custodian's right to withdraw that consent), the cited aspect of the court's holding remains applicable. See §13.62 for a discussion of the right of a parent or Indian custodian to withdraw consent to the voluntary placement of an Indian child at any time.

Venue and stay. The custody action must be brought in the family division of the circuit court for the county in which the guardianship was established. Filing the custody action stays the guardianship action until the disposal of the custody action. MCL 722.26b(4).

VIII. Guardianships and Termination of Parental Rights

§12.29 Under MCL 712A.19b, the parental rights to a child who is in a guardian's custody may be terminated. The grounds specified include

- if the parent has substantially failed, without good cause, to comply with a limited guardianship placement plan (*see* MCL 700.5207, .5209) to the extent that the noncompliance has disrupted the parent-child relationship, and

- if the parent, having the ability to do so, has failed to provide support for the minor for two years and, having the ability to visit, contact, or communicate with the child, has failed to do so without good cause for two years.

MCL 712A.19b(3)(e), (f)

The Americans with Disabilities Act, 42 USC 12101 et seq., is not available as a defense in parental rights termination proceedings because the proceedings are not "services, programs, or activities" covered by the act. 42 USC 12131(2), 12132; *Family Indep Agency v Terry (In re Terry)*, 240 Mich App 14, 24, 610 NW2d 563 (2000).

Practice Tip

- *Compliance with the terms of the limited guardianship placement plan is a complete defense by a parent when the limited guardian petitions for custody. That defense is not available if it is a full guardianship.*

IX. Conservators for Minors and Protective Proceedings

A. In General

§12.30 EPIC defines a *protective proceeding* as a proceeding under the provisions of MCL 700.5401 et seq. MCL 700.1106(z), *amended by* 2024 PA 1 (eff. Feb 21, 2024). The standard for the appointment of a conservator or the entry of a protective order for a minor is that the minor owns money or property that requires management or protection that cannot otherwise be provided, has business affairs that may be jeopardized by minority, or needs funds for support and education and that protection is necessary or desirable to obtain or retain these funds. MCL 700.5401(2). The court may appoint a conservator or make another protective order for an adult if it determines that the person "is unable to manage property and business affairs effectively … [and] has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money." MCL 700.5401(3). However, the court must carefully consider whether there are less-intrusive alternatives than a conservatorship that will protect an individual's property and autonomy. *Bittner-Korbus v Bittner (In re Bittner)*, 312 Mich App 227, 879 NW2d 269 (2015) (citing MCL 700.5407(3), .5408, .5419(1)).

In *Bittner-Korbus,* the court of appeals reversed the probate court's orders establishing a conservatorship and appointing a conservator. The alleged incapacitated person was found to have cognitive impairments giving rise to problems in regularly being able to initiate and complete tasks necessary to manage her financial affairs. However, the individual also made informal arrangements with her daughter to make sure her bills were paid on time, lived within her means, and her household was effectively managed. Accordingly, the court of appeals found that there was not clear and convincing evidence establishing the individual's inability to manage her property and business affairs. The court of appeals also held that the probate court erred in failing to make findings regarding whether the individ-

ual's property "'will be wasted or dissipated unless proper management is provided.'" 312 Mich App at 240 (quoting MCL 700.5401(3)(b)).

B. Appointment Procedures

§12.31 Who may petition. A petition for the appointment of a conservator may be brought under MCL 700.5404(1) by

1. the individual to be protected (including the minor, if at least age 14);
2. any person interested in the minor's estate, affairs, or welfare including the parent, guardian, or custodian; or
3. a person who would be adversely affected by the ineffective management of the property or affairs of the individual to be protected.

The petition. Under MCL 700.5404(2), the petition must include

1. the interest of the petitioner;
2. the name, age, residence, and address of the individual to be protected;
3. the names and addresses of the guardian and the nearest relative;
4. an estimate of the value of the property involved; and
5. the reason the appointment of a conservator is necessary.

If there is a preferred candidate for appointment, the petition must include that person's name and address and the basis for that person's priority for appointment.

Venue. Venue for conservatorship and other protective proceedings is (1) the place in this state where the individual to be protected resides, whether or not a guardian is appointed somewhere else, or (2) if the individual to be protected does not reside in this state, any place where the individual has property. MCL 700.5403.

Venue can be changed to another county on a motion by an interested person or on the court's own initiative for the convenience of the parties and witnesses, for the convenience of the attorneys, or if an impartial trial cannot be held in the county where the action is pending. MCR 5.128(A). Protective proceedings on a minor's behalf are not auxiliary to probate proceedings of a deceased parent, even though the venue may be the same. *In re Estate of Valentino*, 128 Mich App 87, 339 NW2d 698 (1983).

Notice and service. On receipt of a petition based on minority, the court must set a date for a hearing. MCL 700.5406(1).

Notice must be given to

- the minor if 14 years of age or older;
- the minor's presumptive heirs;
- if known, a person named as attorney in fact under a durable power of attorney;
- the nominated conservator;

- a government agency paying benefits to the minor or before which an application for benefits is pending; and
- a guardian or a conservator appointed in another state to manage the protected person's finances if known by the petitioner.

MCR 5.125(C)(25).

Additional special persons who may need to be notified are the following:

- if the minor has no presumptive heirs, the Attorney General
- if an interested person is a resident and citizen of a foreign country, the consul of the foreign nation
- if the minor is receiving Veterans Administration benefits, the Administrator of Veterans' Affairs
- if the minor is an *Indian child* under the MIFPA, the minor's tribe, the Indian custodian, and, if the Indian child's parent or Indian custodian or tribe is unknown, the Secretary of the Interior (See §§13.35–13.39 for the specific notice requirements for proceedings governed by the MIFPA.)
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary
- any person who has filed a demand for notice under MCL 700.5104

MCR 5.125(A). MCL 700.5104 permits an interested person who desires to be notified before an order is made in a guardianship or conservatorship proceeding to file a demand for notice. If a guardianship or protective proceeding is not pending when the demand for notice is filed, the person must pay a filing fee equal to, but separate from, the fee required to commence a guardianship or protective proceeding. The filing fee must be waived if the person shows that they are receiving public assistance, are represented by a legal services program, or are indigent. MCR 2.002. Courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process. MCR 2.002(L).

Notice must be given at least seven days before the hearing for personal service and 14 days for service by mail. MCR 5.108(A), (B). If the minor is 14 or older, the minor must be served personally. MCR 5.402(C). The court may order that additional persons be served in the interest of justice. MCR 5.125(E). The father of a child born out of wedlock is not an interested person to protective proceedings on behalf of a minor unless paternity has been established in a manner provided by law. MCR 5.125(B)(4).

A proof of service form (PC 564) or a waiver and consent form (PC 561) for all interested parties must be filed at or before the hearing. MCR 5.104. Waiver by the individual to be protected is not effective unless the individual attends the hearing or the waiver is confirmed in an interview with a visitor. MCL 700.5311(2), .5405.

Appointment of guardian ad litem. The court may appoint a guardian ad litem to represent a minor in any matter pending before the court. Upon the minor's application or in the court's discretion, the appointment may be revoked and another guardian ad litem appointed. Where not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons of interest. MCL 700.1403(d). The court must state the purpose of the appointment in the appointment order, which may be entered with or without notice. MCR 5.121(A)(1). A guardian ad litem, a physician, a mental health professional, or a visitor appointed in a protective proceeding must consider and report to the court whether there is an appropriate alternative to conservatorship, and, if not, the desirability of limiting the duration and scope of the conservator's authority. MCL 700.5305, .5406.

Appointment of counsel. After the petition is filed or at any time during the proceedings for the appointment of a conservator, the court may appoint an attorney to represent the minor. If the minor is 14 years old or older, consideration must be given to the minor's choice. The appointed attorney has the powers and duties of a guardian ad litem. MCL 700.5406(1).

Evidence. The Michigan Rules of Evidence apply in protective proceedings. MRE 1101. However, oral and written reports of a guardian ad litem or visitor may be received by the court and may be relied on to the extent of their probative value, even though such evidence may not be admissible under the Michigan Rules of Evidence. MCR 5.121(D)(1). Any interested person has the opportunity to examine and controvert reports received into evidence. MCR 5.121(D)(2)(a). The subject of a report received under MCR 5.121(D)(1) may cross-examine the individual making the report. MCR 5.121(D)(2)(b). Other interested persons may cross-examine the individual making the report if the individual is "reasonably available." MCR 5.121(D)(2)(c).

The conservator. The court may appoint an individual, or a professional conservator described in MCL 700.5106, to serve as conservator. These are the priorities for such an appointment:

a. A conservator or guardian of property appointed or recognized by the court in another jurisdiction where the protected individual resides.

b. The nominee of a minor 14 years old or older who has sufficient mental capacity to make an intelligent choice.

c. The protected individual's spouse.

d. An adult child of the protected individual.

e. The protected individual's parent or the person nominated in the parent's will.

f. A relative with whom the protected individual has resided for more than six months before the filing of the petition.

g. Someone nominated by the person who is caring for or paying benefits to the protected individual.

h. Anyone else that the court determines is suitable and qualified if none of the above are suitable or willing to serve.

MCL 700.5409(1). To depart from the statutory provisions and appoint a public conservator under MCL 700.5409(1)(h), the court must find by a preponderance of the evidence that none of the persons listed in MCL 700.5409(1)(a)–(g) are suitable and willing to serve. *In re Guardianship of Gerstler*, 324 Mich App 494, 922 NW2d 168 (2018) (probate court erred appointing professional conservator when ward's adult daughter had priority to serve and there was no evidence to suggest that she was incompetent, unsuitable, and unwilling to serve). The already-appointed conservator or guardian, the spouse, an adult child, a parent, or a relative may nominate a person to serve in their stead; the minor's nominee may not. MCL 700.5409(2).

The court must show good cause to pass over a priority. *In re Estate of Williams*, 133 Mich App 1, 349 NW2d 247 (1984) (adult daughter showed good cause for removal of county public guardian in favor of her nominee). Once a conservator has been appointed, a petition by a person with superior priority does not mandate or authorize removal of a previously appointed conservator in favor of the person with greater priority. *In re Estate of Bontea*, 137 Mich App 374, 358 NW2d 14 (1984) (existing conservator's priority recognized).

Bond. The court may require the conservator to furnish a bond. MCL 700.5410(1). The court must require a conservator's bond if the liquid assets in the conservator's control exceed the limit for administering a decedent's estate under MCL 700.3982, as adjusted for inflation for the year in which the conservator is appointed, unless one or more of the following apply:

> (a) The estate contains no property readily convertible to cash and the cash is in a restricted account with a financial institution.
>
> (b) The conservator has been granted trust powers under section 4401 of the banking code of 1999, 1999 PA 276, MCL 487.14401.
>
> (c) The court determines that requiring a bond would impose a financial hardship on the estate.
>
> (d) The court states on the record the reasons why a bond is not necessary.

MCL 700.5410(1).

If a bond is required, it can be set at the capital value of the estate plus one year's estimated income minus securities held in escrow and the value of land held without power of sale. MCL 700.5410(2); *see* MCR 5.411.

C. Powers and Duties of Conservators

§12.32 On qualification, the conservator will be issued letters of conservatorship. MCL 700.5420(1); MCR 5.202(A), .402(D). At the time of the appointment or later, the court has the authority to confer on the conservator any power the court itself may exercise or to limit any of the conservator's powers. If the court limits the powers conferred on the conservator by MCL 700.5423–.5426, the limitations must appear conspicuously on the letters of conservatorship. MCL 700.5427; MCR 5.202(B).

Unless ordered by the court, letters of conservatorship will have no expiration date. Any restrictions imposed by the court must appear on the letters of authority. MCR 5.202(A), (B).

Conservators' powers and duties are detailed in MCL 700.5423–.5426. A conservator may distribute income and principal from the ward's estate for the support, education, care, or general benefit of the protected individual and that individual's dependents after considering the recommendations of the parent or guardian. MCL 700.5425, .5426. The court must approve all sales, mortgages, and liens of real property by a conservator. MCL 700.5423(3).

Under "MCR 2.201(B)(1), a conservator 'may sue in his or her own name without joining the party for whose benefit the action is brought.'" *Bittner-Korbus v Bittner (In re Bittner)*, 312 Mich App 227, 879 NW2d 269 (2015).

Practice Tips

- *Be specific in setting out the powers of a conservator. For example, if the conservator is not to distribute funds, the appointment order can specify that the funds are to be placed in a restricted account and that withdrawals are not to be made without a prior court order. See exhibit 12.1 for a sample court policy regarding the expenditure of funds. The letters of conservatorship would state that prior approval of the court is required before any expenditure. To further protect the estate, proof of the restricted account could also be required. See SCAO form PC 669 (Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor)) and form 12.1 for an agreement that the conservator's attorney files with the court. Proof of the establishment of a restricted account should be required to be filed with the court within a specified period of time.*
- *It is good practice for judges approving expenditures out of a minor's restricted account to require that receipts be filed with the court documenting the expenditures within a specified period of time.*

Under MCL 700.5429, the conservator may pay just claims against the ward from the estate. These actions may be taken without court authorization or confirmation.

The conservator must notify the court of any change in the conservator's address within seven days. MCR 5.205.

Reports. Under MCL 700.5417, a complete inventory of the estate must be filed with the court within 56 days of the appointment along with an affirmation of completeness as far as information permits. *See also* MCR 5.409(B). Copies must be provided to a protected minor who is 14 years old or older and to interested persons as specified in MCR 5.125(C)(28).

The conservator must also report on the condition of the estate as directed by the court, MCL 700.5418. The conservator must provide a copy of the report to a protected minor who is 14 years old or older and to other interested persons. MCL 700.5418(2).

Unless otherwise ordered by the court, no accounting is required in a minor conservatorship where the assets are restricted or in a conservatorship where no

assets have been received by the conservator. If the assets are ordered to be placed in a restricted account, proof of the restricted account must be filed with the court within 28 days of the conservator's qualification or as otherwise ordered by the court. The conservator must file with the court an annual verification of funds on deposit with a copy of the corresponding financial institution statement attached. MCR 5.409(C)(4). A copy of the corresponding financial institution statement must be presented to the court or a verification of funds on deposit must be filed with the court, either of which must reflect the value of all liquid assets held by a financial institution dated within 30 days after the end of the accounting period, unless waived by the court for good cause. MCR 5.409(C)(5).

D. Termination or Removal

§12.33 A petition to terminate the conservatorship may be brought by any interested person, including the protected individual or the conservator. The petitioner is entitled to the same rights as in the initial proceeding. The authority of the conservator terminates automatically when the protected individual reaches the age of majority. MCL 700.5426(2), .5431. It can also be terminated by order of the court if it becomes no longer necessary. The court may remove a conservator for good cause, after a full hearing, or accept the resignation. MCL 700.5414. When immediate action is required, the court can appoint a special fiduciary pursuant to MCR 5.204. After the conservator's removal, resignation, or death, the court may appoint a successor conservator. MCL 700.5414.

Form 12.1
Agreement Regarding Use of Restricted Account

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

Estate of *[name]*, Deceased

Case No. *[number]-[case-type code]*
Judge *[name]*

_____/

AGREEMENT REGARDING USE OF RESTRICTED ACCOUNT

I, the undersigned, being the attorney for the conservator of the above-captioned estate, agree that in consideration of the Court allowing the use of a nominal bond rather than a corporate surety bond, I, or someone from the firm on my behalf, will do the following:

1. Accompany the conservator to the bank or other financial institution to see that the funds are deposited in a conservatorship account.
2. See that the Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor) is properly filled out and executed by the bank and the conservator.
3. See that the properly executed Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor) is delivered or mailed to the Court by *[date]*.

AMOUNT: $*[amount]*

[Signature line]
[Typed name of attorney]
Attorney for Conservator

FAILURE TO TIMELY FILE THE AFFIDAVIT REGARDING PROOF OF RESTRICTED ACCOUNT WILL RESULT IN THE SUSPENSION OF THE FIDUCIARY.

Exhibit 12.1
Court Policy Regarding Expenditure of Funds in Conservatorships of Minors

The general principle that this Court will follow is that it is this Court's responsibility to preserve the child's money until the minor attains age 18 or to only spend money for basic items for the child that the child could not otherwise obtain through the parents. This policy will apply to petitions for authority for the use of monies in restricted bank accounts and the annual accounting of conservatorships where unrestricted monies are involved.

In the former case, the Court will grant authority to withdraw restricted funds only in conformance with this written policy; and in the latter case, it will be the conservator's responsibility to only spend money in accordance with this policy.

1. No expenditure will be allowed unless it directly benefits the child.
2. No expenditure will be allowed that benefits the child if the expenditure relieves a parental obligation that could otherwise be met. Exceptions to this rule may include such things as unusual medical expenses, educational expenses, and other unusual circumstances that may create an exceptional burden for the family. Before an expenditure is allowed, evidence must be presented that the parent cannot otherwise provide the benefit. Receipts for expenditures allowed will be required within 10 days of an order allowing withdrawal of money from a restricted account.
3. Expenditures regarding maintenance of the principal in a child's account will be allowed ex parte. An example of such a situation would be taxes payable on the interest income from such principal.
4. No money will be released to the Department of Health and Human Services or at its request to relieve a parental obligation, as such an obligation is the parent's and not the child's.

13
Complying with Indian Child Welfare Statutes

13.3 Information Required in Notices of Child Custody Proceedings (Indian Children)

Summary of the Indian Child Welfare Statutes

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Overview of the Indian child welfare statutes. §§13.1–13.6.

The Indian Child Welfare Act (ICWA) provides minimum federal standards for the removal of Indian children from their families, with the intent of protecting the stability and security of Indian tribes. The Michigan Indian Family Preservation Act (MIFPA) sets out requirements and procedures to ensure compliance with the ICWA and has a broader scope than the ICWA.

The court's failure to comply with the ICWA and the MIFPA when applicable can lead to the invalidation of the court's order terminating a parent's parental rights, placing a child in a voluntary or an involuntary guardianship, or placing a child in foster care. If the court has reason to believe, during a custody proceeding, that an Indian child has been improperly removed or retained, the court must stay the proceedings until further determination is made.

The Department of the Interior adopted federal rules to implement the federal statute. *See* 25 CFR Part 23. The Bureau of Indian Affairs (BIA) issued guidelines to assist state courts in interpreting and applying the ICWA and the federal rules, which, while not binding, are persuasive.

Do the Indian child welfare statutes apply? §§13.7–13.19.

The ICWA and the MIFPA apply when

- the child before the court is an *Indian child* and
- the state court proceeding is a *child custody proceeding*.

See §13.7.

Determining whether the child is an *Indian child*. §§13.8–13.14.

- Under the ICWA, an *Indian child* is an unmarried minor who is either a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. The MIFPA and the court rules expand this definition to include *any* unmarried minor who is eligible for tribal membership. See §13.8.
- The court and the Department of Health and Human Services (DHHS) have affirmative duties to investigate whether a child is an Indian child. See §13.9.
- Only tribes recognized by the federal government are eligible for protection under the ICWA and the MIFPA. See §13.10.

- The tribe determines its members. If a child is not a member of a tribe but is eligible for membership in more than one tribe, the court must determine the tribe with which the child has the most significant contacts and designate that tribe as the Indian child's tribe. See §§13.11–13.13.

Is the proceeding a *child custody proceeding?* §§13.15–13.19.

A *child custody proceeding* is one that involves the removal of the child from the parent or Indian custodian, whether temporarily or permanently. Child custody proceedings do not involve divorce proceedings if custody of the Indian child will be awarded to one of the parents. See §13.15. The following proceedings are defined as child custody proceedings:

- foster care placement (including guardianships) (see §13.16)
- termination of parental rights (see §13.17)
- adoptive and preadoptive placements (see §13.18)
- juvenile delinquency proceedings involving a status offense (see §13.19)

Jurisdiction. §§13.20–13.34.

- A tribe has exclusive jurisdiction over an Indian child who is domiciled in, or a resident of, the tribe's reservation or who is a ward of the tribal court (regardless of residence or domicile). See §13.20.
- If the tribe has exclusive jurisdiction over the Indian child but the child is temporarily located off the reservation and at risk of imminent physical damage or harm, the child is subject to the state's emergency removal from the child's parent or Indian custodian. See §§13.21–13.28. However, the emergency jurisdiction ends when it is no longer necessary to prevent imminent physical damage or harm to the child. MCL 712B.7(2). The emergency removal and placement may not last longer than 30 days unless the court makes the following determinations: (1) restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm; (2) it has been unable to transfer the case to the proper tribe; and (3) it has not been possible to initiate a child custody proceeding subject to the ICWA's notice requirements. 25 CFR 23.113(e).
    - The emergency removal petition must describe the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and any documentation, including attempts, to identify the child's tribe. See §13.22.
    - If a court knows or has reason to know that an Indian child is involved, the petitioner must send notice of the pending proceedings and right to intervene to the Indian child's parents, Indian custodian, if any, and tribe by registered mail, return receipt requested. See §13.23.
    - The hearing on the emergency removal petition must generally be held within 14 days of the child's removal from the parent or Indian custodian. See §13.24.

- For the child to remain removed from the parent or Indian custodian, at the removal hearing there must be clear and convincing evidence, including the testimony of at least one expert witness with knowledge of the child-rearing practices of the Indian child's tribe, that (1) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful and (2) continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. See §13.25.
- Unless modified by the tribe and in the absence of good cause to the contrary, the child must be placed according to the following descending order of preference:
  - a member of the Indian child's extended family
  - a foster home licensed, approved, or specified by the Indian child's tribe
  - an Indian foster home licensed or approved by the DHHS
  - an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs

  See §13.26.
- If a child is improperly removed from the parent or custodian, the court must order the child's return unless returning the child to the parent or custodian would subject the child to a substantial and immediate danger or threat of such danger. See §13.27.
- The court must terminate its jurisdiction over the emergency removal if the tribe exercises its exclusive jurisdiction or if the child is no longer in danger of imminent physical damage or harm. If the court's jurisdiction is not dismissed, the petitioner must promptly initiate a state court foster care proceeding. See §13.28.

- The tribe has concurrent jurisdiction with the state over child custody proceedings involving an Indian child who is neither a resident of the tribe's reservation nor the tribe's ward. See §13.29.

  If the tribe has concurrent jurisdiction over the state proceeding, the tribe has the right to
  - intervene or participate at any point in the state court proceedings (see §13.30),
  - request the transfer of the case to the tribal court unless a parent objects to the transfer or the state court finds good cause to deny the transfer (see §§13.31–13.33), or
  - decline a transfer (see §13.34).

Notice of child custody proceeding. §§13.35–13.39.

Parties entitled to notice. §§13.35–13.36.

If a court knows or has reason to know that a custody proceeding involves an Indian child, the petitioner must notify the Indian child's parent, Indian custodian, and tribe.

Notice must identify the pending proceeding and inform the parties of their right to intervene and participate.

If the parent, custodian, or tribe cannot be identified or located, notice must be sent to the Secretary of the Interior, which will have 15 days from the receipt of notice to provide notice to the required parties or notify the court otherwise.

Manner of delivery. §13.37.

Notice must be personally delivered or sent by registered mail with return receipt requested and delivery restricted to the addressee. After the parties are notified of the pending proceedings, subsequent notices of hearings should be delivered in the same manner as provided by the court rule for the particular proceeding.

Commencement of proceedings. §13.38.

Proceedings cannot commence until 10 days after the parties receive notice unless they request up to an additional 20 days to prepare for the proceeding.

Record of notice. §13.39.

The court should keep original copies of all notices, as well as return receipts, in its file.

Involuntary foster care placement. §§13.40–13.48.

The petition. §13.40.

The abuse or neglect petition seeking to place an Indian child in temporary foster care placement must indicate whether the child is a member of or eligible for membership in an Indian tribe and the identity of the tribe, if applicable.

If an Indian child is involved, the petition must specifically describe the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and any documentation, including attempts, to identify the child's tribe.

Evidence required for removal. §§13.41–13.43.

An Indian child may not be removed from the custody of the parent or Indian custodian unless there is clear and convincing evidence that

- active efforts (which require active engagement with the Indian child, parents, tribe, extended family, and caregivers) have been made to provide remedial services and rehabilitative programs (that are culturally appropriate) designed to prevent the breakup of the Indian family;
- these efforts have proved unsuccessful; and
- continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

This evidence must be supported by the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe.

Placement of the child. §§13.44–13.48.

- An Indian child must be placed in the least restrictive setting that most approximates a family and in which the child's special needs, if any, may be met and within reasonable proximity to the home, taking into account any special needs of the child. See §13.44.
- Placement must comply with the following statutory descending order of preference:
  - a member of the Indian child's extended family
  - a foster home licensed, approved, or specified by the Indian child's tribe
  - an Indian foster home licensed or approved by the DHHS
  - an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

  See §13.45.
- The statutory priority placement preference can be modified by the tribe or if the court finds good cause not to follow the preference order. See §§13.46–13.47.
- The court or the DHHS must maintain a record of the efforts to comply with the statutory placement preference. See §13.48.

Juvenile delinquency proceedings involving status offenses. §§13.49–13.50.

Status offenses are actions that are not crimes when committed by an adult, such as truancy and incorrigibility. See §13.49 for the definition of *status offenses.*

If the juvenile will be removed from the custody of the parents or Indian custodian, the ICWA and the MIFPA apply, and the court should apply the standards and comply with the procedures for an involuntary foster care placement.

Involuntary termination of parental rights. §§13.51–13.55.

- Evidence must comply with federal and state standards for termination of parental rights. See §13.51.
- Under the ICWA and the MIFPA, termination requires the following:
  - clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful
  - evidence beyond a reasonable doubt, including the testimony of a qualified expert witness (as described in the MIFPA), that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (see §§13.52–13.54)
- Termination also requires that the state statutory grounds for termination are satisfied and that termination is in the child's best interests. See §13.55.

Adoptive placement following involuntary termination. §§13.56–13.62.

- The adoptive placement of Indian children must generally be in the following descending statutory preference priority:
  - a member of the child's extended family
  - other members of the Indian child's tribe
  - other Indian families

  See §13.56.
- The statutory preference may be modified by the tribe or if the court finds good reason not to comply with the placement priority. See §§13.57–13.58.
- The court or the DHHS must maintain a record of the efforts to comply with the statutory placement preference. See §13.59.
- The court must send its final adoptive order to the Secretary of the Interior. See §13.60.
- After turning 18 years old, the adoptee is entitled to information concerning the tribal affiliation from the court and, after turning 19 years old, from the Secretary of the Interior. See §§13.61–13.62.

Guardianship placement following involuntary proceedings. §13.63.

If the petition for guardianship of a minor involves an Indian child, but both parents do not intend to execute a consent as is required under MCL 712B.13, the guardianship is involuntary. MCR 5.404(A)(3). An involuntary guardianship of an Indian child is governed by MCL 712B.15, .25, and MCR 5.404(C).

Procedures for voluntary proceedings. §§13.64–13.66.

If both parents or Indian custodian intend to execute a consent for guardianship over an Indian child under MCL 712B.13 and MCR 5.404(B), the guardianship is voluntary. MCR 5.404(A)(3).

- For a consent to be valid,
  - it must be executed before the court;
  - the judge must certify that they fully explained the terms and consequences of the consent, that the explanation was in the language of the parent or Indian custodian, and that the parent fully understood the terms and consequences; and
  - more than 10 days have passed since the Indian child's birth.

  See §13.64.
- If the court finds that the consent was obtained through fraud or duress, the court must vacate the adoption order and return the child to the parent. See §13.65.
- The petitioner must notify the Indian child's parent, Indian custodian, and tribe (or, if unable to identify these parties, the Secretary of the Interior) of the pro-

ceeding and the right to intervene by registered mail, return receipt requested. See §13.66.

Consent to adoptive placement. §§13.67–13.73.

- In the direct placement adoption of an Indian child, a parent must execute a consent to adopt under MCL 710.43 and .44 along with a consent for placement of the Indian child under MCL 712B.13(1) and a verified statement in accordance with MCL 712B.13(6). See §§13.67–13.68.
- Where the Indian child is being released for purposes of adoption, the child must generally be placed in the following descending statutory preference priority:
  - a member of the child's extended family
  - a member of the Indian child's tribe
  - an Indian family

  See §13.69.
- The statutory preference may be modified by the tribe or if the court finds good reason not to comply with the only placement priority. See §§13.70–13.71.
- The court or the DHHS must maintain a record of the efforts to comply with the statutory placement preference. See §13.72.
- A parent who executes a consent under the MIFPA may withdraw consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the child. See §13.73.

Consent to a guardianship petition. §13.74.

The parents of an Indian child have the right to voluntarily place the child with a guardian of their choice.

Consent to voluntary termination of parental rights. §§13.75–13.80.

- If a parent of an Indian child elects to voluntarily terminate parental rights and executes a release, the release is subject to the MIFPA. The court must also find that culturally appropriate services were offered to the Indian family. See §13.75.
- Where the Indian child is being released for purposes of adoption, the child must generally be placed in the following descending statutory preference priority:
  - a member of the child's extended family
  - other members of the Indian child's tribe
  - other Indian families

  See §13.76.
- The statutory preference may be modified by the tribe or if the court finds good reason not to comply with the placement priority. See §§13.77–13.78.
- The court or the DHHS must maintain a record of the efforts to comply with the statutory placement preference. See §13.79.

- A parent may withdraw consent at any time before entry of an order terminating parental rights. See §13.80.

Notice to parent or custodian of a change in placement. §§13.81–13.83.

- If the adoption is set aside or vacated, or if the adoptive parents' parental rights are terminated, the court must notify the biological parents, or the prior Indian custodian, who have the right to petition for return of the child to their care. See §§13.81–13.82.
- A change in an Indian child's foster care placement must be in accordance with the statutory placement preferences unless the child is being returned to the parents' or Indian custodian's custody. See §13.83.

Final adoptive order and tribal affiliation information. §§13.84–13.86.

I. Overview of the Indian Child Welfare Statutes

A. Purpose

§13.1 Child custody proceedings involving Indian children are governed by federal and state statutes. The ICWA, 25 USC 1901–1963, provides mandatory minimum federal standards for such actions. 25 USC 1902. Several of the ICWA's procedural requirements are less stringent than statutory and court rule requirements in Michigan. When applicable state law contains standards that offer more protection to parents and Indian custodians than the ICWA, a court must apply those higher standards (these higher standards are noted in this chapter when relevant). *See* 25 USC 1921. The ICWA was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 USC 1902. It is also intended to protect the interests of the tribes themselves in long-term tribal survival. *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989).

The U.S. Supreme Court held that Congress had the authority to create the ICWA under US Const art I, which granted Congress the authority to regulate commerce with Indian tribes. *Haaland v Brackeen*, 599 US 255 (2023). This power extends to Indian affairs. *Id.* The Supreme Court ruled the ICWA does not violate the Tenth Amendment. *Id.* The "active efforts" and "diligent search" requirements of the ICWA apply equally to state and private actors. *Id.* The ICWA only imposes ancillary recordkeeping requirements on state courts.

The Department of the Interior created ICWA regulations to implement the federal statute. *See* 25 CFR Part 23. While not binding, the Bureau of Indian Affairs (BIA) also issued guidelines (BIA Guidelines) to assist state courts in interpreting and applying the ICWA and the federal regulations.

The MIFPA, MCL 712B.1 et seq., sets out requirements and procedures to ensure compliance with the ICWA. Although the MIFPA mirrors the ICWA in many respects, it is slightly broader in scope. The MIFPA is not preempted by the ICWA under the Supremacy Clause, US Const art VI, cl 2. *In re KMN*, 309 Mich App 274, 870 NW2d 75 (2015) (rejecting adoptive parents' claim that ICWA preempted MIFPA where MIFPA provided the "trial courts [with] less discretion to deviate from a placement with a member of the [Indian] child's extended family, a member of the Indian child's tribe, or an Indian family"). See §13.58 for a discussion on the court's ability to change preference for good cause.

B. Consequences of Noncompliance

1. Invalidation of State Court Action for ICWA Violation

§13.2 A petition asking the court to invalidate a placement or termination proceeding because the court's actions violated 25 USC 1911–1913 may be filed by "[a]ny Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe." 25 USC 1914; *see In re Kreft*, 148 Mich App 682, 687–689, 384 NW2d 843 (1986) (providing parent with standing to challenge order independent of tribe's

participation even though 25 USC 1914 states that petition may be brought by child, parent or Indian custodian, *and* tribe).

Violation of the notice provisions of 25 USC 1912(a) results in the conditional reversal of the trial court's order and remand for resolution of the notice issue. *In re Morris*, 491 Mich 81, 115–122, 815 NW2d 62 (2012). However, "[a] remand to ensure proper notice under [the] ICWA that does not lead to any evidence that [the] ICWA applies does not unravel a best-interest determination." *In re Morris (After Remand)*, 300 Mich App 95, 107–108, 832 NW2d 419 (2013); *see also In re Johnson*, 305 Mich App 328, 852 NW2d 224 (2014) (affirming trial court's best interests determination but conditionally reversing order terminating parental rights because record unclear about whether parental claims of Native American ancestry were investigated).

Conditional reversal is also appropriate in cases where the trial court failed to determine, based on qualified expert witness testimony, that returning the Indian child to the custody of the parent or Indian custodian would result in serious emotional or physical damage. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014). Automatic reversal is generally disfavored and the court is not required to return the child if that would put the child at risk of immediate danger. *Id.; see also Empson-Laviolette v Crago*, 280 Mich App 620, 632–633, 760 NW2d 793 (2008) (ICWA preempted stay imposed under MCL 722.26b(4) in guardianship proceeding because stay "infringed on the minimum protections [the child's mother] was afforded under §1913(b)" by preventing her from withdrawing her consent to guardianship at any time); *In re Morgan*, 140 Mich App 594, 601–604, 364 NW2d 754 (1985) (invalidating trial court's order terminating parental rights where trial court used clear and convincing standard, failed to hear expert witness testimony, and failed to establish that remedial or rehabilitative efforts had failed).

2. Invalidation of State Court Action for MIFPA Violation

§13.3 A petition asking the court to invalidate a placement or a termination proceeding because the court's actions violated MCL 712B.7, .9, .11, .13, .15, .21, .23, .25, .27, or .29 may be filed by "[a]ny Indian child who is the subject of an action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody an Indian child was removed, and the Indian child's tribe." MCL 712B.39; *see also* MCL 712B.15(5); *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014) (conditional reversing trial court because there was no qualified expert witness testimony showing that returning Indian children to parent's custody would result in serious emotional or physical damage).

3. Improper Removal

§13.4 If the court has reason to believe, during a custody proceeding, that an Indian child has been improperly removed or retained, the court must expeditiously determine whether there was improper removal or retention. 25 CFR 23.114(a). If the court determines

> at a hearing that a petitioner in an Indian child custody proceeding has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over the petition and immediately return the child to his or her parent or Indian custodian unless returning the child to his or her parent or Indian custodian would subject the child to a substantial and immediate danger or threat of danger.

25 USC 1920; MCL 712B.19.

4. Appealable by Right

§13.5 Decisions of trial courts are appealable by right once a "final" judgment, order, or decision has been entered. *See, e.g.*, MCR 7.103(A). *But see, e.g.*, MCR 7.103(B)(2). Any order involving an Indian child subject to potential invalidation under MCL 712B.39 or 25 USC 1914 is appealable by right. MCR 3.993(A)(6).

C. Guidance Provided by the Bureau of Indian Affairs

§13.6 The BIA issued guidelines for state courts to assist them in interpreting and applying the ICWA (BIA Guidelines). Although the BIA Guidelines do not have binding legislative effect, courts have indicated that the guidelines, particularly within the context of notice issues, are persuasive. *See, e.g. In re Morris*, 491 Mich 81, 815 NW2d 62 (2012). In June 2016, the Department of the Interior issued federal regulations to promote the consistent application of the ICWA nationwide. *See* 25 CFR Part 23.

II. Do the Indian Child Welfare Statutes Apply to This Case?

A. In General

§13.7 The ICWA and the MIFPA standards apply when two conditions are met:

1. The child before the court is an Indian child.
2. The court proceeding is a child custody proceeding.

In re Johanson, 156 Mich App 608, 612, 402 NW2d 13 (1986) (under ICWA); *see also* 25 USC 1903(1), (4); MCL 712B.3(b), (k).

When the ICWA and the MIFPA apply, the court must consider the statutory terms defined by the acts and under the court rules. 25 USC 1903; MCL 712B.3; MCR 3.002. See exhibit 13.1 for a glossary of defined statutory terms (including *Indian child* and *child custody proceeding*).

A parent cannot waive compliance with the ICWA or a child's status as an Indian child. *In re Morris*, 491 Mich 81, 815 NW2d 62 (2012).

B. Is the Child an Indian Child?

1. Definition of *Indian Child*

§13.8 Under the ICWA, an *Indian child* is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe, or (b) …

eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4).

The MIFPA and the court rules provide a broader definition of *Indian child*. MCL 712B.3(k) and MCR 3.002(12) expand the category of individuals listed in 25 USC 1903(4)(b) to include *any* unmarried person under 18 who is eligible for tribal membership (regardless of whether the child is the biological child of an Indian tribe member). See exhibit 13.1.

Practice Tip

- *MIFPA's definition of Indian child has no bearing on whether an Indian tribe will recognize a child for tribal membership. See §13.12.*

2. Duty to Investigate and Document Efforts to Determine if Proceedings Involve an Indian Child

§13.9 The MIFPA and the Michigan Court Rules impose certain duties on the DHHS, the petitioner, and the court.

The DHHS must "actively seek to determine whether a child at initial contact is an Indian child." MCL 712B.9(3). If the DHHS can ascertain the child's potential or actual tribal membership, it must "exercise due diligence to contact the Indian tribe or tribes in writing so that the tribe may verify membership or eligibility for membership." *Id.* If the DHHS cannot determine the child's potential or actual tribal membership, it must, "at a minimum, contact in writing the tribe or tribes located in the county where the child is located and the [S]ecretary [of the Interior]." *Id.*

The petitioner in a child custody proceeding must "document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe." MCL 712B.9(7); *see also* MCR 5.404(A)(1) (guardianships). This documentation must be provided to "the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian" on request. *Id.* The petitions in a juvenile delinquency proceeding and in a child protective proceeding should indicate whether the juvenile is a member of, or eligible for membership in, an Indian tribe, if known. MCR 3.931(B)(2)(d), .961(B)(5). A guardianship petition must likewise indicate whether the minor is an Indian child or whether that fact is unknown. MCR 5.404(A).

The court must inquire at a preliminary hearing in a protective custody proceeding or at a juvenile delinquency hearing whether the child or either parent is a member of an Indian tribe. MCR 3.935(B)(5), .965(B)(2). Note that the court's obligation under the court rules to inquire regarding a child's Indian status is greater than that imposed under 25 USC 1912(a), but the court must apply the higher standard provided by the Michigan Court Rules. *See* 25 USC 1921. See also §13.1.

If there is any indication that the child may be an Indian child, the court must investigate whether the ICWA applies. *In re IEM*, 233 Mich App 438, 592 NW2d 751 (1999), *overruled on other grounds by In re Morris*, 491 Mich 81, 115–122, 815 NW2d 62 (2012); *see also* 25 CFR 23.107; BIA Guidelines §B.1, §B.2.

The record should indicate that an investigation was performed. *In re Johnson*, 305 Mich App 328, 852 NW2d 224 (2014) (conditionally reversing trial court's order terminating parental rights because record unclear about whether parental claims of Native American ancestry were investigated). Circumstances leading the court, the DHHS, or other party to a child custody proceeding to a reasonable belief that a child may be an Indian child include, but are not limited to, any of the following:

- Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that the child is an Indian child.
- Any public or state-licensed agency involved in child protection services or family support has discovered information that suggests that the child is an Indian child.
- The child who is the subject of the proceeding gives the court reason to believe the child is an Indian child.
- The residence or domicile of the child, the biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
- An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

MCL 712B.9(4). If the court becomes aware of the child's Indian heritage after the proceedings have commenced, it must nonetheless comply with the ICWA. *Family Indep Agency v Conselyea (In re TM)*, 245 Mich App 181, 188, 628 NW2d 570 (2001), *overruled on other grounds by Morris,* 491 Mich at 121; *see also* MCL 712B.25(6).

If the parents indicate they are American Indians but do not identify a specific Indian tribe, the court should stay the proceedings to further investigate. *See IEM,* 233 Mich App at 447 (reasoning that "'it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child'") (quoting *In re MCP*, 153 Vt 275, 289, 571 A2d 627 (1989)).

3. Is the Tribe an Indian Tribe?

§13.10 The court determines whether a tribe is an Indian tribe under the ICWA. *Family Indep Agency v Hosler (In re NEGP)*, 245 Mich App 126, 133–134, 626 NW2d 921 (2001), *overruled on other grounds by In re Morris*, 491 Mich 81, 121, 815 NW2d 62 (2012). To be an *Indian tribe,* a tribe must be recognized by the federal government and eligible for services provided to Indians by the Secretary of the Interior. 25 USC 1903(8); MCL 712B.3(o); MCR 3.002(17); *Family Indep Agency v Fried (In re Fried)*, 266 Mich App 535, 540, 702 NW2d 192 (2005) (under ICWA); *see also* BIA Guidelines §B.4.

See exhibit 13.2 for a list of current federally recognized tribes that reside in Michigan. For a list of current federally recognized tribes within the contiguous 48 states and Alaska, see 81 Fed Reg 5019 (2016). Neither the ICWA nor the MIFPA apply to members of non–federally recognized tribes, Canadian tribes, or state historic tribes. However, the DHHS has expanded the definition of *Indian*

tribe and *Indian child* beyond the statutory requirements, requiring caseworkers to deliver services to members of state historic and Canadian tribes. *See* NAA 205.

4. Is the Child a Member of or Eligible for Membership in an Indian Tribe?

a. *Indian Child's Tribe* Defined

§13.11 The *Indian child's tribe* is defined as follows:

> (1) The Indian Tribe in which an Indian child is a member or eligible for membership; or
>
> (2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in [25 CFR 23.109].

25 CFR 23.2; *see also* 25 USC 1903(5); MCL 712B.3(*l*); MCR 3.002(13).

b. Tribe Determines Membership

§13.12 While the court determines whether a tribe is an Indian tribe, the tribe determines its membership. *Family Indep Agency v Hosler (In re NEGP)*, 245 Mich App 126, 133–134, 626 NW2d 921 (2001), *overruled on other grounds by In re Morris*, 491 Mich 81, 121, 815 NW2d 62 (2012). "A written determination or oral testimony by a person authorized by the Indian tribe to speak on its behalf, regarding a child's membership or eligibility for membership in a tribe, is conclusive as to that tribe." MCL 712B.9(6); *see also In re Shawboose*, 175 Mich App 637, 639, 438 NW2d 272 (1989); 25 CFR 23.108; BIA Guidelines §B.7 (providing that tribe's determination is conclusive).

Tribes set their own eligibility requirements, and there is no specific degree of Indian ancestry that qualifies a child for tribal membership. *In re Elliott*, 218 Mich App 196, 201–206, 554 NW2d 32 (1996). A parent's enrollment in an Indian tribe is not a prerequisite to application of the ICWA. *See In re IEM*, 233 Mich App 438, 445, 592 NW2d 751 (1999), *overruled on other grounds by Morris,* 491 Mich at 115–122.

The child's membership in an Indian tribe after entry of an order terminating parental rights where the court did not know or have reason to know of the child's Indian heritage during the proceedings does not invalidate the order. *In re Johanson*, 156 Mich App 608, 612–614, 402 NW2d 13 (1986).

c. Eligibility for Membership in More Than One Tribe

§13.13 If a child meets the definition of *Indian child* through more than one tribe because the child is either a member of more than one tribe or the child is eligible for membership in more than one tribe, the court must provide the opportunity for the tribes to determine who should be designated. 25 CFR 23.109(c). If the tribes are able to reach an agreement, the agreed-on tribe is designated as the Indian child's tribe. If the tribes are unable to reach an agreement, the state court must establish the Indian child's tribe by determining with which tribe the child has the most significant contacts. *See* 25 USC 1903(5)(b); MCL 712B.3(*l*); MCR 3.002(13)(b); *see also* BIA Guidelines §B.5.

Before making this determination, the agency involved in the proceeding should contact each tribe in which the child is eligible for membership in writing, indicating which other tribes are being considered as the child's tribe. BIA Guidelines §B.5.

In determining with which tribe the child has the most significant contacts, the court may consider the following factors:

- the parents' preference for the child's membership
- length of past domicile or residence on or near the reservation of each tribe
- tribal membership of the custodial parent or Indian custodian
- interest asserted by each tribe in response to notice from the court of the proceedings
- whether there has been a previous adjudication with respect to the child by a court of one of the tribes
- self-identification by the child if the child is of sufficient age and capacity to meaningfully self-identify

25 CFR 23.109; *see also* BIA Guidelines §B.5.

If the child is already a member of a tribe but could also be a member of another tribe, the child's existing tribe should be given deference, unless the tribes agree otherwise. 25 CFR 23.109(b). If the child is not a member of any tribe, the tribes should be given the opportunity to determine which of them should be deemed the child's tribe. 25 CFR 23.109(c); *see also* BIA Guidelines §B.5.

d. Rejection of Existing Indian Family Exception

§13.14 Under the "existing Indian family" exception to the ICWA, the ICWA does not apply if an Indian child has been raised in a family that has not exposed the child to Indian culture. Michigan, along with most jurisdictions, has rejected the "existing Indian family" exception to the ICWA. *In re Elliott*, 218 Mich App 196, 203–206, 554 NW2d 32 (1996) (finding that "an 'existing Indian family' exception would be in direct conflict with the concept of tribal sovereignty and the important policy of improving tribal ties reflected in the ICWA"); *see also* MCL 712B.9 (containing no such "existing Indian family" exception and requiring special notice in any child custody proceeding in which "the court knows or has reason to know that an Indian child is involved"); *Family Indep Agency v Hosler (In re NEGP)*, 245 Mich App 126, 133, 626 NW2d 921 (2001), *overruled on other grounds by In re Morris*, 491 Mich 81, 212, 815 NW2d 62 (2012) ("[t]he lack of enrollment in a Native American tribe is not … conclusive of the issue whether a child qualifies as an 'Indian child'").

C. Is This a Child Custody Proceeding?

1. Definition of *Child Custody Proceeding*

§13.15 The ICWA governs any *child custody proceeding* involving an Indian child, which is defined to include the following:

- foster care placement
- termination of parental rights
- preadoptive placement
- adoptive placement

25 USC 1903(1); 25 CFR 23.2 ((1) under "[c]hild custody proceeding"); MCR 3.002(2); *see also* BIA Guidelines §L.3.

The MIFPA expanded the ICWA's definition of *child custody proceeding* to include juvenile guardianship placements and certain status offense charges against an Indian child. *See* MCL 712B.3(b)(i)(C), (v). The standards of the ICWA and the MIFPA govern the child custody proceedings for an Indian parent and a non-Indian parent when the child at issue is an Indian child. *In re Beers*, 325 Mich App 653, 926 NW2d 832 (2018).

Child custody proceedings do not include divorce proceedings involving an Indian child if custody of the child will be awarded to one of the parents or juvenile delinquency proceedings if placement is based on an act which, if committed by an adult, would be deemed a crime. 25 USC 1903(1); MCR 3.002(2).

An Indian child may be subject to two different child custody proceedings, with different ICWA requirements, at the same time. For instance, in stepparent adoption cases, the involuntary termination of the parent's parental rights would involve compliance with certain requirements under the ICWA, and the adoption by the stepparent would require compliance with other requirements under the ICWA.

2. Foster Care Placement and Guardianships

§13.16 *Foster care placement* is broadly defined to include any action where (1) an Indian child is removed from the parent or Indian custodian; (2) the Indian child is temporarily placed in a foster home, institution, the home of a guardian or conservator, or a juvenile guardianship; (3) the parent or Indian custodian is unable to have the Indian child returned on demand; and (4) the parent's rights are not terminated. MCL 712B.3(b)(i); MCR 3.002(2)(a); *see also* 25 USC 1903(1)(i).

See §§13.40–13.48 for a discussion of the ICWA and the MIFPA requirements in involuntary foster care proceedings (those involving child protective services or juvenile guardianships under MCL 712A.19a or .19c, which the court would order during abuse and neglect cases).

See §13.63 for a discussion of the MIFPA requirements in involuntary guardianships.

See §§13.64–13.66 and 13.74 for a discussion of procedures in voluntary proceedings (including those involving consensual guardianships).

3. Termination of Parental Rights

§13.17 A *termination of parental rights proceeding* under the ICWA and the MIFPA is "any action resulting in the termination of the parent-child relationship." 25 USC 1903(1)(ii); MCL 712B.3(b)(ii); MCR 3.002(2)(b).

Termination proceedings can be involuntary, resulting from child protective proceedings. In Michigan, such proceedings are governed by MCL 712A.1–.32. See §§13.51–13.55 for a discussion of the ICWA and the MIFPA provisions that apply to such proceedings.

A termination of parental rights may also be voluntary, such as in those cases where the biological parents consent to termination for purposes of an adoption. See §§13.75–13.80 for the ICWA and the MIFPA provisions that apply to such proceedings.

4. Adoptions and Preadoptive Placements

§13.18 *Preadoptive placement* is "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement." 25 USC 1903(1)(iii); MCL 712B.3(b)(iii); MCR 3.002(2)(c). *Adoptive placement* is the "permanent placement of an Indian child for adoption, including an action resulting in a final decree of adoption." 25 USC 1903(1)(iv); MCL 712B.3(b)(iv); MCR 3.002(2)(d). Such proceedings in Michigan are governed by MCL 710.21–.70 and 722.951–.960.

See §§13.56–13.62 for the ICWA and the MIFPA provisions applicable to adoptive and preadoptive placements following involuntary termination of parental rights.

See §§13.64–13.73 for a discussion of procedures in voluntary proceedings (including direct placement adoption and release of parental rights for purposes of adoption).

5. Juvenile Delinquency Proceedings Involving a Status Offense

§13.19 The ICWA and the MIFPA apply to any juvenile delinquency proceeding where an Indian child is charged with a status offense (actions that are not crimes when committed by adults, such as truancy and incorrigibility) and to any juvenile delinquency proceeding that may result in the removal of the juvenile from the parent or Indian custodian (even if that removal is to a detention or another facility) or the termination of a parental relationship. *See* 25 CFR 23.2 (for definition of status offense); BIA Guidelines §L.18 (placement, including juvenile detention resulting from status offense, is subject to ICWA as "foster-care placement"); *see also* MCL 712B.3(b)(v) (MIFPA applies if Indian child is charged with status offense in violation of MCL 712A.2(a)(2)–(4) or (d)); MCR 3.903(F) (same).

See §§13.49–13.50 for a discussion of the application of the ICWA and the MIFPA to juvenile delinquency proceedings involving status offenses.

III. Jurisdiction over the Indian Child

A. Tribe's Exclusive Jurisdiction of Child Domiciled on the Reservation or Ward of the Tribe

1. In General

§13.20 The tribe has exclusive jurisdiction over an Indian child who resides on or is domiciled on a reservation or who, regardless of residence or domicile (or subsequent change in the child's residence or domicile), is a ward of the tribe. 25 USC 1911(a); MCL 712B.7(1); MCR 3.002(6).

An infant's residence or domicile is that of its parents when the child is born in wedlock and that of its mother when the child is born out of wedlock. *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 48–53 (1989) (finding that parents, who resided on reservation, could not thwart jurisdiction scheme of ICWA by giving birth off reservation).

The term *ward* is not defined by the ICWA and has not been considered by the Michigan courts. The MIFPA and the court rules define *ward of tribal court* as "a child over whom an Indian tribe exercises authority by official action in tribal court or by the governing body of the tribe." MCL 712B.3(w); MCR 3.002(24). Other jurisdictions have adopted similar definitions of *ward* when interpreting the ICWA. *See In re Parental Placement of MRDB*, 241 Mont 455, 787 P2d 1219 (1990); *In re Guardianship of L*, 291 NW2d 278 (SD 1980).

2. State's Emergency Removal of Indian Child Temporarily off the Reservation

a. In General

§13.21 Although the tribe has exclusive jurisdiction over an Indian child who resides or is domiciled on a reservation even if the child is temporarily located off the reservation, MCR 3.963(B)(1)(a), an Indian child temporarily located off the reservation may be subject to emergency removal from the custody of the parent or Indian custodian when necessary "to prevent imminent physical damage or harm to the child." 25 USC 1922; *see also* MCL 712B.7(2); MCR 3.963(A) (emergency removal without court order), (B)(1) (emergency removal with court order), .974(C)(1) (procedures for removing child at home when a petition was authorized). However, the emergency jurisdiction ends when it is no longer necessary to prevent imminent physical damage or harm to the child. MCL 712B.7(2).

The emergency removal and placement may not last longer than 30 days unless the court makes the following determinations:

1. restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
2. it has been unable to transfer the case to the proper tribe; and
3. it has not been possible to initiate a child custody proceeding subject to the ICWA's notice requirements.

25 CFR 23.113(e); *see also* BIA Guidelines §C.5.

b. Information Required in the Emergency Removal Petition

§13.22 A petition for continued emergency custody filed after removal must describe (1) the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and (2) any documentation, including attempts, to identify the child's tribe. MCR 3.961(B)(6); *see* MCL 712B.3(a); MCR 3.002(1) (defining *active efforts*). See also exhibit 13.1.

An affidavit containing the following information must accompany the petition:

- The name, age, and last known address of the Indian child.
- The name and address of the child's parents and Indian custodians, if any.
- The steps taken to provide notice to the child's parents, Indian custodians, and tribe about the emergency proceeding.
- If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA regional director.
- The residence and domicile of the Indian child.
- If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaskan native village, the name of the tribe affiliated with that reservation or village.
- The tribal affiliation of the child and of the parents and/or Indian custodians.
- A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action.
- If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.
- A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

25 CFR 23.113(d); *see also* BIA Guidelines §C.4.

c. Parties Entitled to Notice

§13.23 If a court "knows or has reason to know that an Indian child is involved," the petitioner must notify the Indian child's parent, Indian custodian, and tribe (or, if the identity or location of the parent or Indian custodian or the identity of the tribe cannot be determined, the Secretary of the Interior) of the pending child custody proceeding and the right to intervene by registered mail, return receipt requested. 25 USC 1912(a); MCL 712B.9(1); MCR 3.920(C)(1); *see also* MCR 3.965(B)(2) (preliminary hearing), .967(C) (removal hearing). The tribal notice requirements are triggered by sufficiently reliable information of virtually any criteria on which tribal membership might be based. *In re Morris*, 491

Mich 81, 815 NW2d 62 (2012) (under ICWA); *see also* MCL 712B.9(4) (outlining notice triggering factors in further detail). Once it is known that a child is possibly of Indian ancestry, notice becomes mandatory regardless of where the court is in its proceedings. *Family Indep Agency v Conselyea (In re TM)*, 245 Mich App 181, 188, 628 NW2d 570 (2001), *overruled on other grounds by Morris,* 491 Mich at 121.

The court must dismiss a child protective proceeding

> if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(6), and the matter is before the state court as a result of emergency removal pursuant to MCL 712B.7(2), and either the tribe notifies the state court that it is exercising its jurisdiction, or the emergency no longer exists.

MCR 3.905(B). At the preliminary hearing, the court must notify the Indian child's parent, Indian custodian, and tribe (or, if the identity or location of the parent or Indian custodian or the identity of the tribe cannot be determined, the Secretary of the Interior) of the emergency removal and the removal hearing by registered mail, return receipt requested. *Id.*

d. Timing of the Emergency Removal Hearing

§13.24 The court must complete the removal hearing within 14 days of the Indian child's emergency removal from a parent or Indian custodian unless the parent, Indian custodian, or tribe requests an additional 20 days for the hearing pursuant to MCL 712B.9(2) or the court adjourns the hearing pursuant to MCR 3.923(G). *See* MCR 3.967(A). However, absent extraordinary circumstances that make additional delay unavoidable, the child may not be held in temporary emergency custody more than 45 days. MCR 3.967(A). This 45-day limit contrasts with the 30-day limit in the federal rules and in the BIA Guidelines. 25 CFR 23.113(e); BIA Guidelines §C.5.

A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been notified, there are no objections by the parties to do so, and at least one qualified expert witness is present to provide testimony. MCR 3.965(B)(2). The court may appoint counsel for the child if it is in the child's best interests. 25 USC 1912(b); MCL 712B.21.

e. Evidence Required at the Emergency Removal Hearing

§13.25 In Michigan, MCR 3.967 governs all removal hearings for Indian children. *See* MCR 3.965(B)(2); *see also* MCL 712B.7(2) (requiring compliance with emergency removal hearing requirements outlined in Michigan Court Rules). For an Indian child in protective custody to remain removed from a parent or an Indian custodian pending further proceedings, there must be clear and convincing evidence that

- active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful, and

- continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

MCL 712B.15(2); *see also* MCR 3.967(D) (witness should be qualified expert witness under MCL 712B.17); *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014) (conditional reversing trial court because there was no qualified expert witness testimony showing that returning Indian children to parent's custody would result in serious emotional or physical damage). Evidence that the parent's or custodian's continued custody is likely to result in damage to the child must include the testimony of at least one qualified expert witness who has knowledge about the child-rearing practices of the Indian child's tribe. MCL 712B.15(2).

Active efforts means "tak[ing] into account the prevailing social and cultural conditions and way of life of the Indian child's tribe." MCL 712B.15(2); MCR 3.967(D); *see also* MCR 3.002. The MIFPA and the court rules provide a detailed definition of *active efforts,* which includes engaging with the Indian child, parents, tribe, extended family, and caregivers and providing *culturally appropriate services.* MCL 712B.3(a); MCR 3.002(1); *see also* MCL 712B.3(d) (defining *culturally appropriate services*); MCR 3.002(4) (defining *culturally appropriate services*). See also exhibit 13.1.

The court must state its findings on the record. *See Department of Human Servs v Finfrock (In re Roe)*, 281 Mich App 88, 764 NW2d 789 (2008). See §§13.41–13.43 for a detailed discussion of the procedure at removal hearings.

f. Placement of Child Subject to Emergency Removal

§13.26 If an Indian child is subject to an emergency removal, the child's placement following the removal must adhere to the ICWA's and the MIFPA's placement preferences for foster care placement. 25 USC 1915; MCL 712B.23. When a child's Indian heritage and tribal affiliation are unknown at the time of the off-reservation emergency removal, the state agency may request an interim foster care placement order while it works to definitively identify the Indian child and give notice to the child's tribe. *Indian Child Welfare Act of 1978: A Court Resource Guide*, Identifying an Indian Child or Indian Tribe; Notification Requirements, at 25, *available at* the SCAO's website.

Unless modified by the tribe or in the absence of good cause to the contrary in accordance with MCL 712B.23(3)–(5), the ICWA and the MIFPA require that an Indian child be placed according to the following descending order of preference:

- a member of the Indian child's extended family
- a foster home licensed, approved, or specified by the Indian child's tribe
- an Indian foster home licensed or approved by the DHHS
- an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs

MCL 712B.23(1), (6); MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(b). An Indian child's extended family is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, includes a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term *relative* as that term is defined in MCL 712A.13a(1)(j). MCL 712B.3(f); MCR 3.002(7); *see also* 25 USC 1903(2).

The tribe may alter the statutory preference. MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c); MCL 712B.23(6). If it does, placement must follow the tribe's priority as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c). The standards applicable to the preference requirements require consideration of the prevailing social and cultural standards of the Indian community with which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 USC 1915(d); MCL 712B.23(8); MCR 3.965(B)(13)(b), .967(F).

The court may elect not to follow the statutory foster care placement priority for "good cause." MCL 712B.23(1); *see also* 25 USC 1915(b); MCR 3.965(B)(13)(b), .967(F). Under the MIFPA, good cause to modify the statutory preference order must be based on one or more of the following considerations:

- The request of the child if the child is of sufficient age.
- The extraordinary physical or emotional needs of the child as established by the testimony of an expert witness.

MCL 712B.23(5). "[G]ood cause is limited to the conditions articulated in MCL 712B.23(5)." *In re KMN*, 309 Mich App 274, 290, 870 NW2d 75 (2015) (biological mother's choice of adoptive placement not good cause under MIFPA).

The MIFPA differs from the federal rules, which provide that additional circumstances also constitute good cause to modify the statutory order of preference. *See* 25 CFR 23.132; BIA Guidelines §H.4. However, good cause should be interpreted in accordance with the MIFPA. *KMN,* 309 Mich App at 292 n5 (discussed in §13.58).

The burden of establishing good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. MCL 712B.23(3); *see also* 25 CFR 23.132(b) (requiring proof by clear and convincing evidence).

Before deviating from the MIFPA's placement preferences for good cause, the court must "ensur[e] that all possible placements required under [MCL 712B.23] have been thoroughly investigated and eliminated." MCL 712B.23(4); *see KMN* (before deviation, trial court required to consider placing child with Indian relatives even though they had not yet filed adoption petition). Efforts to follow the placement preferences "must be provided to the court in writing or stated on the record," and the court must address these efforts "at each hearing until the placement meets the requirements of [MCL 712B.23]." MCL 712B.23(4).

g. Consequence of Improper Emergency Removal

§13.27 If the court determines "at a hearing that a petitioner in an Indian child custody proceeding has improperly removed the child from custody of the parent or Indian custodian," the court must decline jurisdiction over the petition and immediately order the child's return to the parent or custodian unless returning the child to the parent or custodian would subject the child to a substantial and immediate danger or threat of such danger. 25 USC 1920; MCL 712B.19; 25 CFR 23.114; *see* BIA Guidelines §K.1.

h. Termination of Emergency Removal or Placement

§13.28 Any emergency removal or placement of an Indian child under state law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. 25 USC 1922; 25 CFR 23.113; *see also* MCL 712B.7(2); MCR 3.974(C)(1); BIA Guidelines §C.3. In either case, the court must dismiss the matter. MCR 3.905(B); *see also* MCL 712B.29 (pertaining to Indian child taken into custody under MCL 712A.14). If the court does not return the Indian child to the parent and the tribe does not elect to exercise its jurisdiction over the case, the petitioner must promptly initiate a state court proceeding for child custody. 25 USC 1922; *see* 25 CFR 23.113; BIA Guidelines §C.3.

B. Tribe and State's Concurrent Jurisdiction

1. In General

§13.29 The state has concurrent jurisdiction with an Indian tribe over an Indian child who is neither a resident on the tribe's reservation nor a ward of the tribe. *See* 25 USC 1911(b); MCL 712B.7(3).

Where the state and the tribe have concurrent jurisdiction, the tribe has several rights over the state court proceedings, including the right to intervene or participate in the proceedings; the right, along with the parent and any Indian custodian, to request a transfer of the case to the tribe; and the right to decline a transfer of the case to the tribe requested by the parent or an Indian custodian. *See* 25 USC 1911(b)–(c); MCL 712B.7(3)–(7); MCR 3.807(B), .905(C)–(D), 5.402(E).

2. Tribe's Rights to Intervene and Participate in State Case

§13.30 Intervention rights under the MIFPA are broader than under the ICWA. Under the MIFPA, the Indian child's custodian and the Indian child's tribe may intervene at any point in any state court child custody proceeding (including voluntary proceedings) regarding an Indian child. MCL 712B.7(6); *see also* MCR 3.807(B)(3), .905(D), 5.402(E)(4); *cf.* 25 USC 1911(c) (allowing intervention in foster care placement or termination of parental rights proceeding).

Note also that "[o]fficial tribal representatives have the right to participate in any proceeding that is subject to the [ICWA] and [the MIFPA]." MCL 712B.7(7). MCL 712B.3(r) defines an *official tribal representative* as "an individual who is designated by the Indian child's tribe to represent the tribe in a court over-

seeing a child custody proceeding." The representative need not be an attorney. *Id.; see also* MCR 3.002(19). See exhibit 13.1.

3. Transfer of Case to the Tribe

a. Petition for Transfer

§13.31 Under the MIFPA, the court must transfer any child custody proceeding involving an Indian child to the tribe's jurisdiction on the petition of the child's parent, Indian custodian, or tribe, unless a parent objects, there is "good cause" not to transfer the case, or the tribal court declines jurisdiction. MCL 712B.7(3); *see also* MCR 3.807(B)(2)(a), .905(C)(1), 5.402(E)(3)(a). *Compare* 25 USC 1911(b) (allowing parties to petition for transfer of foster care placement or termination of parental rights proceedings).

A petition to transfer may be made at any time. MCR 3.807(B)(2)(d), .905(C)(4), 5.402(E)(3)(d). Requests for transfer may be made orally on the record or in writing. 25 CFR 23.115; *see also* BIA Guidelines §F.2. Because a transfer must be subject to the tribal court's right to decline jurisdiction, the state court must not dismiss the matter until the tribal court has accepted the transfer. MCL 712B.7(3); MCR 3.807(B)(2)(b), .905(C)(2), 5.402(E)(3)(b).

b. Parental Objection to Tribe's Request

§13.32 If either parent objects to the transfer of the proceeding to the tribal court, the state court must deny a transfer petition. 25 USC 1911(b); MCL 712B.7(3); *see also* MCR 3.807(B)(2)(a) (parent's objection to transfer of adoption case), .905(C)(1) (parent's objection to transfer of child protective proceeding and juvenile delinquency proceedings involving status offenses), 5.402(E)(3)(a) (parent's objection to guardianship proceedings).

c. Denial of Transfer for Good Cause

§13.33 The state court may deny a transfer petition for good cause. 25 USC 1911(b); MCL 712B.7(3); MCR 3.905(C)(1). Good cause to retain jurisdiction may arise if there is clear and convincing evidence that there is no tribal court or that

- there is "an undue hardship on the parties or witnesses that will be required to present evidence in the tribal court";
- the undue hardship "stem[s] from the requirement to present evidence in the tribal court"; and
- the tribe is "unable to mitigate the undue hardships caused by the requirement of the parties or witnesses [to] present evidence in the tribal court."

In re Spears, 309 Mich App 658, 671–672, 872 NW2d 852 (2015); *see* MCL 712B.7(5); MCR 3.905(C)(1). In *Spears,* the court held that the MIFPA does not permit a trial court to deny a tribe's request to transfer an Indian child custody proceeding to tribal court based on the timeliness of the request or its effect on the child's best interests because neither constitute good cause under MCL 712B.7(5). The trial court in *Spears* erroneously found good cause to not transfer

the proceedings to the tribal court "based its decision on an undue hardship to the minors without determining whether the minors [or any other parties or witnesses] had any requirement to present evidence in the tribal court." 309 Mich App at 672. The trial court also "failed to explain why the tribal court would be unable to mitigate the anticipated undue hardships." *Id.*

The federal rules also discuss how good cause may be determined. *See* 25 CFR 23.118; *see also* BIA Guidelines §F.5. However, Michigan courts must use the MIFPA's definition of *good cause* instead of the federal rules. *Spears* (noting that MCR 3.905 was amended to refer to MIFPA instead of BIA Guidelines).

The court may not consider the adequacy of the tribe, tribal court, or tribal social services when making its good cause determination. MCL 712B.7(4); MCR 3.807(B)(2)(a), .905(C)(1), 5.402(E)(3)(a). The burden of establishing good cause is on the party opposing the transfer. MCL 712B.7(5); MCR 3.905(C)(1); 25 CFR 23.132(b); *see also* BIA Guidelines §H.4.

4. Tribe's Right to Decline Transfer

§13.34 The tribal court to which a transfer is requested may decline to accept the transfer of a state court proceeding covered by the ICWA. *See* 25 USC 1911(b); MCL 712B.7(3). When the state court receives a request to transfer the case to the tribe, it must notify the tribe in writing. This notification may request a timely response regarding whether the tribal court wishes to decline the transfer. 25 CFR 23.116; *see also* BIA Guidelines §F.3. The state court must not dismiss the case until the transfer has been accepted by the tribal court. MCR 3.905(C)(2).

On a declination of transfer, the court must continue to apply the MIFPA and applicable court rule provisions as they pertain to the Indian child. MCR 3.905(C)(3).

IV. Notice of the Child Custody Proceeding

A. Parties Entitled to Notice

§13.35 In Michigan, if the court "knows or has reason to know" that a child custody proceeding involves an Indian child, the petitioner must send notice of the proceeding to the following parties:

- the Indian child's tribe (Note: Where there is more than one tribe involved, the court must notify all tribes that are potentially the Indian child's tribe or to which the Indian child is eligible for membership so that each tribe may assert its claim to that status. 25 CFR 23.111(b)(1); *see also* BIA Guidelines §B.5. See §§13.12–13.13 for a discussion of the manner in which the Indian child's tribe is determined.)
- the parent
- the Indian custodian, if any

MCL 712B.9(1); MCR 3.802(A)(3) (adoption proceedings), .920(C)(1) (child protective proceedings and juvenile delinquency proceedings involving status offense), 5.109(1) (guardianship proceedings); 25 CFR 23.11(a).

The requirement under the MIFPA and Michigan Court Rules for notice regardless of the nature of the proceeding is broader than the ICWA, which provides for notice only in an involuntary proceeding. *See* 25 USC 1912(a). The tribal notice requirements are triggered by sufficiently reliable information of virtually any criteria on which tribal membership might be based. *In re Morris*, 491 Mich 81, 815 NW2d 62 (2012) (under ICWA); *see also* MCL 712B.9(4) (outlining triggering factors in further detail). Once it is known that a child is possibly of Indian ancestry, notice becomes mandatory regardless of where the court is at in its proceedings. *Family Indep Agency v Conselyea (In re TM)*, 245 Mich App 181, 188, 628 NW2d 570 (2001), *overruled on other grounds by Morris,* 491 Mich at 121. Note that a parent cannot waive a child's status as an Indian child or a tribe's right to notice under 25 USC 1912(a). *Morris,* 491 Mich at 95–97, 110–111 (court of appeals erroneously held that parent's "clarification [of tribal status] had relieved the trial court from making further tribal-notification efforts").

Copies of the notices must be sent to the Secretary of the Interior's Regional Director, which for Michigan is the Midwest Regional Director, Bureau of Indian Affairs, Norman Pointe II Building, 5600 W. American Blvd., Suite 500, Bloomington, MN 55437. 25 CFR 23.11(a), (b)(2).

If the parent or Indian custodian or the tribe cannot be identified or located, notice must be sent to the Secretary of the Interior and to the Regional Director of the BIA at the address in the preceding paragraph. 25 USC 1912(a); 25 CFR 23.111(e); MCL 712B.9(1); MCR 3.802(A)(3)(a), .920(C)(1), 5.109(1). The secretary has 15 days after receipt of such notice to provide the requisite notice to the parent or Indian custodian and to the tribe or to notify the court of its need for additional time to complete its search. 25 USC 1912(a); 25 CFR 23.11(c); MCL 712B.9(1).

Notice to the secretary alone is insufficient if the parent indicates an affiliation with a specific Indian tribe. *Family Indep Agency v Hosler (In re NEGP)*, 245 Mich App 126, 130–132, 626 NW2d 921 (2001), *overruled on other grounds by Morris,* 491 Mich at 121 (under ICWA). In such instances, the court is required to investigate the tribe, send notice to that tribe, and suspend any proceedings for at least 10 days after the tribe's receipt of notice in compliance with 25 USC 1912(a). *Hosler,* 245 Mich App at 132. However, "[n]otice under [the] ICWA does not require the court or petitioner to demand a response from the tribes notified." *In re Morris (After Remand)*, 300 Mich App 95, 108, 832 NW2d 419 (2013).

B. Information Required in the Notice

§13.36 The notice must identify the pending proceeding and inform the recipients of their right to intervene in the proceedings on a form approved by the State Court Administrative Office (SCAO). MCR 3.802(A)(3)(a) (adoption proceedings), .920(C)(1) (child protective and juvenile delinquent proceedings), 5.109(1) (guardianship proceedings). For foster care placement or termination of

parental rights proceedings, use SCAO form JC 48. For adoption proceedings, use SCAO form PCA 352. For guardianship proceedings, use SCAO form PC 678.

When a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry confidential and under seal. 25 CFR 23.107(d); *see also* BIA Guidelines §I.4. The notice must inform all parties receiving the notice that they must keep confidential the information in the notice. 25 CFR 23.111(d)(6)(ix); BIA Guidelines §D.3.

25 CFR 23.111(d) lists the additional information that must be included in the notice. See exhibit 13.3. The notice should also "include ancestry information if known"; however, the petitioner need not "conduct independent research to obtain a parent's detailed genealogical information." *In re Morris (After Remand)*, 300 Mich App 95, 105, 832 NW2d 419 (2013); *see also* 25 CFR 23.111(d)(3); BIA Guidelines §D.3 (additional information that should be included in notice to assist tribe in making membership determination).

If the court or the petitioner believes that a parent or an Indian custodian is not likely to understand the contents of the notice because of a lack of adequate comprehension of written English, it must provide a translated version of the notice or have it read and explained to that person in the language that the person best understands. 25 CFR 23.111(f).

C. Manner of Delivery

§13.37 The petitioner must send notice of the pending proceeding and of the right to intervene by personal service or registered mail with return receipt requested and delivery restricted to the addressee or personally deliver it. MCR 3.802(A)(3)(a) (adoption proceedings), 5.109(1) (guardianship proceedings); *see also* 25 USC 1912(a); MCL 712B.9(1); MCR 3.807(B)(2), .920(C)(1) (child protective and juvenile delinquency proceedings). However, a party's receipt of actual notice evidences substantial compliance with the ICWA notice requirements, 25 CFR 23.111(c); BIA Guidelines §D.2 (requiring delivery by registered or certified mail return receipt requested even if notice is personally served). *Family Indep Agency v Conselyea (In re TM)*, 245 Mich App 181, 188–190, 628 NW2d 570 (2001), *overruled on other grounds by In re Morris*, 491 Mich 81, 121, 815 NW2d 62 (2012) (although manner of delivery of notice did not comply with ICWA, where tribes and BIA received actual notice and no tribes sought to intervene, substantial compliance with ICWA was established).

The court rules require that the court ensure that the petitioner has sent notice. MCR 3.807(B)(2) (adoption proceedings), .905(C) (child protective and juvenile delinquency proceedings), 5.402(E)(3) (guardianship proceedings). As a practical matter, however, the court often sends notice itself.

After the parties have been notified of the pending proceedings, subsequent notices of hearings should be delivered in the same manner as provided by the court rule for the particular proceeding. MCR 3.802(A)(3)(b) (adoption proceedings), .920(C)(2) (child protective and juvenile delinquency proceedings); 5.109(2) (guardianship proceedings). If the identity or location of the parent or

Indian custodian or the tribe cannot be determined, notice of the subsequent hearings must be sent by first-class mail to the Secretary of the Interior. MCR 3.802(A)(3)(b) (adoption proceedings), .920(C)(2) (child protective and juvenile delinquency proceedings); 5.109(2) (guardianship proceedings).

D. Commencement of Proceedings Following Notice

§13.38 The court may not commence involuntary foster care placement or termination of parental rights proceedings until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary of the Interior. 25 USC 1912(a); MCL 712B.9(2). However, the court must grant the parent or Indian custodian or the tribe, on request, up to 20 additional days to prepare for the proceeding. *Id.* Note that "[i]f the petitioner or court later discovers that the child may be an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the [Secretary of the Interior] as set forth in [MCL 712B.9(2)]." MCL 712B.9(2). Prior court decisions must be vacated "[i]f the court determines after a hearing that the parent or tribe was prejudiced by lack of notice." *Id.* "The petitioner has the burden of proving lack of prejudice." *Id.*

Neither the court rules nor the ICWA prescribe any time period for proceedings to commence after notice of an adoption or guardianship proceeding is provided. Presumably, the same time constraints would apply.

There is no due process violation where "[n]otice to the tribes was properly provided under [the] ICWA, no tribe sought a request for more time to prepare for the proceedings, and respondent[-father] was given ample time to investigate, uncover, and provide any family information that he could." *In re Morris (After Remand)*, 300 Mich App 95, 108, 832 NW2d 419 (2013).

E. Record of Findings Concerning Notice

§13.39 Trial courts have a duty to ensure that the record includes the following:

- the original or a copy of each notice personally served or sent via registered mail under 25 USC 1912(a)
- the original or a legible copy of the return receipt or other proof of service showing delivery of the notice

In re Morris, 491 Mich 81, 114, 815 NW2d 62 (2012) (under ICWA). The Michigan Supreme Court has also suggested that trial courts retain in the record any correspondence among the petitioner, the court, and the Indian tribe or other person entitled to notice under 25 USC 1912(a). *Id.; see also* 25 CFR 23.111(a)(2); BIA Guidelines §D.5. Once notice is completed, the court should make findings on the record regarding (1) whether the ICWA's (and the MIFPA's) notice requirements have been met, (2) whether the tribe has determined that the child is a member, and (3) whether the ICWA's (or the MIFPA's) provisions apply to the state court proceeding. *See generally Family Indep Agency v Conselyea (In re TM)*,

245 Mich App 181, 187–190, 628 NW2d 570 (2001), *overruled on other grounds by Morris,* 491 Mich at 121.

V. Involuntary Foster Care Placement

A. Information in the Petition to Remove the Child

§13.40 Any request for court action to protect a child must come in the form of a petition that comports with MCR 1.109(D) and (E). MCR 3.961(A). A neglect or abuse petition seeking to involuntarily remove an Indian child from the child's parent or Indian custodian for temporary placement in a foster home or institution must contain all of the following information:

> (1) The child's name, address, and date of birth.
>
> (2) The names and addresses of:
>
> (a) the child's mother and father,
>
> (b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father, and
>
> (c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found.
>
> (3) The essential facts that constitute an offense against the child under the Juvenile Code.
>
> (4) A citation to the section of the Juvenile Code relied on for jurisdiction.
>
> (5) The child's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe.
>
> (6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:
>
> (a) the active efforts, as defined in MCR 3.002, that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and
>
> (b) documentation, including attempts, to identify the child's tribe.

MCR 3.961(B)(1)–(6). See §13.42 for a discussion of active efforts required under the MIFPA. *See also* 25 USC 1912(c); MCL 712B.11 (parties have right to examine reports and documents filed in foster care proceeding).

If a family division case exists (pending or resolved) that involves any of the individuals listed in the petition filed under MCR 3.961(B), the petitioner must attach a completed case inventory. MCR 3.961(A).

B. Evidence Required for Removal

1. In General

§13.41 At the removal hearing, the party seeking to remove an Indian child from the custody of the parent or Indian custodian or seeking the continua-

tion of a removal following an emergency removal must show by clear and convincing evidence

- that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,
- that these efforts have proved unsuccessful, and
- that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

MCL 712B.15(2); *see also* MCR 3.967(D); *In re Detmer/Beaudry*, 321 Mich App 49, 910 NW2d 318 (2017) ("removal" of child under MIFPA refers to court order that child be physically transferred or moved from care and residence of parent or custodian to care and residence of some other person or institution). These requirements are similar to those under 25 USC 1912(d) and (e). Evidence that the parent's or custodian's continued custody is likely to result in damage to the child must include the testimony of at least one qualified expert witness who has knowledge about the child-rearing practices of the Indian child's tribe. MCL 712B.15(2).

The MIFPA provides that an expert witness must possess knowledge about the child-rearing practices of the Indian child's tribe. MCL 712B.15(2). MCR 3.967(D) further states that the witness should be a qualified expert witness under MCL 712B.17. For further discussion of these requirements, see §13.54.

The Indian child's tribe or the BIA may be of assistance in helping to locate qualified expert witnesses. 25 CFR 23.122(b); *see also* BIA Guidelines §G.2.

2. Active Efforts Made to Avoid Removal

§13.42 Before an Indian child may be removed from the custody of the parent or Indian custodian, clear and convincing evidence, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe, must show that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. MCR 3.967(D). The ICWA and the MIFPA contain similar requirements. *See* 25 USC 1912(d); MCL 712B.15(2).

Under the MIFPA, *active efforts* means active engagement with the Indian child, parents, tribe, extended family, and caregivers. See MCL 712B.3(a) and MCR 3.002(1), which specifically set out minimum requirements for satisfying the active efforts standards. Simply referring the family to a service is too passive to meet the MIFPA's requirements. *See id.* A state caseworker should take the client through the steps of the plan rather than requiring that the plan be performed on its own. *Department of Human Servs v Finfrock (In re Roe)*, 281 Mich App 88, 106–107, 764 NW2d 789 (2008) (ICWA requires that active efforts be more direct involvement when Indian parent or custodian is being provided remedial services and rehabilitative programs). See exhibit 13.1 for the MIFPA's complete definition of *active efforts,* which outlines specific issues caseworkers must address.

Active efforts also require providing culturally appropriate services to the Indian family. MCL 712B.3(a)(i); MCR 3.002(1)(a); *see also Department of Human Servs v Lee (In re JL)*, 483 Mich 300, 321–322, 770 NW2d 853 (2009) (under ICWA, active efforts impose higher burden than reasonable efforts and require that service provider provide "culturally relevant remedial and rehabilitative services to prevent the breakup of the family"). Under the MIFPA, *culturally appropriate services* means "services that enhance an Indian child's and family's relationship to, identification, and connection with the Indian child's tribe." MCL 712B.3(d); MCR 3.002(4). Services should allow the family to "practice the teachings, beliefs, customs, and ceremonies of the Indian child's tribe … [and should be] consistent with the tribe's beliefs about child rearing, child development, and family wellness." *Id.* If the child's tribe has a different definition of *culturally appropriate services* than the MIFPA, the court must use the tribe's definition. *Id.*

3. Damage to the Child from Continued Custody

§13.43 In addition to evidence of active efforts, the court must find clear and convincing evidence, including the testimony of at least one qualified expert witness, as described by MCL 712B.17, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. MCR 3.967(D); *see also* 25 USC 1912(e); MCL 712B.15(2); *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014) (conditional reversing trial court because there was no qualified expert witness testimony showing that returning Indian children to parent's custody would result in serious emotional or physical damage).

The evidence must show a causal relationship between the conditions that exist and the damage that is likely to occur. 25 CFR 23.121; BIA Guidelines §G.1. Evidence that shows only the existence of community or family poverty, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. 25 CFR 23.121(d); BIA Guidelines §G.1.

C. Placement of the Child

1. Physical Location of Foster Care

§13.44 The petitioner must place an Indian child (1) in the least restrictive setting that most approximates a family and in which the child's special needs, if any, may be met and (2) within reasonable proximity to the home, taking into account any special needs of the child. 25 USC 1915(b); MCL 712B.23(1).

2. Placement Must Comply with Statutory Preference

a. Statutory Preference

§13.45 Unless modified by the tribe or in the absence of good cause to the contrary in accordance with MCL 712B.23(3)–(5), the petitioner must place an Indian child according to the following descending order of preference:

- a member of the Indian child's extended family
- a foster home licensed, approved, or specified by the Indian child's tribe
- an Indian foster home licensed or approved by the DHHS
- an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs

MCL 712B.23(1), (6); MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(b). For the definition of the Indian child's extended family, see exhibit 13.1.

Application of the preference requirements requires consideration of the prevailing social and cultural standards of the Indian community in which the parent or the extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 USC 1915(d); MCL 712B.23(8); MCR 3.965(B)(13), .967(F).

The placement preference must be followed each time the child is moved to a new foster care placement. 25 USC 1916(b).

b. Tribe Can Modify the Statutory Preference

§13.46 The tribe may alter the statutory preference. MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c); MCL 712B.23(6). If it does, placement must follow the tribe's priority as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c).

c. Court May Change Preference for Good Cause

§13.47 The court may elect not to follow the statutory foster care placement priority for "good cause." MCL 712B.23(1); *see also* 25 USC 1915(b); MCR 3.965(B)(13)(b), .967(F). Under the MIFPA, good cause to modify the statutory preference order must be based on one or more of the following considerations:

- The request of the child if the child is of sufficient age.
- The extraordinary physical or emotional needs of the child as established by the testimony of an expert witness.

MCL 712B.23(5). "[G]ood cause is limited to the conditions articulated in MCL 712B.23(5)." *In re KMN*, 309 Mich App 274, 290, 870 NW2d 75 (2015) (biological mother's choice of adoptive placement not good cause under MIFPA).

The MIFPA differs from the federal rules, which provide that additional circumstances also constitute good cause to modify the statutory order of preference. These additional conditions that a court should consider when determining whether good cause exists to deviate from the order of preference include

- the request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options;

- the request of the child, if the child is of sufficient age and capacity to understand the decision being made;
- the presence of a sibling attachment that can be maintained only through a particular placement;
- the extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preference live; and
- the unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placement after meeting the preference criteria but none has been located.

25 CFR 23.132(c); *see also* BIA Guidelines §H.4.

The burden of establishing good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. MCL 712B.23(3); *see also* 25 CFR 23.132(b) (requiring proof by clear and convincing evidence).

Before deviating from the MIFPA's placement preferences for good cause, the court must "ensur[e] that all possible placements required under [MCL 712B.23] have been thoroughly investigated and eliminated." MCL 712B.23(4); *see KMN* (before deviation, trial court required to consider placing child with Indian relatives even though they had not yet filed adoption petition). Efforts to follow the placement preferences "must be provided to the court in writing or stated on the record," and the court must address these efforts "at each hearing until the placement meets the requirements of [MCL 712B.23]." MCL 712B.23(4).

3. Record of Efforts to Comply

§13.48 The court or the DHHS must maintain a record of the efforts to comply with the foster care priority placement preferences. MCL 712B.23(7); *see also* 25 USC 1915(e). This record, together with the petition or complaint and all substantive orders entered in the proceeding, must be made available to a single state office, which must make the material available to the Indian tribe or Secretary of Interior within seven days of a request. 25 USC 1915(e); *see also* MCL 712B.23(10) (record must be made available on request to "the court, tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian").

VI. Juvenile Delinquency Proceedings Involving Status Offenses

A. Information in the Petition Initiating Delinquency Proceedings

§13.49 MCR 3.903(F) recognizes the application of the MIFPA, MCL 712B.3b(v), if an Indian child is charged with a status offense in violation of MCL 712A.2(a)(2)–(4) or (d), which provides, in relevant part, as follows:

> (a)(2) The juvenile has deserted his or her home without sufficient cause, and the court finds on the record that the juvenile has been placed or refused alternative placement or the juvenile and the juvenile's parent, guardian, or custodian have exhausted or refused family counseling.
>
> (3) The juvenile is repeatedly disobedient to the reasonable and lawful commands of his or her parents, guardian, or custodian, and the court finds on the

record by clear and convincing evidence that court-accessed services are necessary.

(4) The juvenile willfully and repeatedly absents himself or herself from school or other learning program intended to meet the juvenile's educational needs, or repeatedly violates rules and regulations of the school or other learning program, and the court finds on the record that the juvenile, the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems and educational counseling and alternative agency help have been sought. As used in this sub-subdivision only, "learning program" means an organized educational program that is appropriate, given the age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.

…

(d) … a juvenile between the ages of 17 and 18 … who is 1 or more of the following:

(1) Repeatedly addicted to the use of drugs or the intemperate use of alcoholic liquors.

(2) Repeatedly associating with criminal, dissolute, or disorderly persons.

(3) Found of his or her own free will and knowledge in a house of prostitution, assignation, or ill-fame.

(4) Repeatedly associating with thieves, prostitutes, pimps, or procurers.

(5) Willfully disobedient to the reasonable and lawful commands of his or her parents, guardian, or other custodian and in danger of becoming morally depraved.

All petitions initiating delinquency proceedings against a juvenile charged with a status offense under MCL 712A.2(a)(2)–(4) or (d) must contain information concerning the juvenile's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe. MCR 3.931(B)(2)(d).

B. Evidence Required for Removal

§13.50 If an Indian child who has committed a status offense will be removed from the custody of the parents or Indian custodian, if any, the court is obliged to comply with the ICWA and the MIFPA requirements for involuntary foster care placement. See §§13.40–13.48. This applies even if the removal would place the minor in detention.

VII. Involuntary Termination of Parental Rights

A. Evidence Required for Termination

§13.51 The court may not terminate the parental rights of a parent of an Indian child unless the evidence satisfies both (1) the standard for termination under the MIFPA and the ICWA and (2) one or more of the state statutory grounds for termination under MCL 712A.19b. *In re England*, 314 Mich App 245, 253, 887 NW2d 10 (2016); *see* MCR 3.977. The standards of the ICWA and the MIFPA govern the child custody proceedings for an Indian parent and a non-

Indian parent when the child at issue is an Indian child. *In re Beers*, 325 Mich App 653, 926 NW2d 832 (2018).

B. Termination Under the MIFPA and the ICWA

1. In General

§13.52 A party seeking to terminate the parental rights of the parent of an Indian child must show (1) "to the court's satisfaction" that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, MCL 712B.15(3), and (2) that evidence beyond a reasonable doubt, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, shows that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, MCL 712B.15(4). *See* 25 USC 1912(d), (f); MCR 3.977(G); *see also* 25 USC 1912(c); MCL 712B.11 (parties have right to examine reports and documents filed in foster care proceeding).

2. Active Efforts

§13.53 Termination of the parental rights of the parent of an Indian child requires clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. 25 USC 1912(d); MCL 712B.15(3); MCR 3.977(G)(1); *In re England*, 314 Mich App 245, 255–258, 887 NW2d 10 (2016) ("clear and convincing evidence" standard applies to findings under MCL 712B.15(3) about whether active efforts were made to prevent breakup of Indian family).

Under the MIFPA, *active efforts* means active engagement with the Indian child, parents, tribe, extended family, and caregivers. See MCL 712B.3(a) and MCR 3.002(1), which set out minimum steps that must be taken to satisfy the active efforts standards. Simply referring the family to a service is too passive to meet the MIFPA's requirements. *See id.* A state caseworker should take the client through the steps of the plan rather than requiring that the plan be performed on its own. *England,* 314 Mich App at 260 (finding active efforts were made under MIFPA); *Department of Human Servs v Finfrock (In re Roe)*, 281 Mich App 88, 106–107, 764 NW2d 789 (2008) (under ICWA, active efforts require more direct involvement when Indian parent or custodian is being provided remedial services and rehabilitative programs). See exhibit 13.1 for the MIFPA's complete definition of *active efforts,* which outlines the issues caseworkers must address.

Active efforts also require providing culturally appropriate services to the Indian family. MCL 712B.3(a)(i); MCR 3.002(1)(a); *see also Department of Human Servs v Lee (In re JL)*, 483 Mich 300, 321–322, 770 NW2d 853 (2009) (under ICWA, active efforts impose higher burden than reasonable efforts and require that service provider provide "culturally relevant remedial and rehabilitative services to prevent the breakup of the family"). Under the MIFPA, *culturally appropriate services* means "services that enhance an Indian child's and family's

relationship to, identification, and connection with the Indian child's tribe." MCL 712B.3(d); MCR 3.002(4). *See England,* 314 Mich App at 260 (caseworker arranged for culturally appropriate counseling services through American Indian Health and Family Services). See also exhibit 13.1. Services should allow the family to "practice the teachings, beliefs, customs, and ceremonies of the Indian child's tribe … [and should be] consistent with the tribe's beliefs about child rearing, child development, and family wellness." MCL 712B.3(d); MCR 3.002(4). If the child's tribe has a different definition of *culturally appropriate services* than the MIFPA, the court must use the tribe's definition. *Id.*

The ICWA does not require the DHHS or the tribe to provide services each time a new termination proceeding is commenced against a parent when past efforts failed and it does not appear that additional services will change the outcome. *Lee,* 483 Mich at 305; *see also Finfrock,* 281 Mich App at 102, 105 (nothing in 25 USC 1912(d) prevented DHHS from seeking termination of parental rights when past efforts to reunite family were unsuccessful). However, the DHHS must "undertake a thorough, contemporaneous assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services." *Lee,* 483 Mich at 305. Although the court in *Lee* "decline[d] to establish an arbitrary threshold" at which past services could be used to satisfy current active efforts, it directed trial courts to "carefully assess the timing of the services provided to the parent [and noted that] … [t]he timing of the services must be judged by reference to the grounds for seeking termination and their relevance to the parent's current situation." *Id.* at 324–325. The *Lee* court also declined to hold that "active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding." *Id.* at 325.

3. Damage to the Child from Continued Custody

§13.54 Termination of the parental rights of a parent of an Indian child also requires evidence beyond a reasonable doubt, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. MCL 712B.15(4); MCR 3.977(G)(2). A trial court's "beyond a reasonable doubt" finding must contain or encompass the testimony of a qualified expert witness who opines that continued custody of the Indian child by the parent will likely result in serious physical or emotional harm to the child. *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 874 NW2d 205 (2015); *see also* 25 USC 1912(f); *In re England*, 314 Mich App 245, 261–262, 887 NW2d 10 (2016) (affirming termination where respondent pleaded guilty to second-degree child abuse, failed to take responsibility for his actions, failed to follow through with services, and tribal caseworker opined that child was at risk for future harm if placed in respondent's care); *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014) (conditional reversing trial court because there was no qualified expert witness testimony showing that returning Indian children to parent's custody would result in serious emotional or physical damage).

The evidence must show a causal relationship between the conditions that exist and the damage that is likely to occur. 25 CFR 23.121(c); *see also* BIA Guidelines §G.1. Evidence that shows only the existence of community or family poverty, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior is insufficient to establish that continued custody is likely to result in serious emotional or physical damage to the child. 25 CFR 23.121(d); *see also* BIA Guidelines §G.1.

Under the MIFPA, a qualified expert witness is (listed in order of preference)

> (a) [a] member of the Indian child's tribe, or witness approved by the Indian child's tribe, who is recognized by the tribal community as knowledgeable in tribal customs and how the tribal customs pertain to family organization and child rearing practices[; or]
>
> (b) [a] person with knowledge, skill, experience, training, or education and who can speak to the Indian child's tribe and its customs and how the tribal customs pertain to family organization and child rearing practices.

MCL 712B.17(1). A party seeking to rebut the testimony of the petitioner's qualified expert witness "may present his or her own qualified expert witness." MCL 712B.17(2). The Indian child's tribe or the BIA may be of assistance in helping to locate qualified expert witnesses. 25 CFR 23.122(b). However, locating an expert who meets the necessary criteria is solely the responsibility of the petitioner.

C. State Statutory Grounds for Termination

§13.55 In addition to establishing that the ICWA and the MIFPA standards for termination are satisfied, the court must also find that clear and convincing evidence supports the state statutory grounds for termination, MCR 3.977, and that a preponderance of the evidence supports that termination is in the child's best interests. *In re Moss*, 301 Mich App 76, 836 NW2d 182 (2013); *see Michigan Family Law* §§25.55–25.77 (Hon. Marilyn J. Kelly et al eds, ICLE 8th ed). The court must also notify the parent that even after parental rights are involuntarily terminated, the child support obligation will continue until a court modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated. MCR 3.809(A).

VIII. Adoptive Placement Following Involuntary Termination

A. Placement Must Comply with Statutory Preference

1. Statutory Preference

§13.56 Unless modified by the tribe or in the absence of good cause to the contrary, the adoptive placement of an Indian child must follow the descending order of preference:

- a member of the child's extended family
- other members of the Indian child's tribe
- other Indian families

25 USC 1915(a); MCL 712B.23(2), (6).

In Michigan, placement preferences should be interpreted in accordance with the MIFPA. *In re KMN*, 309 Mich App 274, 292 n5, 870 NW2d 75 (2015) ("[i]f the Legislature had intended the order of preference and good cause to be interpreted in accordance with the ICWA, it would have so specified in the MIFPA"). In *KMN,* the court of appeals vacated orders granting an Indian child's adoption by non-Indian parents because the trial court failed to place the child according to the placement preferences under MCL 712B.23 or find good cause for disregarding the statutory preferences. The *KMN* court held that the trial court was required to consider a possible placement with the child's Indian relatives even though they had not yet filed an adoption petition. The court explained that unlike the ICWA, the MIFPA "does not give a preference to eligible parties over ineligible parties …. [A]bsent good cause, [an] adoptive placement *must* be either with a member of the child's extended family, a member of the Indian child's tribe, or an Indian family, in that 'order of preference.'" 309 Mich App at 290 (quoting MCL 712B.23(2)).

Application of the preference requirements requires consideration of the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 USC 1915(d); MCL 712B.23(8). See exhibit 13.1 for a definition of *extended family member.*

2. Tribe May Modify the Preference

§13.57 The tribe may alter the statutory preference. MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c); MCL 712B.23(6). If it does, placement must follow the tribe's priority as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c).

3. Court May Change the Preference for Good Cause

§13.58 The court may elect not to follow the statutory adoption placement priority for "good cause." MCL 712B.23(2); *see also* 25 USC 1915(a). Under the MIFPA, good cause to modify the statutory preference order must be based on one or more of the following considerations:

- The request of the child if the child is of sufficient age.
- The extraordinary physical or emotional needs of the child as established by the testimony of an expert witness.

MCL 712B.23(5). "[G]ood cause is limited to the conditions articulated in MCL 712B.23(5)." *In re KMN*, 309 Mich App 274, 290, 870 NW2d 75 (2015) (biological mother's choice of adoptive placement not good cause under MIFPA).

The MIFPA differs from the federal rules, which provide that additional circumstances also constitute good cause to modify the statutory order of preference. These additional conditions that a court should consider when determining whether good cause exists to deviate from the order of preference include

- the request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options;
- the request of the child, if the child is of sufficient age and capacity to understand the decision being made;
- the presence of a sibling attachment that can be maintained only through a particular placement;
- the extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preference live; and
- the unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placement after meeting the preference criteria but none has been located.

25 CFR 23.132(c); *see also* BIA Guidelines §H.4. However, good cause should be interpreted in accordance with the MIFPA. *KMN,* 309 Mich App at 292 n5 ("[i]f the Legislature had intended the order of preference and good cause to be interpreted in accordance with the ICWA, it would have so specified in the MIFPA"). In *KMN,* the court of appeals vacated orders granting an Indian child's adoption by non-Indian parents because the trial court failed to place the child according to the placement preferences under MCL 712B.23 or find good cause for disregarding the statutory preferences. The court explained that "good cause is limited to the conditions articulated in MCL 712B.23(5)—a request made by a child of a sufficient age or a circumstance involving a child with an extraordinary need." 309 Mich App at 290. The child's biological mother's preference of adoptive parents was therefore not good cause for disregarding the preferences under MCL 712B.23(2). *Id.*

The burden of establishing good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. MCL 712B.23(3); *see also* 25 CFR 23.132(b) (requiring proof by clear and convincing evidence).

Before deviating from the MIFPA's placement preferences for good cause, the court must "ensur[e] that all possible placements required under [MCL 712B.23] have been thoroughly investigated and eliminated." MCL 712B.23(4); *see KMN* (before deviation, trial court required to consider placing child with Indian relatives even though they had not yet filed adoption petition). Efforts to follow the placement preferences "must be provided to the court in writing or stated on the record," and the court must address these efforts "at each hearing until the placement meets the requirements of [MCL 712B.23]." MCL 712B.23(4).

4. Record of Efforts to Comply

§13.59 The court or the DHHS must maintain a record of the efforts to comply with the adoption placement priority placement preferences. MCL 712B.23(7); *see also* 25 USC 1915(e). This record, together with the petition or complaint and all substantive orders entered in the proceeding, must be made available to a single state office, which must make the material available to the Indian tribe or Secretary of Interior within seven days of a request. 25 USC

1915(e); *see also* MCL 712B.23(10) (record must be made available on request to "the court, tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian").

B. Final Adoptive Order Sent to Secretary of Interior

§13.60 Within 30 days of the court's entry of a final decree or adoptive order concerning any Indian child, the court must provide the Secretary of the Interior and the tribal enrollment officer of the appropriate tribe with a copy of the decree or order together with the following information:

- the Indian child's name, birth date, and tribal affiliation;
- the names and addresses of the biological parents, and when applicable, the affidavit filed by the biological parents requesting confidentiality (Note: The biological parents may file an affidavit with the court requesting that their identity remain confidential, *see* 25 USC 1951(a); 25 CFR 23.71(a); *see also* MCL 712B.35(2) ("[i]f court records contain a statement of identifying information of the biological parent or parents that their identity remains confidential, the court shall include the statement of identifying information with the other information sent to the [S]ecretary [of the Interior] and the tribal enrollment officer of the appropriate Indian tribe described in [MCL 712B.35(1)]").);
- the names and addresses of the adoptive parents; and
- the identity of any agency having files or information relating to such adoptive placement.

25 USC 1951(a); 25 CFR 23.71(a); *see also* MCL 712B.35(1).

This information must be delivered in an envelope marked "Confidential" and sent to the following address: Chief, Division of Human Services, Bureau of Indian Affairs, 1849 C Street, NW, MS-3645-MIB, Washington, DC 20240. 25 CFR 23.71(a). The information is not subject to the Freedom of Information Act, and the Secretary of the Interior must ensure that the information remains confidential. 25 USC 1951(a); 25 CFR 23.71(a).

C. Adoptee's Right to Tribal Affiliation Information

1. Release of Information by the Court

§13.61 An Indian child adoptee, on reaching the age of 18, is entitled to information concerning tribal identity. The adoptee may apply to the court that entered the final decree of adoption for information concerning the tribal affiliation, if any, of the adoptee's biological parents and such other information as may be necessary to protect any rights flowing from the adoptee's tribal relationship, and the court must comply with the request. 25 USC 1917; MCL 712B.27(4); MCR 3.807(C).

If the biological parent has not consented to release of identifying information, the court may reveal information regarding the adoptee's biological parents to the tribe rather than to the adoptee, with a request that the tribe keep the infor-

mation confidential, to allow the tribe to determine the adoptee's tribal membership. *In re Hanson*, 188 Mich App 392, 398–399, 470 NW2d 669 (1991).

If the court is prohibited by state law from disclosing the biological parents' identifying information, it should ask the BIA to assist the adoptee in becoming a tribal member without breaching any confidentiality. BIA Guidelines §J.4.

2. Release of Information by the Secretary of the Interior

§13.62 An adoptee over the age of 18, as well as the adoptive or foster parents of an Indian child or the Indian child's tribe, may also request information concerning tribal affiliation from the Secretary of the Interior. 25 USC 1951(b). However, if the biological parents have filed an affidavit requesting that their identifying information remain confidential, the names of the biological parents must not be released. 25 CFR 23.71(b).

Where the Secretary of the Interior is prohibited from disclosing the biological parents' identifying information, the Secretary of the Interior's chief tribal enrollment officer can certify the child's tribe, and where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by the tribe. 25 USC 1951(b); 25 CFR 23.71(b).

Note that the Secretary of the Interior maintains the confidential file on all state adoptions involving Indian children. 25 CFR 23.71(b).

IX. Guardianship Placement Following Involuntary Proceedings

§13.63 A guardianship proceeding is considered involuntary under the MIFPA if a parent does not execute a consent pursuant to MCL 712B.13 in a guardianship proceeding under MCL 700.5204 or .5205. MCL 712B.15(1); *see also* MCL 712B.25(3). The MIFPA's procedural requirements for involuntary guardianships are detailed in MCL 712B.15, .25, and MCR 5.404(C). *See id.*; *see also* PC 651-Ib. For a discussion of voluntary proceedings under MCL 712B.13 and MCR 5.404(B), see §§13.61–13.66 and 13.74.

The petitioner must notify the Indian child's parent, Indian custodian, and tribe (or, if the identity or location of the parent or Indian custodian or the identity of the tribe cannot be determined, the Secretary of the Interior) of the pending proceedings on the petition to establish guardianship over the Indian child and the right to intervene by personal service or by registered mail with return receipt requested and delivery restricted to the addressee. MCL 712B.9(1); MCR 5.109(1); *see also* MCL 712B.15(1)(a), .25(6) (notice must comply with Michigan Court Rules, ICWA, and MCL 712B.9(1)).

The petitioner in a guardianship proceeding must "document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe." MCR 5.404(A)(1); *see* MCL 712B.9(7). This documentation must be provided to "the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian" on request. *Id.* The petitioner must "state in the petition what active efforts were made to provide remedial services and rehabilita-

tive programs designed to prevent the break up of the Indian family as defined in MCR 3.002(1)." MCR 5.404(A)(3). If a guardianship petition does not state that the minor is an Indian child, the court must ask whether the child or either parent is an Indian tribal member. MCR 5.404(D). "If the child is a member or if a parent is a member and the child is eligible for membership in the tribe, the court shall either dismiss the petition or allow the petition to comply with MCR 5.404(A)(1)." MCR 5.404(D).

When a guardianship proceeding is involuntary and "the court knows or has reason to know that the child is an Indian child, the court may order the [DHHS] or a court employee" to investigate and report on the proposed guardianship. MCL 712B.25(1). "If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership." MCR 5.404(A)(2). The report must be written, include the information required in MCL 700.5204, and state "whether the child is … an Indian child" and "[t]he identity and location of the Indian child's parents, if known." MCL 712B.25(1)(a), (b). If the child is an Indian child, the report must also indicate the following:

> (i) The tribe or tribes of which the child is a member or eligible for membership.
>
> (ii) If the child and family need culturally appropriate and other services to preserve the Indian family.
>
> (iii) The identity and location of extended family members and if no extended family members can be found, what efforts were made to locate them.

MCL 712B.25(1)(c); *see* MCR 5.404(A)(2). See also exhibit 13.1 for the definition of *extended family members.* The report must be filed and served at least seven days before the petition hearing. MCR 5.404(A)(2).

At the petition hearing, the court must determine if

- "the tribe has exclusive jurisdiction,"
- the current placement meets the placement requirements in MCR 5.404(C)(2)–(3),
- the guardianship is in the Indian child's best interests,
- the child should be represented by a court-appointed lawyer-guardian ad litem (who can also be appointed when the petition is filed, *see* MCR 5.404(A)(2)), and
- whether each parent desires to consent to the guardianship if no consents were filed with the petition.

MCR 5.404(C)(1); *see* MCL 712B.25(2). Note that if both parents elect to consent to the guardianship, it turns into a voluntary guardianship. See §13.64 to proceed under a voluntary guardianship. The court must terminate the guardianship or dismiss the petition if the tribe has exclusive jurisdiction. MCL 712B.25(2).

No placement can be made without testimony of a qualified expert witness (as defined by MCL 712B.17), with knowledge of the tribe's child rearing practices,

that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." MCL 712B.15(2); MCR 5.404(F)(1).

If after ordering a guardianship the court discovers that the child may be an Indian child, it must provide notice to the tribe, the parents or Indian custodian, and the current guardian. *See* MCL 712B.25(6) (containing notice requirements); MCR 5.402(E)(5). A copy of the notice must be mailed to the guardian by first-class mail. MCR 5.402(E)(5). The court must also schedule a hearing in accordance with MCR 5.404(C) and (F) and enter an order for an investigation under MCR 5.404(A)(2). MCR 5.402(E)(5)(a)–(b).

X. Procedures for Voluntary Proceedings

A. Is the Consent Valid?

§13.64 Under the MIFPA, a proceeding is voluntary if *both* parents or the Indian custodian voluntarily consent to a petition for guardianship under MCL 700.5204 or .5205 or if a parent consents to an adoptive placement or "the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28 and .29], or consent under [MCL 710.43 and .44]." MCL 712B.13; *see* PC 686. Note that for purposes of voluntary proceedings, the MIFPA provides more protection under MCL 712B.13 (specifying certain circumstances that give rise to voluntary proceeding) than the ICWA provides under 25 USC 1913. *See* 25 USC 1921 (applicable state law prevails if it contains higher standards than ICWA).

Once a parent or the Indian custodian has voluntarily consented, the court must follow the ICWA's and the MIFPA's placement preferences (unless the child's tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23.

To obtain a valid consent from the child's parent or custodian, the following procedures must be followed:

- *Execution before the court.* The parent or Indian custodian must execute the consent in writing on an SCAO approved form before a judge of a court of competent jurisdiction. Execution does not need to be in open court where the parent requests confidentiality.
- *Judge's certification.* A certificate by the presiding judge must accompany the consent, certifying that (1) the judge fully explained the terms and consequences of the consent in detail, (2) the explanation was in the language of the parent or Indian custodian if English is not the primary language, and (3) the parent or Indian custodian fully understood the terms and consequences.
- *More than 10 days since child's birth.* More than 10 days have passed since the Indian child's birth.

MCL 712B.13; *see also* 25 USC 1913(a); 25 CFR 23.125; BIA Guidelines §I.6.

The consent should contain the following information:

- the name and birthday of the Indian child
- the name of the Indian child's tribe
- an identifying number or other indication of the child's membership in the tribe, if any
- the name and address of the consenting parent or Indian custodian
- a sworn statement from a translator, if used, attesting to the translation's accuracy
- the consenting parent's or guardian's signature "recorded before the judge, verifying an oath of understanding of the significance of the voluntary placement and the parent's right to file a written demand to terminate the voluntary placement or consent at any time"
- the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time

MCL 712B.13(2); *see also* 25 CFR 23.126; BIA Guidelines §I.7.

B. Consequences of Obtaining Consent Through Fraud or Duress

§13.65 A parent may withdraw consent and petition the court to vacate a final adoption order regarding an Indian child on the grounds that consent "was obtained through fraud or duress." MCL 712B.27(5); *see also* 25 USC 1913(d). The parent or guardian must file a petition to vacate the adoption order in the court that entered the final order of adoption. 25 CFR 23.136; *see also* BIA Guidelines §K.2. When a petition is filed to vacate an adoption order, the court must give notice to all parties to the adoption proceedings and the child's tribe and must hold a hearing on the petition. 25 CFR 23.136(b).

If the court finds that the consent was obtained through fraud or duress, the court *must* vacate the adoption order and return the child to the parent. 25 USC 1913(d); MCL 712B.27(5); 25 CFR 23.136; BIA Guidelines §K.2. An adoption may not be vacated pursuant to 25 USC 1913(d) or MCL 712B.27(5) if the adoption has been effective for at least two years, unless otherwise permitted by law. 25 USC 1913(d); MCL 712B.27(5).

C. Notice and Proceeding Requirements

§13.66 The petitioner must notify the Indian child's parent, Indian custodian, and tribe (or, if the identity or location of the parent or Indian custodian or the identity of the tribe cannot be determined, the Secretary of the Interior) of the voluntary proceeding and the right to intervene by registered mail, return receipt requested. MCL 712B.9(1); *see also* MCL 712B.13(1)(b), .27(3) (notice must comply with Michigan Court Rules, ICWA, and MCL 712B.9(1)); MCR 3.802(A)(3)(a). All voluntary proceedings must follow the Michigan Court Rules. In addition, guardianship proceedings under MCL 700.5204 or .5205 must

follow MCL 712B.25, while adoption proceedings must follow MCL 712B.27. MCL 712B.13(1)(c).

XI. Consent to Adoptive Placement

A. In General

§13.67 Adoptive placement is the "permanent placement of an Indian child for adoption, including any action resulting in a final decree for adoption." 25 USC 1903(1)(iv); MCL 712B.3(b)(iv); MCR 3.002(2)(d). The Indian child's parent must execute a consent under MCL 712B.13(1) (see §13.64) along with either a consent to adopt under MCL 710.43 and .44 or a release under MCL 710.28 and .29. MCL 712B.13(3). MCL 712B.13(1) only requires that a parent consent to the termination of parental rights for the purpose of adoption by executing a release, under MCL 710.28 and .29, but does not require any additional consent. *In re Williams*, 501 Mich 289, 915 NW2d 328 (2018) (finding court of appeals erred "by construing the language 'in conjunction with' [found in MCL 712B.13(3)] to mean that a consenting parent must complete two separate forms"); *see also* MCL 712B.27(1) ("If a release or consent to adoption under [the Adoption Code, MCL 710.21 et seq.,] is executed, consent to voluntary placement of an Indian child must also be executed by both parents of the Indian child in accordance with [MCL 712B.13]."). But see MCR 3.804(A)(1), which states that both parents must consent "except in stepparent adoptions under MCL 710.23a(4)."

The consent or release must comply with MCR 3.804(A). Consent hearings involving Indian children must be held along with a consent to adopt under MCL 710.44 or a release under MCL 710.29. MCR 3.804(B)(2). Before executing a consent or release, the parent must be notified that the child support obligation will continue until a court modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated. MCR 3.804(C)(1)–(2). The court may not use videoconferencing technology to conduct a consent hearing (as outlined in MCR 3.804(B)(3)) when an Indian child is involved.

B. Consent to Direct Placement Adoption

§13.68 Under a direct placement adoption, a biological parent or guardian consents to the child's placement with a specific adoptive parent and "transfers physical custody of the child to th[at] prospective adoptive parent." MCL 710.22(o). See also exhibit 13.1 for the definition of *guardian* under the Michigan Court Rules. Note that the biological parent or guardian must personally select the adoptive parent; "[t]he selection shall not be delegated." MCL 710.23a(2).

In the direct placement adoption of an Indian child, a parent must execute a consent to adopt under MCL 710.43 and .44 along with a consent for placement of the Indian child under MCL 712B.13(1). MCL 712B.13(3), .27(1). See SCAO form PCA 308i. See also §13.64 (discussing consent requirements under MCL 712B.13(1)). The consent must be accompanied by the parent's or guardian's written statement affirming

> (a) That the parent or guardian has received a list of community and federal resource supports and a copy of the written document described in [MCL 722.956(1)(c)].
>
> (b) As required by [MCL 710.29] and [MCL 710.44], that the parent or guardian has received counseling related to the adoption of his or her Indian child or waives the counseling with the signing of the verified statement.
>
> (c) That the parent or guardian has not received or been promised any money or anything of value for the consent to adoption of the Indian child, except for lawful payments that are itemized on a schedule filed with the consent.
>
> (d) That the validity and finality of the consent are not affected by any collateral or separate agreement between the parent or guardian and the adoptive parent.
>
> (e) That the parent or guardian understands that it serves the welfare of the Indian child for the parent to keep the child placing agency, court, or department informed of any health problems that the parent develops that could affect the child.
>
> (f) That the parent or guardian understands that it serves the welfare of the Indian child for the parent or guardian to keep his or her address current with the child placing agency, court, or department in order to permit a response to any inquiry concerning medical or social history from an adoptive parent of a minor adoptee or from an adoptee who is 18 years or older.

MCL 712B.13(6); *see also* MCR 3.804.

C. Child's Adoptive Placement

§13.69 The ICWA and the MIFPA provide a preference priority for the adoptive placement of an Indian child. 25 USC 1915(a); MCL 712B.23(2), (6). The ICWA recognizes the right of parents of an Indian child to voluntarily place the child in an adoptive placement of their choice (i.e., direct placement adoption). 25 USC 1915(c). However, Michigan caselaw has held that placement preferences and good cause for deviating from these preferences should be interpreted in accordance with the MIFPA. *In re KMN*, 309 Mich App 274, 292 n5, 870 NW2d 75 (2015). Therefore, when the child is being released for purposes of adoption under MCL 710.28, unless modified by the tribe or in the absence of good cause to the contrary, the adoptive placement of an Indian child *must* be in the following descending order of preference:

- a member of the child's extended family
- other members of the Indian child's tribe
- other Indian families

25 USC 1915(a); MCL 712B.23(2), (6). A biological parent's preference is not good cause for deviating from this statutory order of preference. 309 Mich App at 290–291 (discussed in §§13.56 and 13.58). However, under the federal rules, the court must also consider the preference of the Indian child or the Indian child's parent. 25 CFR 23.131(d).

Application of the preference requirements requires consideration of the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 USC 1915(d); MCL 712B.23(8). See exhibit 13.1 for a definition of *extended family member.*

D. Tribe May Modify the Preference

§13.70 The tribe may alter the statutory preference. MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c); MCL 712B.23(6). If it does, placement must follow the tribe's priority as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c).

E. Court May Change the Preference for Good Cause

§13.71 The court may elect not to follow the statutory adoption placement priority for "good cause." MCL 712B.23(2); *see also* 25 USC 1915(a). Under the MIFPA, good cause to modify the statutory preference order must be based on one or more of the following considerations:

- The request of the child if the child is of sufficient age.
- The extraordinary physical or emotional needs of the child as established by the testimony of an expert witness.

MCL 712B.23(5). "[G]ood cause is limited to the conditions articulated in MCL 712B.23(5)." *In re KMN*, 309 Mich App 274, 290, 870 NW2d 75 (2015) (biological mother's choice of adoptive placement not good cause under MIFPA).

The MIFPA differs from the federal rules, which provide that additional circumstances also constitute good cause to modify the statutory order of preference. 25 CFR 23.132; *see also* BIA Guidelines §H.4. However, good cause should be interpreted in accordance with the MIFPA. *KMN,* 309 Mich App at 292 n5 (discussed in §13.58).

The burden of establishing good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. MCL 712B.23(3); *see also* 25 CFR 23.132(b) (requiring proof by clear and convincing evidence).

Before deviating from the MIFPA's placement preferences for good cause, the court must "ensur[e] that all possible placements required under [MCL 712B.23] have been thoroughly investigated and eliminated." MCL 712B.23(4); *see KMN* (before deviation, trial court required to consider placing child with Indian relatives even though they had not yet filed adoption petition). Efforts to follow the placement preferences "must be provided to the court in writing or stated on the record," and the court must address these efforts "at each hearing until the placement meets the requirements of [MCL 712B.23]." MCL 712B.23(4).

F. Record of Efforts to Comply

§13.72 The court or the DHHS must maintain a record of the efforts to comply with the adoption placement priority placement preferences. MCL

712B.23(7); *see also* 25 USC 1915(e). This record, together with the petition or complaint and all substantive orders entered in the proceeding, must be made available to a single state office, which must make the material available to the Indian tribe or Secretary of Interior within seven days of a request. 25 USC 1915(e); *see also* MCL 712B.23(10) (record must be made available on request to "the court, tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian").

G. Withdrawal of Consent

§13.73 There are unique protections for a parent of an Indian child who provides consent under MCL 712B.13. "A parent who executes a consent under [MCL 712B.13] may withdraw his or her consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the Indian child." MCL 712B.13(3); *see also* MCL 712B.13(6) (permitting parent to withdraw consent to adoption under MCL 710.43 "at any time before entry of a final order for adoption by filing notification of the withdrawal of consent with the court"); *In re JJW*, 320 Mich App 88, 902 NW2d 901 (2017) (MCL 712B.13(3) expressly provides power to withdraw consent to parents, not Indian custodian), *rev'd on other grounds by In re Williams*, 501 Mich 289, 915 NW2d 328 (2018). In *In re Williams,* the state initiated termination proceedings against the parent of Indian children. During the termination proceedings, the parent was entitled to the limited protections under MCL 712B.15. To avoid trial, he voluntarily released his parental rights under MCL 712B.13(1). Later, the parent wished to withdraw his release before the final order of adoption. The Michigan Supreme Court found that the parent was entitled to withdraw his consent at any time before entry of the Indian children's final order of adoption. Therefore, the benefits of the withdrawal provision does not exclude parents who provide consent under MCL 712B.13 who were previously participants in child protective proceeding otherwise governed by MCL 712B.15. Note, however, that the child would be returned to the position the child was in before the parent consented to the termination of parental rights, not necessarily to the parent who withdraws consent. *In re Williams,* 501 Mich at 310.

Note that a "[w]ithdrawal of consent under [MCL 712B.13] constitutes a withdrawal of a release executed under [MCL 710.28 and .29] or a consent to adopt executed under [MCL 710.43 and .44]." MCL 712B.13(3); *see also* MCR 3.804(D).

The ICWA also permits a parent to withdraw consent "[i]n any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, … for any reason at any time prior to the entry of a final decree … *and the child shall be returned to the parent.*" 25 USC 1913(c) (emphasis added). The parent must stipulate the intention to withdraw consent in an instrument executed under oath filed in the court where the consent was filed. MCL 712B.13(6); 25 CFR 23.128(c). The clerk of that court must promptly notify "the party by or through whom any preadoptive or adoptive placement [was] arranged of such filing." *Id.* That party must then ensure the child's return to the parent "as soon as practicable." *Id.*

In most cases, once a parent files a demand requesting the return of the child under MCL 712B.13(3) with the court, the court must order that the child be returned to the parent or custodian. MCL 712B.13(3); *see also* MCR 3.804(C).

However, neither the ICWA nor the MIFPA allow for the rescission of a placement order due to a withdrawal in consent by a placement agency or a tribe after the entry of a placement order. *In re JJW.*

XII. Consent to a Guardianship Petition

§13.74 Although an Indian child who is the subject of a guardianship must generally be placed according to a statutory descending order of preference (see §13.45), the parents of an Indian child have the right to voluntarily place the child with a guardian of their choice. See MCL 712B.23(1), which specifically excludes guardianship placements "where both parents submit a consent for the guardianship" from the statutory order of preference. *See also* MCL 712B.13(1). See §13.64.

Under the MIFPA, a guardianship is voluntary if both parents or Indian custodian voluntarily consent to a petition for guardianship under MCL 700.5204 or .5205. MCL 712B.13(1); *see* MCR 5.404; PC 651-Ia. Requirements for a valid consent are laid out in MCL 712B.13, as discussed in §13.64. *See also* MCR 5.404(B)(1); PC 686. If only one parent consents, it is an involuntary guardianship. But see MCR 5.404(C)(1), which provides both parents with the chance to consent to the guardianship and make it a voluntary guardianship. The child's tribe is allowed to intervene even in a voluntary guardianship. MCL 712B.7(6).

The petitioner in a guardianship proceeding must "document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe." MCR 5.404(A)(1); *see* MCL 712B.9(7). This documentation must be provided to "the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian" on request. *Id.* If a guardianship petition does not state that the minor is an Indian child, the court must ask whether the child or either parent is an Indian tribal member. MCR 5.404(D). "If the child is a member or if a parent is a member and the child is eligible for membership in the tribe, the court shall either dismiss the petition or allow the petition to comply with MCR 5.404(A)(1)." MCR 5.404(D).

The petitioner must notify the Indian child's parent, Indian custodian, and tribe (or, if the identity or location of the parent or Indian custodian or the identity of the tribe cannot be determined, the Secretary of the Interior) of the pending proceedings on the petition to establish guardianship over the Indian child and the right to intervene by personal service or by registered mail with return receipt requested and delivery restricted to the addressee. MCL 712B.9(1); MCR 5.109(1); *see also* MCL 712B.13(1)(b), .25(6) (notice must comply with Michigan Court Rules, ICWA, and MCL 712B.9(1)).

In a voluntary guardianship proceeding, the court must hold a hearing to determine if

- "the tribe has exclusive jurisdiction,"

- both parents or the Indian custodian executed a valid consent,
- the guardianship is in the Indian child's best interests, and
- the child should be represented by a court-appointed lawyer-guardian ad litem (who may also be appointed when the petition is filed, *see* MCR 5.404(A)(2)).

MCR 5.404(B)(2); *see* MCL 712B.25(2). The court may use videoconferencing technology to conduct a hearing for purposes of a voluntary consent to guardianship of an Indian child. MCL 712B.13(1); MCR 5.404(B)(1); *see also* MCR 3.811. The court must terminate the guardianship or dismiss the petition if the tribe has exclusive jurisdiction. MCL 712B.25(2).

A parent or Indian custodian may withdraw consent to a guardianship "at any time" by sending the court written notice "substantially in compliance on a form approved by the state court administrative office [stating] that [he or she] revokes consent and wants his or her Indian child returned." MCL 712B.13(4); *see* MCR 5.404(B)(3); PC 687; *see also* MCL 712B.25(4); *Empson-Laviolette v Crago*, 280 Mich App 620, 633, 760 NW2d 793 (2008) (pre-MIFPA case in which Indian child's parent had right to withdraw consent to guardianship and have child returned to her custody).

If both parents withdraw their consent, the court must enter an ex parte order terminating the guardianship and return the child to the parent or Indian custodian as soon as it receives the notice. MCR 5.404(B)(3). If both parents executed a consent but only one parent sends a notice to withdraw consent, the court must hold a hearing within 21 days on whether to terminate the guardianship. *Id.*

XIII. Consent to Voluntarily Terminate Parental Rights During Child Protective Proceedings

A. In General

§13.75 Under the ICWA and the MIFPA, a *termination of parental rights* proceeding means "any action resulting in the termination of the parent-child relationship." 25 USC 1903(1)(ii); MCL 712B.3(b)(ii); MCR 3.002(2)(b). When the court has taken jurisdiction over a child in a child protective proceeding, it has authority to conduct a hearing to determine if parental rights should be involuntarily terminated; however, the parent may elect to voluntarily terminate parental rights. *In re Toler*, 193 Mich App 474, 477, 484 NW2d 672 (1992).

If the parent executes a release under MCL 710.28 and .29 during an Indian child protective proceeding, the release is subject to MCL 712B.15. "If the release follows the initiation of a [child protective] proceeding under [MCL 712A.2(b)], the court shall make a finding that culturally appropriate services were offered." MCL 712B.13(5). Under the MIFPA, *culturally appropriate services* means "services that enhance an Indian child's and family's relationship to, identification, and connection with the Indian child's tribe." MCL 712B.3(d); MCR 3.002(4). Services should allow the family to "practice the teachings, beliefs, customs, and ceremonies of the Indian child's tribe … [and should be] consistent with the tribe's beliefs about child rearing, child development, and family wellness." *Id.* If

the child's tribe has a different definition of *culturally appropriate services* than the MIFPA, the court must use the tribe's definition. *Id.*

If the parents execute a release to adoption under the Michigan Adoption Code, MCL 710.21 et seq., both parents must also execute a consent to voluntary placement of an Indian child in accordance with MCL 712B.13. MCL 712B.27(1). Parents who voluntarily consent to the termination of their parental rights for the purpose of adoption may withdraw that consent at any time before an adoption is finalized. *In re Williams*, 501 Mich 289, 915 NW2d 328 (2018).

> [A] parent who consents during an involuntary termination proceeding is not entitled to "the return of the Indian child" to *him or her*. Instead, the child returns to the position the child was in before his or her parent consented to the termination of parental rights.

In re Williams, 501 Mich at 310. Note that a parent withdrawing consent does not negate a possible refiling of a termination petition because the parent is still subject to MCL 712B.15. *In re Williams,* 501 Mich at 310.

B. Child Placement Preferences

§13.76 Where the child is being released for purposes of adoption under MCL 710.28, and unless modified by the tribe or in the absence of good cause to the contrary, the adoptive placement of an Indian child must be in the following descending order of preference:

- a member of the child's extended family
- other members of the Indian child's tribe
- other Indian families

25 USC 1915(a); MCL 712B.23(2), (6).

Application of the preference requirements requires consideration of the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 USC 1915(d); MCL 712B.23(8). See exhibit 13.1 for a definition of *extended family member.*

C. Tribe May Modify the Preference

§13.77 The tribe may alter the statutory preference. MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c); MCL 712B.23(6). If it does, placement must follow the tribe's priority as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). MCR 3.965(B)(13)(b), .967(F); *see also* 25 USC 1915(c).

D. Court May Change the Preference for Good Cause

§13.78 The court may elect not to follow the statutory adoption placement priority for "good cause." MCL 712B.23(2); *see also* 25 USC 1915(a). Under the MIFPA, good cause to modify the statutory preference order must be based on one or more of the following considerations:

- The request of the child if the child is of sufficient age.
- The extraordinary physical or emotional needs of the child as established by the testimony of an expert witness.

MCL 712B.23(5)."[G]ood cause is limited to the conditions articulated in MCL 712B.23(5)." *In re KMN*, 309 Mich App 274, 290, 870 NW2d 75 (2015) (biological mother's choice of adoptive placement not good cause under MIFPA).

The MIFPA differs from the federal rules, which provide that additional circumstances also constitute good cause to modify the statutory order of preference. 25 CFR 23.132; BIA Guidelines §H.4. However, good cause should be interpreted in accordance with the MIFPA. *KMN,* 309 Mich App at 292 n5 (discussed in §13.58).

The burden of establishing good cause not to follow the statutory preferences is on the party urging that the preferences not be followed. MCL 712B.23(3); *see also* 25 CFR 23.132(b) (requiring proof by clear and convincing evidence).

Before deviating from the MIFPA's placement preferences for good cause, the court must "ensur[e] that all possible placements required under [MCL 712B.23] have been thoroughly investigated and eliminated." MCL 712B.23(4). Efforts to follow the placement preferences "must be provided to the court in writing or stated on the record," and the court must address these efforts "at each hearing until the placement meets the requirements of [MCL 712B.23]." MCL 712B.23(4).

E. Record of Efforts to Comply

§13.79 The court or the DHHS must maintain a record of the efforts to comply with the adoption placement priority placement preferences. MCL 712B.23(7); *see also* 25 USC 1915(e). This record, together with the petition or complaint and all substantive orders entered in the proceeding, must be made available to a single state office, which must make the material available to the Indian tribe or Secretary of Interior within seven days of a request. 25 USC 1915(e); *see also* MCL 712B.23(10) (record must be made available on request to "the court, tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian").

F. Withdrawal of Consent

§13.80 The ICWA permits a parent or custodian to withdraw consent "[i]n any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, … for any reason at any time prior to the entry of a final decree … and the child shall be returned to the parent [or custodian]." 25 USC 1913(c). The parent must stipulate the intention to withdraw consent in an instrument executed under oath filed in the court where the consent was filed. 25 CFR 23.128(c); *see also* BIA Guidelines §I.7. However, the MIFPA does not specifically provide whether a parent can withdraw the release executed under MCL 710.28 and .29 during a child protective proceeding. *In re JJW*, 320 Mich App 88,

121, 902 NW2d 901 (2017), *rev'd on other grounds by In re Williams*, 501 Mich 289, 915 NW2d 328 (2018).

In *In re Kiogima*, 189 Mich App 6, 11, 472 NW2d 13 (1991), the court distinguished between a release of parental rights (where a release is given to a child placing agency or the Department of Human Services (now DHHS)) and a consent to adoption (where a consent for adoption is given to a specific person or agency). In distinguishing between the two terms, the court found that under a release of parental rights, the parent may withdraw the release up until the entry of the order terminating parental rights; however, a consent to adoption may be withdrawn up until the entry of the adoption decree. *Id.* at 13 (rejecting respondent-mother's claim that 25 USC 1913(c) afforded her right to withdraw her release of parental rights over her children at any time before entry of adoption decree).

XIV. Notice to Parent or Custodian of a Change in Placement

A. In General

§13.81 If an Indian child is removed from a foster care home or institution for the purpose of further foster care or preadoptive or adoptive placement, the court must notify the child's biological parents or prior Indian custodians of the removal and inform each party of the right to petition for return of custody of the child. 25 CFR 23.139; *see also* BIA Guidelines §J.3. The parent or Indian custodian may waive the right to such notice by executing and filing a written waiver with the court, but that waiver may be revoked at any time by filing a written notice of revocation. *Id.* Any new placement of the Indian child must comply with the requirements of the ICWA (except when the Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed). 25 USC 1916(b).

B. Disruption of Adoption

§13.82 A biological parent or former Indian custodian may petition for the return of custody of an Indian child under the following circumstances:

- the adoptive parents voluntarily consent to the termination of their parental rights to the child or
- the final decree of adoption has been vacated or set aside.

25 USC 1916(a); MCL 712B.27(6).

The court must grant the petition "unless there is a showing, in a proceeding subject to the provisions of [25 USC 1912], that [] return of custody is not in the best interests of the child." 25 USC 1916(a); MCL 712B.27(6). The provisions of 25 USC 1912(a)–(f) govern the following:

- notice of proceedings and time for preparation
- appointment of counsel
- the examination of reports or other documents
- remedial services, rehabilitative programs, and preventive measures

- foster care placement orders
- orders terminating parental rights

C. Removal from Foster Care

§13.83 When an Indian child is removed from foster care for the purpose of further foster care, preadoptive, or adoptive placement, the placement must be in accordance with the ICWA placement preferences except when the child "is being returned to the parent or Indian custodian from whose custody the child was originally removed." 25 USC 1916(b).

XV. Final Adoptive Order and Tribal Affiliation Information

A. Final Adoptive Order Sent to Secretary of Interior

§13.84 Within 30 days of the court's entry of a final decree or adoptive order concerning any Indian child, the court must provide the Secretary of the Interior with a copy of the decree or order together with the following information:

- the Indian child's name, birth date, and tribal affiliation;
- the names and addresses of the biological parents, and when applicable, the affidavit filed by the biological parents requesting confidentiality (Note: The biological parents may file an affidavit with the court requesting that their identity remain confidential. *See* 25 USC 1951(a); 25 CFR 23.71(a). This right is available to parents in a voluntary or involuntary proceeding. *See* 25 CFR 23.71(a). Parents seeking confidentiality should complete SCAO form PCA 353. Note also that "[i]f court records contain a statement of identifying information of the biological parent or parents that their identity remains confidential, the court shall include the statement of identifying information with the other information sent to the [S]ecretary [of the Interior] and the tribal enrollment officer of the appropriate Indian tribe described in [MCL 712B.35(1)]." MCL 712B.35(2).);
- the names and addresses of the adoptive parents; and
- the identity of any agency having files or information relating to such adoptive placement.

25 USC 1951(a); 25 CFR 23.71(a); MCL 712B.35(1). This information must be delivered in an envelope marked "Confidential" and sent to the following address: Chief, Division of Human Services, Bureau of Indian Affairs, 1849 C Street, NW, MS-3645-MIB, Washington, DC 20240. 25 CFR 23.71(a).

The information is not subject to the Freedom of Information Act, and the Secretary of the Interior must ensure that the information remains confidential. 25 USC 1951(a); 25 CFR 23.71(a).

B. Adoptee's Right to Tribal Affiliation Information

1. Release of Information by the Court

§13.85 An Indian child adoptee, on reaching the age of 18, is entitled to information concerning tribal identity. The adoptee may apply to the court that entered the final decree of adoption for information concerning the tribal affiliation, if any, of the adoptee's biological parents and such other information as may be necessary to protect any rights flowing from the adoptee's tribal relationship, and the court must comply with the request. 25 USC 1917; MCL 712B.27(4); MCR 3.807(C).

If the biological parent has not consented to release of identifying information, the court may reveal information regarding the adoptee's biological parents to the tribe, with a request that the tribe keep the information confidential, to allow the tribe to determine the adoptee's tribal membership. *In re Hanson*, 188 Mich App 392, 398–399, 470 NW2d 669 (1991).

2. Release of Information by the Secretary of the Interior

§13.86 An adoptee over the age of 18, as well as the adoptive or foster parents of an Indian child or the Indian child's tribe, may also request information concerning the adoptee's tribal affiliations from the Secretary of the Interior. 25 USC 1951(b). However, if the biological parents have filed an affidavit requesting that their identifying information remain confidential, the names of the biological parents must remain confidential. 25 CFR 23.71(b).

Where the Secretary of the Interior is prohibited from disclosing the biological parents' identifying information, the Secretary of the Interior's chief tribal enrollment officer may certify the child's tribe and, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by the tribe. 25 USC 1951(b); 25 CFR 23.71(b).

Note that the Secretary of the Interior maintains the confidential file on all state adoptions involving Indian children. 25 CFR 23.71(b).

Exhibit 13.1
Glossary of Defined Terms

MCR 3.002 Indian Children

For purposes of applying the Indian Child Welfare Act, 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, to proceedings under the Juvenile Code, the Adoption Code, and the Estates and Protected Individuals Code, the following definitions taken from MCL 712B.3 and MCL 712B.7 shall apply.

(1) "Active efforts" means actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family. Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active efforts include reasonable efforts as required by title IV-E of the social security act, 42 USC 670 to 679c, and also include doing or addressing all of the following:

(a) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.

(b) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services.

(c) Conducting or causing to be conducted a diligent search for extended family members for placement.

(d) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practice within the tribal community to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.

(e) Completing a comprehensive assessment of the situation of the Indian child's family, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

(f) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding.

(g) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

(h) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the

goals of the Indian child's permanency plan, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction.

(i) Offering and employing all available family preservation strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

(j) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs, and providing information about those resources to the Indian child's family, and actively assisting the Indian child's family or offering active assistance in accessing those resources.

(k) Monitoring client progress and client participation in services.

(*l*) Providing a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family.

(2) "Child custody proceeding" shall mean and include

(a) "foster-care placement," which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated,

(b) "termination of parental rights," which shall mean any action resulting in the termination of the parent-child relationship,

(c) "preadoptive placement," which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and

(d) "adoptive placement," which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act that, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(3) "Court" means the family division of circuit court or the probate court.

(4) "Culturally appropriate services" means services that enhance an Indian child's and family's relationship to, identification, and connection with the Indian child's tribe. Culturally appropriate services should provide the opportunity to practice the teachings, beliefs, customs, and ceremonies of the Indian child's tribe so those may be incorporated into the Indian child's daily life, as well as services that address the issues that have brought the child and family to the attention of the department that are consistent with the tribe's beliefs about child rearing, child development, and family wellness. Culturally appropriate services may involve tribal representatives, extended family members, tribal elders, spiritual and cultural advisors, tribal

social services, individual Indian caregivers, medicine men or women, and natural healers. If the Indian child's tribe establishes a different definition of culturally appropriate services, the court shall follow the tribe's definition.

(5) "Department" means the department of human services or any successor department or agency.

(6) "Exclusive jurisdiction" shall mean that an Indian tribe has jurisdiction exclusive as to any state over any child custody proceeding as defined above involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction, regardless of the residence or domicile, or subsequent change in his or her residence or domicile. MCL 712B.7.

(7) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 years and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term "relative" as that term is defined in MCL 712A.13a(1)(j).

(8) "Foster home or institution" means a child caring institution as that term is defined in section 1 of 1973 PA 116, MCL 722.111.

(9) "Guardian" means a person who has qualified as a guardian of a minor under a parental or spousal nomination or a court order issued under section 19a or 19c of chapter XIIA, section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, or sections 600 to 644 of the mental health code, 1974 PA 258, MCL 330.1600 to 330.1644. Guardian may also include a person appointed by a tribal court under tribal code or custom. Guardian does not include a guardian ad litem.

(10) "Guardian ad litem" means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney.

(11) "Indian" means any member of any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians, including any Alaska native village as defined in section 1602(c) of the Alaska native claims settlement act, 43 USC 1602.

(12) "Indian child" means any unmarried person who is under age 18 and is either
  (a) a member of an Indian tribe, or
  (b) is eligible for membership in an Indian tribe as determined by that Indian tribe.

(13) "Indian child's tribe" means
  (a) the Indian tribe in which an Indian child is a member or eligible for membership, or
  (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the most significant contacts.

(14) "Indian child welfare act" means the Indian child welfare act of 1978, 25 USC 1901 to 1963.

(15) "Indian custodian" means any Indian person who has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent.

(16) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(17) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 43 USC 1602(c).

(18) "Lawyer-guardian ad litem" means an attorney appointed under MCL 712B.21 to represent the child with the powers and duties as set forth in MCL 712A.17d. The provisions of MCL 712A.17d also apply to a lawyer-guardian ad litem appointed for the purposes of MIFPA under each of the following:
  (a) MCL 700.5213 and 700.5219,
  (b) MCL 722.24, and
  (c) MCL 722.630.

(19) "Official tribal representative" means an individual who is designated by the Indian child's tribe to represent the tribe in a court overseeing a child custody proceeding. An official tribal representative does not need to be an attorney.

(20) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established.

(21) "Reservation" means Indian country as defined in section 18 USC 1151 and any lands not covered under such section, for which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

(22) "Secretary" means the Secretary of the Interior.

(23) "Tribal court" means a court with jurisdiction over child custody proceedings and that is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe that is vested with authority over child custody proceedings.

(24) "Ward of tribal court" means a child over whom an Indian tribe exercises authority by official action in tribal court or by the governing body of the tribe.

Exhibit 13.2
Federally Recognized Indian Tribes in Michigan

Twelve federally recognized tribes currently reside in Michigan:

1. Bay Mills Indian Community
2. Grand Traverse Band of Ottawa and Chippewa Indians
3. Hannahville Indian Community
4. Nottawaseppi Band of Huron Potawatomi
5. Keweenaw Bay Indian Community
6. Lac Vieux Desert Band of Lake Superior Chippewa Indians
7. Little River Band of Ottawa Indians
8. Little Traverse Bay Bands of Odawa Indians
9. Match-E-Be-Nash-She-Wish Band of Potawatomi Indians
10. Pokagon Band of Potawatomi Indians
11. Saginaw Chippewa Indian Tribe
12. Sault Ste. Marie Tribe of Chippewa Indians

81 Fed Reg 5019 (2016). See the Native American Tribal Courts webpage on the Michigan Court's website or contact the Office of Federal Acknowledgment, Bureau of Indian Affairs, Washington, DC, for an updated list of federally recognized tribes in Michigan.

Note that the Indian Child Welfare Act does not apply to an Indian tribe that is not federally recognized. *Family Indep Agency v Fried (In re Fried)*, 266 Mich App 535, 540, 702 NW2d 192 (2005); *see also* BIA Guidelines §B.4.

Exhibit 13.3
Information Required in Notices of Child Custody Proceedings (Indian Children)

The Code of Federal Regulations require that notice be written in a clear and understandable language and include the following information:

- the child's name, birth date, and birthplace
- all names known of the parents, the parents' birth dates and birthplaces, and tribal enrollment if known
- if known, the names, birth dates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents
- the name of each Indian tribe in which the child is a member (or may be eligible for membership if a biological parent is a member)
- a copy of the petition, the complaint, or any other document by which the proceeding was initiated
- the name of the petitioner and the name and address of the petitioner's attorney
- a statement of the right of the biological parents or Indian custodians, if not already a party to the child custody proceeding, to intervene in the proceeding
- a statement of the Indian tribe's right to intervene at any time in a state court proceeding for the foster-care placement of or termination of parental rights to an Indian child
- a statement that if the parents or Indian custodians are unable to afford counsel, the parent or Indian custodian has the right to court-appointed counsel
- a statement of the right to, on request, up to 20 additional days to prepare for the proceedings
- the mailing address and telephone number of the court and information related to the parties and those notified of the proceeding
- a statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the foster-care-placement or termination-of-parental-rights proceeding to the tribal court
- the potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians
- a statement that all parties notified must keep confidential the information in the notice and that the notice should not be handled by anyone not needing the information to exercise rights under the ICWA

25 CFR 23.111(d).

14
Miscellaneous Issues

I. The Emancipation of a Minor

A. In General

§14.1 An emancipated minor has the rights and responsibilities of an adult, except for specific rights defined by constitution and statute, such as the rights to vote or drink alcoholic beverages. MCL 722.4e.

A minor may be emancipated from the parents or guardian by operation of law or through a petition filed with the family division of the circuit court. MCL 722.4.

B. Emancipation by Operation of Law

§14.2 A youth may be emancipated by operation of law when the person is validly emancipated under the law of another state, is 18 years of age, or

is on active duty with the United States Armed Forces. MCL 722.4(2). This statute also provides for limited emancipation for medical care when the minor is in the custody of a law enforcement agency or in the jurisdiction of the Department of Corrections.

C. Emancipation by Petition

1. Filing the Petition

§14.3 A petition for emancipation is filed by the minor in the family division of the circuit court in the county where the minor resides. MCL 722.4a.

The petition must be signed and verified by the minor and include the following:

- the minor's full name, birth date, and the county and state where the minor was born;
- the name and address of the minor's parents, guardian, or custodian;
- the minor's address and length of residency there;
- a certified copy of the minor's birth certificate;
- declarations that the minor has demonstrated the ability to handle financial affairs and to manage personal and social affairs; and
- an affidavit by one of a designated list of professionals who has personal knowledge of the minor's circumstances and believes that emancipation is in the minor's best interests.

MCL 722.4a(1), (2). The designated list of professionals includes

- a physician or nurse
- a member of the clergy
- a law enforcement officer
- a regulated child care provider
- a psychologist or family therapist
- a social worker or social work technician
- a school administrator, school counselor, or teacher

MCL 722.4a(2).

A copy of the petition and a summons to appear at the hearing must be served on the minor's parents or guardian, and a notice of the hearing must be served on the person who provided the affidavit. MCL 722.4a(3).

The persons interested in a petition for emancipation of a minor are

- the minor,
- the parents of the minor,
- the affiant on an affidavit supporting emancipation, and

- the minor's guardian or conservator.

MCR 5.125(C)(29).

2. The Court's Role; Hearings

§14.4 After a petition is filed, the court may do one or more of the following:

- assign an employee to investigate the allegations and prepare a report,
- appoint an attorney for the minor,
- appoint an attorney for the minor's parents or guardian if they oppose the petition and are indigent, or
- dismiss the petition if the custodial parent does not consent and is providing support.

MCL 722.4b.

A petition for emancipation that is not accompanied by the statutorily mandated affidavits and documents is defective and must be dismissed for failure to state a claim on which relief may be granted. *Ryan v Ryan*, 260 Mich App 315, 677 NW2d 899 (2004). The failure to file these documents may not be excused. *Id.*

If the petition is not dismissed, a hearing is held before a judge or referee sitting without a jury. MCL 722.4c(1). The minor may specifically request that the matter be heard by a judge. *Id.*

The minor has the burden of showing by a preponderance of the evidence that emancipation should be ordered. MCL 722.4c.

3. Standards for Issuing an Order

§14.5 The court must issue an order of emancipation if the court determines that emancipation is in the minor's best interests and the minor establishes all of the following:

1. The minor's parents or guardian do not object to the petition, or the parents or guardian objecting are not supporting the minor financially.
2. The minor is at least 16 years old.
3. The minor is a state resident.
4. The minor can manage their own financial affairs, which can be shown by proof of employment or other means of support.
5. The minor can manage their own social and personal affairs, which can be shown by proof of housing.
6. The minor understands the responsibilities as an emancipated youth.

MCL 722.4c(2).

4. Rescinding an Order

§14.6 The order of emancipation may be rescinded by the family division of the circuit court that issued the order on a petition brought by the minor or the parents or guardian. MCL 722.4d(1).

A copy of the petition for rescission and a summons must be served on the minor or the minor's parents. MCL 722.4d(2).

Proof needed for granting the petition. The court may grant the petition and rescind the order of emancipation if it determines one or more of the following:

1. The minor is indigent and has no means of support.
2. The minor and the parents agree the order should be rescinded.
3. There is a resumption of family relations inconsistent with the existing emancipation order.

MCL 722.4d(3).

II. Changing an Adult's Name

A. In General

§14.7 A person who has been a resident of a county for at least one year may submit a written petition to the family division of the circuit court of that county to change their name as long as the person shows sufficient reason for the change and does not seek the change with fraudulent intent. MCL 711.1(1).

The Michigan Courts' Self-Help Center offers guidance for pro se litigants involved in name change proceedings.

Practice Tip

- *Nothing in the statute prohibits a resident foreign national from petitioning for a name change. However, to verify the identity of the person, the court should require an official certification of residency (i.e., a green card).*

Fraudulent intent. A person having the same or a similar name to that proposed by the petitioner may intervene in the proceeding to show fraudulent intent. MCL 711.1(4).

If the person seeking the name change has a criminal record, is presumed to have fraudulent intent, and has the burden to rebut the presumption. The court will set a time for a hearing and order publication. MCL 711.1(1).

Perjury. If a person intentionally makes a false statement in the petition for the name change, that statement constitutes criminal perjury. MCL 711.1(8).

Publication. A published notice of a proceeding to change a name shall include the name of the petitioner; the current name of the subject of the petition; the proposed name; and the time, date, and place of the hearing. MCR 3.613(A). See SCAO form PC 563. Effective January 1, 2024, the court must pay the costs of publication if fees are waived under MCR 2.002. MCR 3.613(B); *see* ADM File No 2023-05.

For good cause, the family court can order that no publication of the proceeding take place and that the record of the proceeding remain confidential. MCL 711.3. Good cause includes cases where the petitioner has been the victim of stalking or an assaultive crime or there is other evidence that publication would put the petitioner or another person in physical danger. MCL 711.3(1). Evidence of the possibility of physical danger must include the petitioner or endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available. MCL 711.3(2). Where the court orders that records are to be confidential and that no publication is to take place, records are to be maintained in a sealed envelope marked confidential and placed in a private file. MCR 3.613(G). It is a misdemeanor for such information to be disclosed except under court order. MCL 711.3(3). The record is exempt from disclosure under the Freedom of Information Act, MCL 15.231 et seq. MCL 711.3(4).

B. Procedure

§14.8 Criminal check. An applicant for a name change who is at least 22 years old must have two complete sets of fingerprints taken at a local police agency; the fingerprints are then forwarded to the state police with a copy of the petition and the required fees. MCL 711.1(2).

The state police are responsible for checking their records, forwarding the fingerprints to the FBI, and reporting to the court whether these checks have shown pending charges against or any record of conviction of the petitioner. There is no hearing until the report is submitted. *Id.*

If the court grants the name change petition of a person who has a criminal record, the court must forward its order to the state police. The order is also sent to the Department of Corrections, the county sheriff, or other courts that have had jurisdiction over the person in the preceding two years. MCL 711.1(3).

If the petitioner is married. If the court grants a married person's petition for a name change, it may also include in the order the name of the spouse, if the person consents, and that of the petitioner's minor children of whom the petitioner has custody. MCL 711.1(6). Requirements for changing a minor's name are discussed in §14.10.

A divorced woman. If the wife wishes to use a name other than her husband's, the judge may, when granting the divorce, restore her birth name or prior surname or allow her to adopt another surname if the change is not sought with fraudulent or evil intent. MCL 552.391. The request may be made in the complaint or at any time before the judgment. *See also Piotrowski v Piotrowski*, 71 Mich App 213, 247 NW2d 354 (1976) (overruling trial court's denial of restoration, which would have provided different names for mother and child).

III. Choosing or Changing a Minor's Name

A. In General

§14.9 A child's surname is designated by the child's parents. MCL 333.2824.

A child born out of wedlock. If the mother was not married when the child was conceived or born, and if the mother and father did not complete and file an acknowledgment of parentage, the mother designates the child's surname. MCL 333.2824(3). But see §2.4 regarding gender neutrality in statutes after *Obergefell v Hodges*, 576 US 644 (2015).

Parental disputes. Parental disputes regarding a child's surname are resolved in the best interests of the child. *Garling v Spiering*, 203 Mich App 1, 512 NW2d 12 (1993). There is no requirement that the child's surname be the surname the parties used during the marriage when the child was conceived and born. *Id.; see also Rappleye v Rappleye*, 183 Mich App 396, 454 NW2d 231 (1990) (best interests of child considered in allowing child to choose to use her stepfather's surname).

B. Changing a Minor's Name by Petition

1. Procedure

§14.10 A petition to change a minor's name must be signed by both parents, by the surviving parent if the other is deceased, by the minor's guardian if both parents are deceased, or by one parent if they are the only legal parent available to give consent. MCL 711.1(5). However, MCL 711.1 does not abrogate or supersede the common-law rights to a name change. *In re Warshefski*, 331 Mich App 83, 951 NW2d 90 (2020) (although petitioner's request to change his surname could not be granted under MCL 711.1 because petitioner's parent who opposed name change was still paying child support, trial court properly concluded that MCL 711.1 did not abrogate petitioner's common-law right to change his name, and trial court correctly employed best interests test in granting 14-year-old minor child's petition when parents could not agree on how to resolve petitioner's request).

A minor over 14 years of age must sign a written consent to the name change in the court's presence. *Id.*

If the court considers a minor under 14 to be of sufficient age to express a preference, the court must consult the minor and consider the minor's wishes. *Id.*

The same requirements apply if it is the parent who has petitioned to change their name and the child is to be included in the order. See the discussion of the requirements when the petitioner is married in §14.8. Also, the minor must be the natural or adopted child of the petitioner. MCL 711.1(6).

2. When the Noncustodial Parent's Consent Is Not Required

§14.11 The minor's name may be changed on the signature of the custodial parent alone if the noncustodial parent has done any of the following:

1. failed or neglected to provide regular and substantial support, or has failed to substantially comply with a support order for two or more years before the petition was filed, and failed or neglected to visit, contact, or communicate with the child for two years or more before the filing;

2. been convicted of the crime of child abuse or criminal sexual conduct and the victim was the child or the child's sibling; or
3. been convicted of first-degree or second-degree murder regardless of the victim's nature.

MCL 711.1(7). This provision requires the consent of the custodial parent, notice to the noncustodial parent, and a hearing. *Id.*

IV. Parental Consent and Abortions Involving Unemancipated Minors

§14.12 The U.S. Supreme Court overruled *Roe v Wade*, 410 US 113 (1973), and *Planned Parenthood of SE Pennsylvania v Casey*, 505 US 833 (1992), when it ruled in *Dobbs v Jackson Women's Health Org*, 597 US 215 (2022), that the U.S. Constitution did not give women the right to an abortion and that the authority to regulate abortion rested with states.

In November 2022, Michigan voters approved an amendment to the Michigan Constitution that protects a woman's right to reproductive freedom, meaning that in Michigan, women have a constitutional right to make decisions about pregnancy, contraception, childbirth, and abortion. Mich Const 1963 art 1, §28. In April 2023, the Michigan Legislature repealed a pair of 1931 laws banning abortion without exception for rape or incest and making it a felony to assist a woman in obtaining an abortion. *See* 2023 PA 11, *repealing* MCL 750.14, .15.

Under the Parental Rights Restoration Act, MCL 722.901 et seq., it is illegal to perform an abortion on a minor without first obtaining the written consent of the minor and one of the minor's parents or legal guardian. MCL 722.903. A *minor* is a person under the age of 18 who is not emancipated. MCL 722.902(c).

Exception. A minor may petition the court for a waiver of the parental consent requirement if

1. a parent or legal guardian is not available,
2. a parent or legal guardian refuses to give consent, or
3. the minor elects not to seek the consent of a parent or the legal guardian.

MCL 722.903(2).

The proceedings are to be completed with confidentiality and sufficient expedition to provide an effective opportunity for the minor to provide self-consent to the abortion. MCL 722.904(2).

Practice Tips

- *Both MCL 722.904 and MCR 3.615 have provisions for maintaining confidentiality, including*
  - *the option of using initials in the petition*
  - *requiring a closed hearing*
  - *the option of having the hearing conducted in the judge's chambers*
  - *maintaining a single file on the petition and limiting access to it*

- *limiting hearing notice to the minor and her attorney or another representative*

- *To assure confidentiality, a court may also*
  - *schedule the hearing at a time when other motions or proceedings are not scheduled*
  - *if the hearing is in the courtroom, lock the courtroom doors*
  - *establish procedures so the hearing participants can discreetly enter and leave*
  - *train staff in the confidential nature of the proceedings*

Jurisdiction. The family division of the circuit court has exclusive jurisdiction over cases involving parental consent for abortions performed on unemancipated minors. *See* MCL 600.1021. The minor does not have to be a resident of Michigan for the Parental Rights Restoration Act to apply. MCL 722.906.

Venue. The minor may file the petition for a waiver of parental consent in the county in which the minor resides or is found. MCL 722.904(2)(b); MCR 3.615(I).

Initial contact with the minor. On the court's first contact with the minor, it must provide the minor with notice of the following three rights:

1. The proceedings will be confidential, which includes the right to use initials in the title of the proceeding.
2. The minor may request the court to appoint an attorney or guardian ad litem.
3. The court will assist the minor with preparing and filing the petition.

MCL 722.904(2)(a); *see also* MCR 3.615.

If the minor's first contact with the court is by a personal visit, the court must provide a written notice of rights and form for petition, a confidential information sheet, and a request for the appointment of an attorney. MCR 3.615(C)(1).

If the minor's first contact is by telephone, the minor will be told that she can receive the above information by coming to the court or by mail. If mail is requested, the court must mail the forms within 24 hours of the telephone contact to an address specified by the minor. MCR 3.615(C)(2).

Filing the petition. A minor may file a petition on her own behalf or through a next friend. MCL 722.904(2)(d); *see also* MCR 3.615(E).

The minor is not required to pay a fee for proceedings under this section. *Id.*

Appointment of counsel. The court must immediately appoint an attorney to represent the minor if one is requested by the minor or next friend. Except for good cause stated on the record, the court must appoint an attorney selected by the minor if the minor has secured the attorney's agreement or the attorney has previously indicated a willingness to be appointed. MCR 3.615(F). The minor must contact the attorney within 24 hours of appointment, and the court must advise the minor of this requirement. MCR 3.615(F)(3).

Hearing; burden of proof; time requirements. A hearing on the petition must be held within 72 hours, excluding Sundays and holidays, after the petition is filed. MCL 722.904(2)(g).

The hearing may be heard informally in the judge's chambers. MCR 3.615(J)(4). The petitioner has the burden of proof by a preponderance of the evidence to establish the statutory criteria at the hearing. MCR 3.615(J)(1). All relevant and material evidence may be received. MCR 3.615(J)(3).

A written order granting or denying the petition must be issued 48 hours, excluding Sundays and holidays, after the hearing on the petition. MCR 3.615(J)(5); *see also* MCR 3.615(K).

Practice Tip

- *Both MCL 722.904 and MCR 3.615 set strict time periods for the proceedings. A staff alerted to the nature of the petition and trained in its requirements can be the best insurance of expeditious processing of the petition.*

Conditions for grant of waiver of parental consent. There are two alternate grounds for the court to grant the minor's petition. The court is to grant a waiver of parental consent if it finds either (1) the minor is sufficiently mature and well-enough informed to make the decision regarding abortion independently of her parents or legal guardian or (2) the waiver would be in the best interests of the minor. MCL 722.904(3). See exhibit 14.1 for questions that might be helpful in gathering information that would be relevant to finding if either of these grounds exists.

Practice Tip

- *The types of questions in exhibit 14.1 have been used by some judges in interviewing the minor. In other jurisdictions, a caseworker uses these questions to gather initial data for the court. While the questions are divided into separate waiver issues, the information could be relevant to either ground. Note also that the judge only needs to find that one of the waiver conditions is met. Problems might arise where a judge uses both grounds together.*

The court's final responsibilities. The court must issue and make a part of the confidential record its specific findings of fact and conclusions of law in support of its ruling either on the record or in a written opinion. MCL 722.904(2)(h). The court must also report suspected child abuse under the child protection law. MCL 722.904(5).

Postpetition actions to open a petition file. After the waiver of parental consent proceedings are completed, the file is closed and may only be opened by court order for good cause and only for a purpose specified by the court. MCR 3.615(B)(3). Good cause is a legally sufficient or substantial reason. *FG v Washtenaw Cty Circuit Court (In re FG)*, 264 Mich App 413, 691 NW2d 465 (2004). A former petitioner has good cause to review her closed file when she seeks to determine if the court considered her mental condition during the waiver proceedings. Further, the confidentiality issues are not violated when the petitioner herself is seeking to open the file.

Exhibit 14.1
Questions to Assist the Court Regarding Waiver of Parental Consent to a Minor's Abortion

In the Matter of:

D.O.B.:

Address:

Issue 1

Is the minor sufficiently mature and well-enough informed to make the decision regarding abortion independently of her parents or legal guardian? MCL 722.904(3)(a).

Personal Information

With whom do you reside?

Who has legal custody?

Where is the noncustodial parent and how much contact do you have with that person?

Do you have a legal guardian?

Are you attending school?

Which school?

What is the highest grade level you have completed?

What are your grades?

What school activities do you participate in?

What nonschool activities do you participate in, such as church or in the community?

What is your employment history?

What is your source of financial support?

What do you spend money on and do you save any?

What are your responsibilities in your own home or residence?

What is your driving record?

What is your mental health record, if any?

What are your general plans for the future?

Was the pregnancy intended?

If not, do you understand why you became pregnant on this occasion?

What would you do in the future to avoid an unwanted pregnancy?

Counseling Information

Have you received specific counseling regarding abortion and, if so, with whom and when?

What are the counselor's credentials?

Do you think the information is accurate and thorough?

Do you feel you need more counseling regarding the pregnancy and request for abortion?

Did the counseling cover these options?

- Abortion ___ Yes ___ No
- Adoption ___ Yes ___ No
- Marriage ___ Yes ___ No
- Single parenthood ___ Yes ___ No

Do you understand, and have you considered, these various options or alternatives to abortion?

Why have you chosen abortion as your option?

Do you understand how much time you have left to make this decision?

How and where would you go about obtaining an abortion?

How would you pay for the abortion procedure?

Medical Information

What is your health history?

Who is your physician?

Have you previously had an abortion?

____ Yes

____ No

If yes, how many times?

Have you been examined by a physician regarding your pregnancy? When and where?

Did you give a true statement of your medical history to the examining physician?

Did your physician make a recommendation to you regarding your abortion?

Would there be any foreseeable medical complications according to your physician?

Have the abortion procedures and the medical risks been explained to you?

Have the aftercare procedures been explained to and understood by you?

Have you been informed of and do you understand what to do if medical complications occur?

Have you been counseled on possible emotional and psychological problems you may experience after the abortion?

How would you deal with such problems, if any occur?

Issue 2

Is it in the best interests of the minor to grant the waiver of parental consent? MCL 722.904(3)(b).

What is your relationship with your parents or guardian?

What is your relationship with the father of the child?

To whom do you usually turn for advice?

What is this person's advice on this issue of abortion, if any?

Why do you feel you should not inform a parent or guardian about your pregnancy and request for this waiver?

How do your parents or guardian generally respond when confronted with your actions that displease them?

Is there a reason to believe that emotional or physical harm would come to you as a result of discussing your pregnancy and desire for an abortion with either parent or your guardian?

____ Yes

____ No

If so, what?

What evidence regarding your parents' or guardian's past behavior is there that would show harm would come to you if you requested their consent to this abortion?

Additional Information

Have you received any promise from anyone if you would have the abortion?

Have you received any threats of action or inaction if you do not have the abortion?

Is this your voluntary decision to seek consent of the court rather than get parental consent?

Did this pregnancy arise out of any physical or sexual abuse or any other criminal act?

Caseworker Interviews

Do you want to be represented by an attorney?

State any additional information you wish to bring to the court's attention on why you must have the abortion for your physical and mental well-being.

Dated: *[date]*

[Signature line]
Interviewer
[Interviewer's title and address]

I have examined this report, and its contents are true to the best of my information, knowledge, and belief.

Dated: *[date]*

[Signature line]
Minor

2017 Tax Act	Tax Cuts and Jobs Act of 2017
ADR	alternative dispute resolution
BIA	Bureau of Indian Affairs
CEJ	continuing exclusive jurisdiction
CRSC	Combat-Related Special Compensation
CTC	Child Tax Credit
DHHS	Department of Health and Human Services
DRAA	Domestic Relations Arbitration Act
EDRO	eligible domestic relations order
EPIC	Estates and Protected Individuals Code, MCL 700.1101 et seq.
ERISA	Employee Retirement Income Security Act of 1974, Pub L No 93-406
ESOP	employee stock ownership plan
FOC	Friend of the Court
GPA	Genetic Parentage Act
ICWA	Indian Child Welfare Act, 25 USC 1901 et seq.
IIWA	Interstate Income Withholding Act, MCL 552.671 et seq.
IVF	in vitro fertilization
LGAL	lawyer–guardian ad litem
MCI	Michigan Children's Institute
MCSF	Michigan Child Support Formula of 2004
MiCSES	Michigan Child Support Enforcement System
MiSDU	Michigan State Disbursement Unit
MIFPA	Michigan Indian Family Preservation Act
MJI	Michigan Judicial Institute
MMA	Michigan Marriage Amendment
MPSERS	Michigan Public School Employees Retirement System
NDAA 2017	National Defense Authorization Act for Fiscal Year 2017
OCS	Office of Child Support
PBGC	Pension Benefit Guaranty Corporation
PKPA	Parental Kidnapping Prevention Act, 28 USC 1738A
PPO	personal protection order

QDRO	qualified domestic relations order
QJSA	qualified joint and survivor annuity
QPSA	qualified preretirement survivor annuity
RPA	Revocation of Paternity Act
SCAO	State Court Administrative Office
SERF	shared economic responsibility formula
SPTEA	Support and Parenting Time Enforcement Act, MCL 552.601 et seq.
SSPA	Summary Support and Paternity Act
TRO	temporary restraining order
UCAPA	Uniform Child Abduction Prevention Act
UCCJA	Uniform Child Custody Jurisdiction Act
UCCJEA	Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1101 et seq.
UCLA	Uniform Collaborative Law Act
UIFSA	Uniform Interstate Family Support Act, MCL 552.1101 et seq.
UFMJRA	Uniform Foreign Money-Judgments Recognition Act, MCL 691.1151 et seq.
USFSPA	Uniformed Services Former Spouses' Protection Act

Statutes

(References are to sections, forms, and exhibits.)

United States Constitution

United States Code

Internal Revenue Code

Public Laws

Michigan Constitution

Michigan Compiled Laws

Public Acts of Michigan

Court Rules, Rules of Evidence, and Related Orders

(References are to sections, forms, and exhibits.)

Michigan

Michigan Court Rules

Michigan Rules of Evidence

Michigan Administrative Orders

Federal

Federal Rules of Civil Procedure

Federal Rules of Evidence

Regulations and Other Administrative Materials

(References are to sections, forms, and exhibits.)

Michigan

Michigan Rules of Professional Conduct

Michigan Child Support Formula

Michigan Child Support Formula Supplement

Federal

Code of Federal Regulations

Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings

Attorney General Opinions

(References are to sections, forms, and exhibits.)

Opinions of the Attorney General

Ethics Opinions

(References are to sections, forms, and exhibits.)

Ethics Opinions

Other

(References are to sections, forms, and exhibits.)

Other

Cases

(References are to sections, forms, and exhibits.)