UPDATED REPORT

of the

Quality & Depth of Hearings Committee

Michigan Court Improvement Program Statewide Taskforce

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ACKNOWLEDGEMENT

This report was first issued in November 2011 and is the original product of the individuals listed below. The report was updated in December 2013 to comply with recent changes in state and federal law, policy, and resources. While new sections have been added and portions edited, the foundation and recommendations remain the same. The CIP Statewide Task Force gives special thanks to the 2011 QDH committee for its invaluable contributions, and recognizes that the updated report would not be in existence without the original report, which was the work product of the following individuals:

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Table of Contents

QUALITY AND DEPTH OF HEARINGS 1

COMMITTEE RECOMMENDATIONS 1

I. INTRODUCTION 1

II. CONSENSUS BUILDING/SYSTEM IMPROVEMENT 2

III. BEST PRACTICES FOR COURT HEARINGS 2

A. Production and Distribution of Court Orders 2

B. Removal Hearings 2

C. Preliminary Hearing 4

D. Pleas 8

E. Pretrial Conference 11

F. Adjudication Phase 12

G. Dispositional Phase 16

H. Dispositional Review Hearings 20

I. Permanency Planning Hearing 22

J. Termination of Parental Rights Hearing 24

K. Miscellaneous Hearings 28

IV. INDIAN CHILDREN 34

V. INCARCERATED PARTIES 35

VI. CHILD SUPPORT 35

VII. SUMMARY OF RECOMMENDATIONS 35

VIII. FUTURE CONSIDERATIONS FOR THE COURTS 36

QUALITY AND DEPTH OF HEARINGS COMMITTEE RECOMMENDATIONS

I. INTRODUCTION

In 2003, the federal government required each state Court Improvement Program (CIP) to conduct a reassessment of its state laws and performance and then adopt a strategic plan to improve the state's handling of child abuse and neglect litigation for children in foster care. The Michigan State Court Administrative Office commissioned the Muskie School of Public Service and the American Bar Association to conduct the reassessment. They submitted their final reassessment report in 2005.

The CIP Quality and Depth of Hearings Committee (QDH Committee) was charged with responding to Chapter Four of the reassessment report and related recommendations for changes in the Michigan system.

The committee generally agrees with the proposition that child protection proceedings should be assigned to a well-trained jurist who has a full-time, long-term assignment to handle such cases. The jurist should also have adequate time available to devote to the caseload, and a management information system designed to assure timely case processing and track meaningful outcomes.

The reassessment report says, at page 12, that "[o]verall, Michigan courts are better organized to handle child protective proceedings than those of most other states." The QDH Committee agrees with that conclusion, but is also committed to using the material in the reassessment report to further improve handling these cases.

The committee recognizes that complying with some of the recommendations, like those pertaining to judicial workload and judicial assignment policies will be long-term projects. The QDH Committee has elected to focus its initial efforts on a careful analysis of what should be accomplished before, during, and after each type of hearing that occurs in a child protective proceeding. The QDH Committee chose to build on the existing procedural framework set forth in Michigan's statutes and court rules, identifying best practices, and recommending procedural changes that should result in substantial improvements. The recommendations are not meant to be a "bench guide" or procedural checklist for conducting each type of hearing; rather, the recommendations are a response to specifics from the reassessment report and to highlight other areas where practice could be improved.

The reassessment report also focuses on the relationship between various parties who participate in child protective proceedings. The committee agrees that the system will provide the best outcomes for families when all parties have a good understanding of their respective roles, an appreciation for the roles of other parties, and a commitment to working together to achieve the best outcomes possible. Toward that end, this report makes occasional recommendations directed to parties who are not part of the court system.

As experienced professionals, the committee members understand that some of the best practices it has recommended will be difficult to implement because of resource limitations. In those cases, the committee has set forth goals to strive for, even if they can be only partially attained now, or fully attained only over time.

II. CONSENSUS BUILDING/SYSTEM IMPROVEMENT

The committee recommends that in each jurisdiction, a Family Division judge should convene a workgroup to meet semiannually and discuss the processing of child protective proceedings. The workgroup should consist of representatives from the Department of Human Services (DHS), local private agencies, the prosecutor's office or attorney general's office, defense bar, lawyer guardians ad litem, Friend of the Court, adults who were previously under court jurisdiction, the Foster Care Review Board, tribal partners, and Community Mental Health where appropriate. If there are other interested agencies or systems in the jurisdiction, such as Court Appointed Special Advocates, they should also be invited. These multidisciplinary meetings will allow the group to address procedural concerns and develop solutions. Equally as important, the meetings will help build rapport and establish trust among child welfare professionals in each community.

III. BEST PRACTICES FOR COURT HEARINGS

A. Production and Distribution of Court Orders

The Court speaks through its **written** orders. The following are examples of actions in child protective proceedings that require a written court order: removal of a child from the home, placement or replacement of a child, a child's return home, medical authorizations, adjudication, dispositional orders (which include treatment plans), evaluations/assessments, supervised or unsupervised visitation, and case dismissal. Timely written court orders are critical to prevent delayed services and/or reunification. Further, to avoid jeopardizing title IV-E funding, the best practice is to use SCAO-approved court order forms that incorporate the required funding language and findings.

Removal orders should be expedited by the court to ensure that the agency may act to immediately remove the child(ren) from the unsafe environment, as well as to comply with federal title IV-E funding regulations. Dispositional orders that do not order removal and cannot be served the same day should be served on all parties within 7 days of the court hearing. Delays in receiving dispositional orders and dispositional review orders may affect the ability of a caseworker to make timely referrals for services, which may cause a delay in permanency for children and may result in costly foster care expenses. DHS is unable to pay for some services for a family until the court order is received.

Achieving timely permanency for youth is critical and should not be delayed because of barriers in the administrative processes. Any delay can have a detrimental effect on the family's ability to be reunified.

B. Removal Hearings

The court may order the removal of a child from the home at any time during a child protective proceeding. However, there are two distinct removal processes under the Juvenile Code: Removal preadjudication (Protective Custody) and removal postadjudication (Emergency Removal). Both removals require similar judicial findings, but are governed by different court rules and therefore have different procedures.

Protective Custody MCL 712A.14A-14B; MCR 3.963

Michigan law authorizes a law enforcement officer to take a child into protective custody, without a court order, under certain exigent conditions. To effectuate the transfer of the child to DHS for placement and care, the court must issue a protective custody and placement order. Similarly, to take a child into protective custody, DHS must petition the court for a protective custody and placement order. Follow these procedures for an initial removal request when the child is not already under court jurisdiction.

1. DHS must submit a petition or affidavit of facts requesting removal and/or placement of a child into foster care. This may be received electronically or otherwise by the judge or referee.
2. The judge or referee may issue an ex parte order authorizing DHS to take the child into protective custody and place the child pending the preliminary hearing. A referee's order is considered an interim order pending a preliminary hearing under these circumstances.
3. The court must find <u>all</u> of the following:
    a. There is a reasonable cause to believe that the child is at substantial risk of harm or that the surroundings present an imminent risk of harm to the child's health and safety;
    b. That the child's immediate removal is necessary to protect the child's health and safety;
    c. The circumstances warrant issuing an ex parte order ending the preliminary hearing;
    d. Reasonable efforts were made to prevent or eliminate the need for removal;
    e. No other remedy is reasonably available to protect the child;
    f. Continued placement in the home is contrary to the child's welfare; and
    g. The ex parte order must be supported by written findings of fact.
4. The order must be communicated in writing, electronically or otherwise, to the appropriate county DHS office and filed with the court the next business day.
5. The case must be scheduled for a <u>preliminary hearing</u> within 24 hours.

Before the enactment of this law in 2012, court practices varied on protective custody removals. Some courts accepted a verbal removal and placement request by DHS in emergency after-hours situations. The on-call jurist would verbally authorize the action and complete a written order the following business day. Other courts required DHS to provide a written petition to the on-call jurist, who would provide a written or verbal order in response.

The law was amended in 2012 to provide uniform standards for protective custody removals. It now enumerates the written petition and court order process for protective custody and placement into care. Courts maintain discretion in developing the method of communication to execute the process.[1] The best practice for court orders authorizing a child to be taken into protective custody is to include case-specific facts to support both the contrary to the welfare and reasonable efforts to prevent removal findings, in order to preserve title IV-E funding.

[1] SCAO encourages courts to meet with a group of DHS representatives and local law enforcement to develop an after-hours emergency removal and placement plan. The group should determine the most efficient and effective way to communicate the case-specific information to the on-call jurist, provide for the preparation and signature of the order, and ensure return of the order to the DHS worker.

Emergency Removal

The agency may request an emergency removal of a child, over whom the court has retained jurisdiction but for whom the child was still maintained in the child's home. Emergency removals are governed by MCR 3.974(B). If the court orders the child to be taken into protective custody, an emergency removal hearing is required within 24 hours after the removal, excluding Sundays and holidays.

The respondent parent is entitled to receive a written statement of the reasons for the removal, and to be advised of the following rights: (a) to have counsel at the dispositional review hearing, (b) to contest the continuing placement at the dispositional review hearing within 14 days, and (c) to use compulsory process to obtain witnesses for the dispositional review hearing. Unless the court returns the child home pending the dispositional review hearing, the court must make a written determination that the out of home placement criteria are satisfied. The out-of-home placement criteria include that:

1. Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
2. No provision or service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk.
3. Continuing the child's residence in the home is contrary to the child's welfare.
4. Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
5. Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.

C. Preliminary Hearing

The court must hold a preliminary hearing if the child has been taken into temporary protective custody, or if the petitioner is requesting that the child be taken into custody.[2] MCR 3.965 governs the preliminary hearing process. The committee recommends the following as best practices tips:

1. The petitioner should make repeated attempts, if necessary, to secure the attendance of the parent, guardian, or custodian at the initial court appearance.

2. If any of the parties are incarcerated, the court should assist in securing their participation by telephone.[3]

3. At the beginning of the hearing, the court should ascertain the identity of the parties present, determine if venue is proper, and ask if the child or either parent is a member of an Indian tribe or if the child is under tribal court jurisdiction or resides on a reservation. If the child is, or may be, eligible for tribal membership, refer to the procedures in the "Indian Children" section of this document (p. 34). The court should also verify the accuracy of the respondent's address and telephone number and inquire if anyone has information about the identity, address, or telephone number of any party for whom that information is not set forth in the petition.

[2] See Section B on Removal Hearings.
[3] See p. 35 on the procedures on "Incarcerated Parties."

4. The court should take testimony about the tentative identity of the child's father if the child has no legal father. The best practice at this stage may include utilizing the Absent Parent Protocol.[4]

5. The court must advise the respondent of the right to have counsel at this hearing and at any subsequent hearing. Additionally, the court should inform the respondent that he or she may be ordered to reimburse the funding unit, fully or partially, for the costs of providing court-appointed counsel. Note that *putative* fathers are not entitled to court-appointed counsel.[5]

6. The court should determine, on the record, whether the case should be dismissed, referred for alternative services, or whether it should move forward on the formal judicial calendar.

7. The court should advise the respondent of his or her right to trial and determine how the respondent wishes to plead. If the respondent elects to admit the allegations, the court should make findings on the record or in writing as to what facts are considered established. These findings can be considered *res judicata* for subsequent proceedings in the case. Refer to the procedures in the "Pleas" section of this document (pp. 8-11).

8. If the allegations in the petition only pertain to one parent, the parent against whom no allegations are made is only a "party" to the child protection proceeding, as defined by MCR 3.903(A)(19)(b). He or she is not a "respondent." The court cannot accept admissions from a nonrespondent parent.[6] If, after the court assumes jurisdiction over the child, the petitioner files a supplemental petition against a parent who was originally a nonrespondent parent, the petitioner must prove the allegations of the supplemental petition by legally admissible evidence.[7]

9. The court should inquire if there is a child support order already established for the child who is the subject of the proceeding. Refer to section VI "Child Support" in this document (p. 35).

10. If it is necessary to adjourn the preliminary hearing to secure the attendance of parties or counsel, the adjourned hearing must be conducted within 14 days. If the hearing is adjourned to provide notice to a tribe or the Secretary of the Interior as required under the Michigan Indian Family Preservation Act, the adjourned hearing must be conducted within 21 days.[8] Any amendments of the petition should be filed before the adjourned hearing takes place.

11. At the conclusion of the preliminary hearing, the court should seek input from all parties about the temporary orders that will be in effect until the next hearing.

12. If the court authorizes the petition, the order following the preliminary hearing *must* address the following issues:

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[4] http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/APP.pdf

[5] MCL 712A.17c (4) states that a "respondent" has the right to court-appointed counsel. MCR 3.903(C)(1) defines "respondent" to include a "parent." The definition of "parent" in MCR 3.903(17) includes "the father." MCR3.903 (A)(7) defines "father" and does not include a putative father.

[6] *In re SLH*, 277 Mich App 622, 669-670; 747 NW2d 547 (2008).

[7] *In re CR*, 250 Mich App 185, 201-202; 646 NW2d 506 (2001).

[8] MCR 3.965(B)(10), as amended in October 2013, states "If the court knows or has reason to know the child is an Indian, the court may adjourn the hearing for up to 21 days to ensure proper notice to the tribe or Secretary of the Interior as required by MCR 3.920(C)(1)."

- **Administration.** Who will develop a case plan and assure that temporary orders are enforced? [9]

- **Custody.** Who will have custody of the child until the next hearing? If the court enters a temporary custody order that conflicts with an existing order for custody or parenting time, the new order should specify who will provide notice to the court that issued the prior order. [10]

- **Parenting Time.** If the child is removed from home, the order should specify parenting time terms. The court should operate from the presumption that both parents are entitled to parenting time, so long as it does not pose an undue risk of harm to the child's physical or emotional well-being.[11] Restrictions on parenting time should not be unduly burdensome. [12] If a parent violates a restriction regarding parenting time, subsequent visits should not be automatically terminated; rather, the court should exercise its discretion whether to suspend or continue parenting time. The committee agrees with the position advocated by the Michigan Association for Infant Mental Health that it is especially important to maintain parent-child contact for infants and young children. The frequency of parenting time can sometimes be increased by using volunteers to supervise visits on holidays or outside normal working hours. Parents should be given an opportunity to identify potential visitation supervisors, subject to the approval of the caseworker and the L-GAL. In the event that siblings are not placed together, the court should ensure that the siblings have the opportunity for contact with each other as the case progresses. If a child has a close relationship with a relative other than a parent, the court may authorize, in its discretion, visits with that relative.

- **Reasonable Efforts.** If a child is removed from home, the court must make findings that "reasonable efforts" have been made to prevent the removal (or "active efforts" to prevent the breakup of the Indian family if the Indian Child Welfare Act (ICWA)/Michigan Indian Family Preservation Act[13] (MIFPA) applies). The court has 60 days from the date of removal to make this finding. If the court does not make this finding within 60 days, federal title IV-E funding cannot be used to fund any portion of the case. **Appendix A** provides a summary of the MIFPA.

  If the court believes that the agency (usually DHS) should make additional efforts before removing the child from the home, the court should not order removal of the child and should order the agency to provide additional services to the family.

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[9] For a case to be eligible for funding under title IV-E, DHS must provide supervision.
[10] MCR 3.205.
[11] MCL 712A.13a(13): If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.
[12] *In re Carter*, Unpublished per curiam opinion of the Court of Appeals, issued March 6, 2012 (Docket No. 304476)(Stating in footnote 4 that, "[P]arenting time can only be conditioned if the visitation may be harmful for the child and after the child undergoes a psychological evaluation and/or counseling. [citation omitted]. Therefore, a blanket policy that conditions parenting time, including supervised parenting time, upon three consecutive negative drug screens, without following the statutory framework, would be contrary to Michigan law.")
[13] MCL 712B.1-41. Because the statutory definition of active efforts incorporates the federal definition of reasonable efforts, it is no longer necessary for courts to make both reasonable and active efforts findings for title IV-E eligibility for Indian children.

- **Reasonable Efforts Not Required**. In certain egregious cases, the court is not required to find that the agency made reasonable efforts to maintain the child in the home. In certain aggravated circumstances, Michigan and federal statutes[14] allow the court to find that no reasonable efforts to prevent removal are required. Under those circumstances, the court must hold a permanency planning hearing within 28 days of that finding, even if the adjudication hearing has not yet occurred. This expedited permanency planning hearing should be scheduled before the end of the preliminary hearing to ensure it is scheduled for a date within the next 28 days.

- **Contrary to the Welfare Findings**. The court must also make a "Contrary to Welfare" finding, citing the specific reasons why continued placement of the child with the parent is contrary to the child's welfare. This finding must be made on the first court order that authorizes the removal of the child from the home.[15]

- **Schedule the Next Hearing or Case Events.**

13. The order **may** also address the following issues if necessary or appropriate:

- Continuity of necessary medical care and preservation of the child's existing educational program, to the greatest degree possible.

- Removal of a nonparent adult from the child's home.[16]

- Other preliminary orders affecting adults, including their participation in evaluations.[17]

- Any necessary examinations of the child.[18]

- Orders assigning child support or requiring reimbursement for the costs of placement or other court services.

- Services to be provided to the child, such as medical treatment or counseling.

- Orders regarding adults releasing information or participating in services.[19]

- Home studies of relatives who may be able to provide placement for the child.

- Writs to secure the attendance of an incarcerated party who should attend the next hearing.

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[14] MCL 712A.19a(2), MCR 3.976(B)(1); 42 USC 671(a)(15)(D); 45 CFR 1356.21(b)(3).
[15] 45 CFR 1356.21(c).
[16] MCL 712A.13a(4).
[17] MCL 712A.6.
[18] MCL 712A.12; MCR 3.923(B).
[19] Orders directed to adults at any pretrial stage of the proceeding should be based on the adults' consent, unless required to assure the welfare of the child, as stated in MCL 712A.6. At or after the dispositional hearing, the court has broad authority to issue orders to adults. See *In re Macomber*, 436 Mich 386; 461 NW2d 671 (1990). See also MCL 712A.18(g) and MCL 712A.6.

- An order changing venue, e.g., transferring the case to a party's county of residence.[20]

14. At the conclusion of the preliminary hearing, the court should advise the respondent(s) that DHS has an obligation to produce an initial services plan within 30 working days and that the respondent may, but is not required to, participate in services.

15. If the preliminary hearing is conducted by a referee, the referee should advise the parties, at the conclusion of the hearing, of their right to have the referee's recommendations reviewed by a judge.[21]

16. The judicial officer, at the conclusion of the preliminary hearing, should advise the respondents of their right to a jury trial.[22]

17. At the conclusion of the preliminary hearing, if the court orders the removal of the child from the home, the court should advise the parents that they have the right to appeal the removal order to the Court of Appeals within 21 days.[23]

D. Pleas

A respondent may consent to the court's jurisdiction at the preliminary hearing or at a later date. After such a plea has been accepted, the court's authority to enter orders directed to adults is governed by MCL 712A.18(1)(g), as well as by the court's determination of what orders are necessary to effectuate the court's jurisdiction. Courts should follow the procedures set forth in this section whenever a plea is taken.

1. Admission by one party

A petition in a child protective proceeding may contain allegations against one parent but not the other, or allegations against both parents. If there are allegations against both parents, one parent may admit the allegations that pertain to him or her, and the court may take jurisdiction over the child without the other parent admitting to the allegations that pertain to him or her.[24] In such cases, the admitting parent's plea must be sufficient to prove a jurisdictional ground. [25]

2. Plea of admission

MCR 3.971 governs the procedures for pleas of admission or no contest.

The court must assure that the admitting party and, if the party is represented, his or her attorney, is present at the hearing. The child's L-GAL must also be present. The prosecutor or attorney for the petitioner should also be present. MCR 3.971(A) provides that the plea may be taken at any time after the filing of the petition, provided that the petitioner and the attorney for the child have

[20] MCL 712A.2(d); MCR 3.926.
[21] MCR 3.913(C).
[22] MCR 3.911(B).
[23] MCR 3.993(A)(1).
[24] *In re CR* 250 Mich App 185; 646 NW2d 506 (2002).
[25] *In re SLH*, 277 Mich App 662; 747 NW2d 547 (2008).

been notified of a plea offer to an amended petition and have been given the opportunity to object before the plea is accepted. If the admitting party is not represented, the court should advise him or her, on the record, of the right to be represented by counsel, including court appointed counsel for an indigent party.

The court should assure that the plea is voluntary. This means that the court should inquire if any threats or promises have been made to induce or encourage the respondent to admit the allegations. If the plea agreement involves amending the petition, a resolution of criminal charges, or other agreement, the court should place the details of the agreement on the record.

The court should determine if the respondent understands the implications of admitting the allegations with the following procedural statements and questions:

- Advise the respondent of his or her trial rights.

- Ask the respondent if he or she is aware that findings resulting from the plea could later be used as evidence in a proceeding to terminate parental rights.

- Ask the respondent if he or she has had an opportunity to discuss the plea with his or her attorney, and offer a recess or an adjournment to consult with the attorney if the respondent believes the previous opportunity to consult was not sufficient.

- Make inquiries to determine the respondent's general level of competence and understanding. These may include questions about the respondent's educational attainment, if respondent is subject to a guardianship, or any current use of drugs or alcohol by respondent.

- Ask the respondent's attorney if he or she believes the respondent understands the implications of making the admission.

- The court, petitioner's attorney, or the parent's attorney should ask the respondent questions that demonstrate a factual basis for the plea.

- Make a finding indicating which statutory ground applies, and additional findings of fact, in writing or on the record, based on the respondent's testimony.

- With respect to the taking of the plea, while the court can accept admissions to less than all of the allegations and still find an adequate basis for jurisdiction, the court should proceed cautiously with respect to "watering down" the plea for two significant reasons. First, the orders of disposition,[26] which set forth the efforts to be made by the parents and the services to be provided to them, are designed to rectify the conditions that led the child to be removed from the home; that is, the orders are directly tied to the reason that the court exercised jurisdiction. Second, if termination is ultimately sought based upon

[26] MCL 712A.18f.

any condition that falls outside the plea that served as a basis for the court exercising jurisdiction, the petitioner will need to produce legally admissible evidence to establish each allegation. As a practical matter, that can prove particularly difficult with respect to allegations of sexual and physical abuse.

- The court may find that an adequate factual basis for jurisdiction exists even if the respondent has not admitted each individual allegation contained in the petition. Allegations that have not been adjudicated cannot be used as evidence in a proceeding to terminate parental rights unless they are proven at that stage by legally admissible evidence.[27] [28]

- Note on the face of the petition that the matter has been adjudicated, the date of the plea, and the identity of the judicial officer who took the plea.

- Determine whether to adjourn the case for disposition. If the child is in placement, the dispositional hearing must be held within 28 days.[29] If the court continues directly to disposition, all parties must be provided with a copy of the case service plan.

- Once the court asserts jurisdiction over the child, the court may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction.[30] These orders are not limited to the respondents or parties.

- If the case is adjourned for disposition, the court should inquire of the parties about the necessity for changes in any temporary orders. The same considerations should apply as at the conclusion of the preliminary hearing (pp. 4-8 above). Custody and parenting time should be specified in a court order, unless that has been done in a previous order. The court should order necessary examinations or evaluations, with the results furnished to the court, the caseworker, and all counsel. The committee recognizes that not all service providers have contracts with DHS. In the event that the court determines that input from a service provider not under DHS contract would be beneficial, the court may order that service provider to provide services at court expense.

3. Plea of no contest

A no contest plea requires the court to give the respondent the same advice of trial rights that must be given upon a plea of admission. The court should conduct similar inquiries to assure that the plea is voluntary and understood. The factual basis may be supplied by testimony or, with the

[27] For a discussion of this issue, see Chapter Ten of the Child Protective Proceedings Benchbook (Revised Edition), published by the Michigan Judicial Institute.
[28] *In re Gilliam*, 241 Mich App 133, 137 (2000) ("If termination is sought on the basis of one or more circumstances 'new or different' from those that led to the original assumption of jurisdiction, 'legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights.'") (applying then MCR 5.974[E][1], now MCR 3.977[F][1][b]).
[29] MCR 3.973(C).
[30] MCL 712A.6.

consent of the respondent, by an offer of proof. The factual basis for a plea of no contest should address all of the allegations in the petition. The court must state on the record why it is appropriate to accept a plea of no contest. Typical reasons for accepting a plea of no contest include avoidance of civil or criminal liability, intoxication, or lack of memory. The committee recommends that the court only accept pleas of no contest when absolutely necessary.

4. Withdrawal of plea

A request to withdraw an admission should be in writing and by proper motion to the court. The rejection or approval of the request is within the court's sole discretion.

In deciding whether to allow a respondent to withdraw either an admission or a plea of no contest, the court should apply considerations similar to those used in criminal cases.[31] For example, MCR 6.310 provides the instances in which a criminal plea may be withdrawn. The criminal court rule procedures for withdrawing a plea provide good guidance because they are based on the court's ultimate discretion and they contemplate issues of procedural fairness for all parties. The court rule provides that a defendant must file a motion establishing grounds to withdraw the plea. The court may order the plea withdrawn only in the interest of justice. Plea withdrawals can be allowed because of an error in the plea proceeding or because the plea was not knowingly or voluntarily made.

E. Pretrial Conference

MCR 3.922 and MCR 2.401 govern pretrial procedures. The committee believes that the best practice requires that a pretrial conference be held before every contested adjudication or hearing on a petition to terminate parental rights. The following best practice tips apply:

1. The court should hold a pretrial conference within 21 days after the respondent enters a denial.

2. A pretrial conference should be conducted on the record with all parties physically present or participating via telephone.

3. Any amendments to the petition should be filed before the pretrial conference.

4. Any documents that must be served on the parties, but have not yet been served, should be served at the pretrial conference.

5. If the children are subject to ICWA/MIFPA requirements, the court must review the petitioner's notice to the tribe, any tribal involvement, possible transfer to tribal court, and tribal placement preferences. The notice provision is triggered once the court "knows or has reason to know" the child could possibly have Indian heritage.[32]

[31] See *In re Zelzack*, 180 Mich App 117; 446 NW2d 588 (1989); and MCR 6.310.

[32] In *In re Morris Minors*, 491 Mich 81, 82 (2012), the Michigan Supreme Court recently held that: A) " . . . sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the ICWA notice requirement." B) " . . . a parent of an Indian child cannot waive the separate and independent ICWA rights of an Indian child's tribe and . . the trial court must maintain a documentary record including, at minimum, (1) the original or a copy of

6. Federal law (25 USC 1903[1][i]-[iv]) categorizes four distinct types of child custody proceedings: foster care placements, terminations of parental rights, preadoptive placements, and adoptive placements. Michigan has adopted this rule in MCR 3.002(2)(a)-(d).

7. If the child does not have a legal father, the court should review the efforts to establish paternity. The court may order the agency to conduct further attempts to locate and legitimize a father. The Absent Parent Protocol urges that courts take leadership to "identify and involve absent parents … beginning with the earliest stages of a child protection case."

8. The court should direct the manner and method of service of the summons for trial consistent with MCR 3.920 and MCR 3.921.

9. Counsel should be prepared to specify the witnesses and exhibits they intend to produce at trial, unless the court directs a different schedule for exchanging witness lists and exhibits.

10. The court should set deadlines for discovery and for filing motions. It also should set hearing dates for motions.

11. The court should determine whether a jury trial is requested and should set a date for trial within 63 days from the date the child was removed, unless a longer time is required for an acceptable reason. [33]

12. Unrepresented parties should be advised or readvised of their right to counsel.

13. The court should review temporary orders and modify them, if necessary, using the same criteria set forth above (pp. 5-7).

14. The court should prepare a written order that records any agreements reached during the pretrial conference and issue a scheduling order that includes the dates of all scheduled hearings and due dates. The orders must be served on all parties.

F. Adjudication Phase

A petition requesting that the court take jurisdiction may contain allegations against one or both parents. An adjudication against one parent is sufficient to bring the children under the jurisdiction of the court, and gives the court the authority to issue orders.[34]

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each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a) and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice." C) "[T]he proper remedy for an ICWA-notice violation is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue."

[33] MCR 3.972(A) sets forth the following reasons:

(1) stipulation of parties for good cause
(2) process cannot be completed
(3) adjournment is necessary to secure the testimony of presently unavailable witness

[34] *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002); Note: The Michigan Supreme Court recently granted leave to appeal in another case to address the viability of the "one parent doctrine" espoused in *In re CR*. See *In re Sanders*, 493 Mich 959; 828 NW2d 391 (2013).

A substantial number of abuse/neglect cases are resolved by plea, rather than contested adjudication. For cases that *are* tried, trial procedure is similar in most respects to a trial in any other court. MCR 3.972 governs trial procedures.

Perhaps the most significant difference between abuse/neglect trials and other types of trials is the participation of the child's L-GAL. The L-GAL's job is to consider the evidence and make a recommendation to the court regarding the child's best interests. MCL 712A.17d(1)(b) states the L-GAL should actively participate in all aspects of the litigation.[35] At trial, this means the L-GAL may participate in jury selection, make opening and closing statements, present evidence, examine witnesses and offer objections.

A referee licensed to practice law may preside over a nonjury adjudication hearing.[36]

Absent good cause, MCR 3.972 requires that the trial commence within 63 days of a child's removal from the parents' care. If the trial is not commenced within that time, the court must make an appropriate finding about the reason for the delay and provide justification for continued placement unless the child has been released to a parent. **Because children have a different perception of time than adults do, prompt adjudication is presumed to be in the child's best interests.**

The following procedures assume that the contested case will be tried by a jury. If a jury is not trying the case, the same general procedures should be used, omitting the references to juries, jury procedures, and jury instructions:

1. Prior to the commencement of an adjudication hearing, the court should confirm that all interested parties have been served with a summons and copy of the petition. If personal service has not been achieved, the court should determine whether appropriate procedures have been used to secure alternative service under MCR 3.920(B)(4)(b).

2. If a respondent appears for trial without an attorney, the court should readvise him or her about the right to legal counsel. The court should also advise the respondent of the right to court-appointed counsel for indigent parties.

3. If any of the parties are incarcerated, the court should make arrangements for the incarcerated party to be present. In cases where this is impossible or impractical, the court <u>must</u> allow the incarcerated party to participate by telephone.[37] The court should facilitate telephonic participation for prisoners who are incarcerated outside the state of Michigan.[38]

4. After the court has determined that the parties are present or have been properly served, the court must read the petition, unless the parties waive the reading. The reading of the petition serves two purposes: (1) it advises the respondent of the charges to be tried; and (2) if a jury will hear the case, reading the petition gives the jury a sense of what the case is about. Both

[35] MCL 712A.17d(1)(m) states that L-GALs must participate in training in early childhood, child, and adolescent development.
[36] MCR 3.913(A)(2)(b).
[37] MCR 2.004.
[38] *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

purposes can be served by reading material parts of the petition, including the name(s) of the child(ren), the names of the parents, the statutory section(s) asserted as grounds for taking jurisdiction, and the specific factual allegations about the respondents' behavior. Many petitions contain statements about reasonable efforts to prevent removal, placement efforts, or the petitioner's opinion about what the court should do. The court should **not** read these statements, as they are inappropriate for a jury to consider and may be confusing.

5. Before a trial, the judge should meet briefly with the attorneys and unrepresented interested parties to discuss initial matters such as:

   - Which parts of the petition will be read and which, if any, will not be read.
   - Procedures for voir dire.
   - Entitlement to peremptory challenges.[39]
   - What preliminary instructions the court will give, before and after voir dire.
   - Order of proof and argument.
   - Whether the child(ren) should be present in court during the trial..
   - Any limitations on evidence resulting from a pretrial conference or motions *in limine*. If a party invokes the "tender years" exception to the hearsay rule, or requests special accommodations for a witness under MCL 712A.17b those matters should be resolved prior to trial. The procedures set forth in the statute should be used to avoid trauma the child might experience as a result of having to personally participate in the trial.
   - Marking of exhibits and stipulations to admit exhibits, if any.

6. Adjudication hearings are open to the public unless the court finds that a portion of the hearing should be closed to protect a victim or a juvenile witness.[40] The court should excuse the jury to hear objections to evidence that might confuse the jury or expose jurors to prejudicial material.

7. Prior to closing statements, the court should confer with the attorneys and unrepresented parties regarding final jury instructions. If the court denies a request to give a special instruction or modify a special instruction, counsel should be allowed an opportunity for argument and objection on the record out of the presence of the jury. Each party should be offered the opportunity to submit a brief "theory of the case" to be read as part of the final instructions.[41]

8. A proposed verdict form should be prepared and presented to the parties. At the conclusion of the proofs, the L-GAL is entitled to make a recommendation as to what statutory

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[39] MCR 2.511(E) states that two or more parties on the same side are considered a single party for purposes of peremptory challenges unless they have "adverse interests." Best practice is to allow each parent three peremptory challenges. [Attorneys for parents sometimes ask that the L-GAL be aligned with the petitioner to limit the number of peremptory challenges. Unless the parties agree, the L-GAL should be considered "neutral" until the evidence is complete and, therefore, entitled to his/her own peremptory challenges.]

[40] MCL 712A.17 (7); MCR 3.925(A)(2).

[41] M Civ JI Ch. 097.

grounds, if any, have been proven. As best practice, the committee recommends that the L-GAL makes his statement before the parents' closing statement. In making his or her recommendation, the L-GAL should state the child's preference, if any, even if it conflicts with the L-GAL's recommendation.

9. During a jury trial, the judge should try to prevent the presentation of evidence or argument about where the child(ren) will be placed or what orders the court might enter if the jury finds that the court has jurisdiction. These are matters appropriate to disposition, not adjudication.

10. A jury may be asked to deliver a **general verdict** (a finding that the court has, or does not have, jurisdiction over the child) or a **specific verdict** (findings on whether each alleged basis for jurisdiction has, or has not, been proven). The committee believes that best practice requires a **specific verdict** stating which factual allegations the jury found to be true. MCR 3.972(E) requires the jury to state whether one or more of the statutory grounds have been proven (see *In re VanDalen*[42] for a discussion of appropriate jury instructions on permissible verdicts and permissible verdict forms). Protective proceedings are considered one continuous proceeding from beginning to end.[43] Therefore, facts determined by a jury become *res judicata*, and do not need to be proven again in the course of a termination hearing.[44]

11. At the conclusion of the trial, the court should offer the parties the opportunity to have the jury polled.[45]

12. After the adjudication is complete and (if applicable) the jury has been discharged, the court should allow the parties an opportunity to request changes in existing temporary orders pending a disposition of the case.

13. The dispositional phase hearing may be convened immediately following the conclusion of the adjudication phase. The interval between the adjudication and disposition hearings is within the court's discretion.[46] If disposition is not immediate, and the case is adjourned to allow preparation for the dispositional hearing, the dispositional hearing should be scheduled within 28 days of the adjudication if the child is in placement. The court may allow a longer time interval for good cause.[47] The committee recommends that the specific reason for an extended adjournment be placed on the record or stated in writing by the court.

15. Prompt disposition of adjudicated cases is consistent with the child's best interests and makes it easier for the court to comply with the statutory deadlines for review. It also encourages parents to immediately begin to work on the issues they must resolve before reunification, or case closure can occur.

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[42] 293 Mich App 120 at pp 133-135.
[43] *In the Matter of LaFlure*, 48 Mich App 377; 210 NW2d 482 (1973).
[44] *In re Van Dalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011).
[45] MCR 2.514(B)(2).
[46] MCR 3.973(C).
[47] *Id.*

G. Dispositional Phase

MCR 3.973 governs the dispositional hearing. At this hearing, the court reviews the proposed case plan, gets input from all parties, and enters orders that may remain in place until the case is dismissed. Dispositional hearings are open to the public.[48]

1. A separate hearing is required to determine what disposition the court will order.[49] The committee recommends that the same judicial officer who presided during the adjudication phase conduct the dispositional hearing, whenever possible.

2. A dispositional hearing may take place immediately following adjudication, or the court may adjourn the hearing so that additional information can be gathered. If adjourned, the hearing should be held as soon as practicable, but must be held within 28 days absent good cause. "Good cause" may include, but is not limited to, the following:
   - Emergency unavailability of the assigned jurist, a party, or an attorney.
   - Failure to achieve timely service of notice of the hearing on an interested party.
   - Unavailability of an essential report from a service provider.
   - An emergency that affects the ability of the court to hold hearings.

3. Courts should be conservative in adjourning any hearing in a protective proceeding because federal law[50] has strict time limits for children to achieve permanency. Dispositional hearings are especially important because, after the dispositional hearing, the court has authority to order implementation of the case service plan. Until disposition, courts may only issue temporary orders to assure the child's safety and a parent's participation in services is deemed voluntary.

4. The DHS or agency caseworker assigned to the case must gather all relevant information, prepare a report and proposed case service plan, and provide those documents to the court. The report should recommend disposition, and identify the caseworker responsible for carrying out the case service plan. The case service plan should list the services the parent needs, and outline the responsibilities and obligations of the agency and the parent. In preparing the report, the caseworker should consider concurrent planning and, if specific steps are necessary to accomplish the secondary plan, the caseworker should request whatever orders are necessary to support the concurrent planning process, such as initiating home studies or licensing relatives to provide foster care.

[48] MCR 3.925(A).
[49] *In re AMAC*, 269 Mich App 533; 711 NW2d 426 (2006).
[50] Adoption and Safe Families Act, PL 105-89 (1997).

5. The caseworker should file the report and proposed case service plan with the court and distribute copies of both to all parties at least five working days before the disposition hearing.[51] The court should designate a central location where workers can deliver reports.

6. The court may order the production of evidence, examinations, or evaluations on its own motion.[52] The court should begin the dispositional hearing by determining whether the parties, including the child, and the foster parents, if any, received timely notice of the hearing. The court should then ascertain who is present to participate in the hearing. The child who is the subject of the proceeding is entitled to be present. A party who is incarcerated must be afforded the opportunity to participate by telephone if the party cannot attend in person.[53] Other parties may be allowed to participate by telephone or videoconference in the court's discretion. If timely notice has been given, the court may proceed in the absence of one or more of the parties.[54] The court should state on the record the attempts that were made to identify, locate, and secure the attendance of an absent parent.

7. The Michigan Rules of Evidence (MRE), other than those regarding privilege, do not apply at a dispositional hearing.[55] In addition, the Michigan Child Protection Law governs privileges in child protective cases.[56] It states in pertinent part: "Any legally recognized privileged communication except that between attorney and client … is abrogated [sic] … ." Privileges authorized by federal law, such as privileges relating to health care, education, or substance abuse treatment, may be set aside in child protective cases by court orders for disclosure of the privileged information, or by the parent signing a release to allow the disclosure. Even though the MREs do not apply during dispositional hearings, legally admissible evidence may be required in special circumstances, such as to prove allegations that did not appear in the original petition.[57]

8. Unrepresented parties should be advised of their right to counsel, including court-appointed counsel for indigent parties.

9. The case service plan should be offered into evidence. The court should then inquire if any of the other parties present intend to offer evidence or reports. The court should ask the DHS or agency caseworker if there are additions or corrections to the case services plan. DHS's attorney or legal consultant [58] should be offered an opportunity to state his or her position and address specific requests for orders.

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[51] MCR 3.973(E)(3) does not state when the report must be filed, but does state the parties must be given an opportunity to examine the reports. The Michigan Court Improvement Program Reassessment, dated August 2005, recommends that court reports should be delivered no later than five days before court hearings (at p. 192).
[52] MCR 3.923.
[53] MCR 2.004; *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).
[54] MCR 3.973(D)(3).
[55] MCR 3.973(E); MCL 722.631. Also see *In re Brock*, 442 Mich 101; 499 NW2d 752 (1993).
[56] MCL 722.631.
[57] MCR 3.977(F).
[58] In Wayne County, the Attorney General, rather than the prosecutor, acts as the DHS legal consultant.

10. The court should ask the parents' attorneys to state their positions about what disposition the court should order. The parents or their attorneys have the right to present or cross-examine witnesses or offer evidence in addition to the case service plan. The committee recommends, as a matter of best practice, that each parent be allowed an opportunity to address the court personally, as well as through counsel.

11. If the court has appointed a CASA for a child, or the Foster Care Review Board has reviewed the case, the court should give the CASA and/or FCRB panel an opportunity to provide input.

12. The L-GAL should be asked for a recommendation about what disposition is in the best interests of the child(ren). The child's L-GAL should state on the record whether he or she has met with or observed the child prior to the hearing. If the L-GAL has not visited the children prior to the hearing as required by MCL 712A.17d(1)(d), the court should determine on the record whether there is good cause to excuse the noncompliance. The L-GAL should advise the court about the child's wishes for disposition. This is particularly important if the child does not agree with the position advocated by the L-GAL. In appropriate circumstances, the court may consider appointing another attorney (in addition to the L-GAL) to advocate for the child's *position* while the LGAL advocates for the child's *best interests*. If the child is present at the dispositional hearing, the court should allow the child an opportunity to participate in an age-appropriate manner, which may include asking questions. If the child chooses to state a disposition preference, the child should do so on the record.[59] The child's preference may also be presented in other ways, such as written statements or as part of the L-GAL's report.

After hearing from all the parties and giving bona fide consideration to the positions presented, the judicial officer will order a disposition. The court may order full or partial compliance with the case services plan, and may enter orders directed to nonrespondent adults pursuant to MCL 712.A(6) and MCL 712A.18(1)(g), including orders removing an individual from the home where the child resides.

If the court elects to order a *specific* placement or *level* of placement that is inconsistent with the DHS position, the court should state on the record what testimony has been considered and what efforts have been made to work with all the parties.[60]

In making a disposition, the court should address all the findings of fact that supported the earlier adjudication decision. The court's disposition order should include:

- Identification of the permanency plan.
- What efforts are appropriate for concurrent planning.
- A statement about whether "reasonable efforts" (and "active efforts" in the cases of Indian children) have been made to prevent the child's removal, unless such findings have been made in a previous order.

[59] *In re HRC*, 286 Mich App 444; 781 NW2d 105 (2009).
[60] Such findings are necessary to preserve eligibility for federal participation in payment for foster care under Title IV-E of the Social Security Act. HHS/ACF Questions and Answers on Child Welfare Final Rule, Question 13.

- If the child is to be removed from a custodial parent, the conditions and frequency of parenting time. If the child will reside apart from siblings, the court should order a schedule of contact between siblings. The court may also consider restrictions on contact with the child, or order contact or visitation with other individuals, such as grandparents, with whom the child may have an established relationship.

- If the court orders the removal of an Indian child, as defined by the Michigan Indian Family Preservation Act,[61] the court must assure that the child's placement is consistent with the placement preferences set forth in MIFPA unless good cause to deviate from the placement preference has been established by the party requesting the deviation, or the tribe's placement preferences.[62]

- The court may order a respondent to reimburse the court for the costs of placement, legal representation, or other services, and may order a party to pay child support, provided that the child support order complies with MCL 552.605 and MCR 3.211(D).

- If the whereabouts of any party are unknown, the court should order continued attempts to locate that party and determine the party's interest in participating in the case.[63]

- The court should schedule a timely review of the disposition in accordance with Michigan statutes and court rules. The committee recommends, as best practice, that the court consult with all parties about their future availability, and that the date and time of the next review hearing be incorporated into the dispositional order. If that is not possible, the committee recommends that the next review hearing be scheduled in an order issued within seven days of the dispositional hearing.

When ordering a disposition in a protective proceeding, the court should give serious consideration to allowing the child(ren) to remain in their own home with appropriate safeguards and services. The committee recognizes that, although foster care is intended to assure the safety of the child, it causes disruption and emotional upset and may interfere with the child's education and established personal relationships. Foster care should be utilized only when absolutely necessary. If the court does order an out-of-home placement, the court, the caseworker, the parents, and the foster parents should cooperate to accomplish reunification of the family as expeditiously as possible if reunification can safely be accomplished.

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[61] MCL 712B.3(k).

[62] MCL 712B.23. MIFPA sets forth the burden of establishing good cause at 712B.23(3) and what constitutes good cause at 712B.23(4) and (5). MCL 712B.23(6) requires the court to follow the tribal preference, however, 25 USC 1915(c) notes the preference of a parent or child shall be considered where appropriate while MIFPA does not, therefore, ICWA would be considered as providing a higher level of protection and should be followed in this regard.

[63] Michigan Absent Parent Protocol, published January 2008, available at: http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/APP.pdf

At the conclusion of the initial dispositional hearing, the court should advise the parents that they can appeal – as of right – an initial dispositional hearing placing the child under the supervision of the court within 21 days.[64]

H. Dispositional Review Hearings

The purpose of the dispositional review hearing is to review the parties' compliance with the existing case plan and to review the continued appropriateness of the permanency plan to determine if modifications are needed. If a child has not been removed from home, statutes and court rules allow a 182-day interval between review hearings.[65] If a child has been removed from home, a review hearing must occur every 91 days for the first year, and every 182 days thereafter. Timeliness of review hearings may affect the availability of federal funding to support the child's placement.

The committee recommends, as a best practice, that each case be reviewed every 91 days. Whenever possible, the same judicial officer who conducted the original dispositional hearing should conduct all subsequent dispositional review hearings. At least five days prior to the dispositional review hearing, the caseworker responsible for carrying out the case plan should file a report with the court documenting the progress toward executing the case plan and a recommendation for orders that the court should enter at the review hearing. The caseworker should serve the court report on all interested parties, including nonrespondent parties, at the same time the report is filed with the court. It is particularly important that copies of the report be served on incarcerated parties prior to the hearing.

If a Foster Care Review Board panel has reviewed the case, the court shall ensure that the parties have an opportunity to review the FCRB report and file objections before the court enters a dispositional review order. The court must file the FCRB report in the confidential portion of the case file.[66]

At the beginning of a review hearing, the court should determine whether all parties received appropriate notice. Any child who is at least 11 years old is entitled to notice.[67] If the children are excused from attending the hearing pursuant to MCR 3.973(D)(1), the court should state the reasons on the record. The court should identify the attending parties, including the children. The court may, in its discretion, allow parties to participate in the review hearing by telephone or videoconference. Incarcerated parties should be allowed to participate by telephone. The court should assure that a child's L-GAL has visited the child before the hearing unless excused from that requirement by the court for good cause.

At the hearing, the court report should be offered into evidence. Each party should be offered an opportunity to address the court and present evidence. The L-GAL should make a recommendation to the court about the best interests of the child. If any children are present, the

[64] MCR 3.993(A)(1).
[65] For example, if the child was never removed from home, MCR 3.974 allows a six-month interval before the first review and six-month intervals after the first year of jurisdiction.
[66] MCR 3.975(E).
[67] MCR 3.921(B)(2)(i).

court should ask them for input, giving consideration to their ages and abilities to express themselves. The court should also attempt to answer their questions.

In determining whether to continue or modify the case plan or permanency plan at a review hearing, the court should consider the following issues:

1. The parent(s) and worker's compliance with each element of the case plan.
2. The need for continued placement, if the child has been removed. The court should consider what services might allow the child to return safely to the parent's custody, or if any relatives might be able to provide care for the child.
3. Frequency and duration of parenting time, if the child will continue in out-of-home care. The court should consider what efforts have been made or could be made to facilitate and increase the availability of parenting time, if appropriate, including such issues as funding for transportation to and from parenting time visits. If parenting time is being supervised, the court should consider whether supervision needs to continue, and who should be authorized to provide supervision.[68]
4. Sibling visitation, if siblings are not placed in the same home.
5. Ongoing contact between the children and other individuals, such as grandparents or other relatives who may have established relationships with the children.
6. The children's educational progress and any need for supportive services.
7. Whether or not the children have any unmet needs for medical treatment or counseling.
8. The need for additional evaluations.
9. Orders that require the parties to participate in services such as substance abuse treatment, parenting education, or counseling, and whether the respondent has benefited from such services.
10. Concurrent planning efforts that have been or should be made.
11. Input from a CASA and, if applicable, findings and recommendations by an FCRB panel that has reviewed the case.
12. Input from the foster parents.
13. Information about team decision-making meetings, permanency planning conferences, wraparound meetings, or mediation.
14. Compliance with any court orders that have required a party to reimburse the funding unit for all or part of the costs of the child's care or court-ordered services.
15. If the case plan has been completed, whether to dismiss the case from court jurisdiction. The court may dismiss the case on its own motion. While some period of supervision is desirable after a child has returned to a parent's or guardian's care, three months should generally be sufficient. The committee recommends, as a best practice, that the court apply a presumption in favor of dismissal for any case review beyond three months after the child has been returned to a parent's care.

At the conclusion of the dispositional review hearing, the court should state the permanency planning goal on the record, and make findings about the reasonableness of the efforts to achieve

[68] The committee recommends that the court consider allowing supervision of visits by appropriate adults who are identified by the parent(s) and approved by the caseworker. Relatives, neighbors, teachers, church members, or other adults who can help supervise visits may add to the frequency of contact between the family and the child.

that goal. The court may return the child to the parents, continue out-of-home placement, change the child's placement, modify the existing dispositional order, enter a new dispositional order, or modify the case plan.[69]

The court will need to give significant time and attention to the agency's plan as it is presented at the dispositional hearing to ensure the following:

1. That the plan has been informed by a competent assessment of the parent's specific parenting needs and strengths as well as the child's developmental and safety needs.
2. That the plan promotes the maintenance or establishment of the parent-child bond.
3. That the plan supports the parent's growth and development in the role as a parent.
4. That the plan provides clear criteria for assessing the parent's progress in being able to safely and adequately parent the child.

Substantive input should be obtained from the parent's attorneys and the child's L-GAL before the court orders parent-child visitation.

Parenting time considerations should also be given significant time and attention in the Court's postdispositional review of the case services plan. As the case progresses, the Court should consider the reasonable efforts determination as a means of ensuring that the agency is following this critical aspect of the plan.

The committee recommends, as a best practice, that the date for the next review hearing be incorporated into the order that results from each review hearing. The SCAO-approved form for an order following a review hearing contains a line for entering that information.

The committee recommends, as a best practice, that the DHS or private agency caseworker responsible for the case, as well as all attorneys, unrepresented parties, and CASA receive a copy of the court's order within seven days after the hearing.

I. Permanency Planning Hearing

Michigan statutes [70] and court rules [71] require that the court conduct periodic "permanency planning hearings." The purpose of the permanency planning hearing is to assure that the court holds all parties accountable for finding a permanent placement for the child in a reasonable amount of time.

In "aggravated circumstances," such as a caregiver's conviction of a serious crime, severe injury to a child or a sibling, or a prior termination of parental rights, the court must hold a permanency planning hearing within 28 days after determining that the aggravated circumstances render it unnecessary to make reasonable efforts to prevent the child's removal or reunite the family.[72] It necessarily follows that, if aggravated circumstances exist, the court is not required to make reasonable efforts findings.

In the more typical cases where no "aggravated circumstances" exist, a permanency planning hearing is required no later than 12 months after the child is removed from home, and at least

[69] MCR 3.975(G).
[70] MCL 712A.19a(1).
[71] MCR 3.976.
[72] MCR 3.976(B)(1).

every 12 months thereafter.[73] Permanency planning hearings may be conducted at shorter intervals in the court's discretion. As with other required hearings, failure to conduct a timely permanency planning hearing may jeopardize federal funding for the child's placement.

The notice to the parties before a permanency planning hearing must specifically state that the hearing will be a permanency planning hearing. The notice must also state that the hearing may result in subsequent proceedings to terminate parental rights.

If the Foster Care Review Board has reviewed the case and issued recommendations, the court shall ensure that the parties have an opportunity to review those recommendations and file objections before the court enters a new dispositional order. The court must file the FCRB panel's recommendations in the confidential part of the case file, and may incorporate any or all of the FCRB recommendations into the order entered following the hearing.[74]

At a permanency planning hearing, the court must consider the evidence and then address specific questions in a particular order. The first issue the court must consider is whether the child should be returned to the custody of the parent(s). If the court determines that the child should not be returned to a parent's custody, the next issue to consider is whether to order the agency to file a petition to terminate parental rights.

The court **must** order the agency to initiate termination proceedings if the child has been in foster care for 15 out of the most recent 22 months, unless one of the statutory exceptions applies. The exceptions include:

1. The child is being cared for by relatives.[75]
2. The state has not provided the family with the necessary services for the child's safe return home.
3. A compelling reason exists not to proceed, including:[76]
    - Adoption is not the appropriate goal for the child.
    - No grounds to file a termination petition exist.
    - The child is an unaccompanied refugee minor.
    - There are international legal obligations or compelling foreign policy reasons not to file a termination petition.

If a statutory exception does not apply and the court directs the agency to file a termination petition, the agency may be given up to 28 days to file the petition.[77]

If one of the exceptions applies or the court decides not to order the agency to seek a termination of parental rights, the court must state its reasoning on the record[78] and order an alternative placement plan. Alternative placement plans include a limited-time continuation in foster care, long-term placement in foster care, or a juvenile guardianship. The federal government also

[73] MCR 3.976(B)(2) and (3).
[74] MCR 3.976(D)(3).
[75] MCL 712A.19a(6)(a).
[76] MCL 712A.19a(6)(b)(i)-(iv).
[77] MCR 3.976(E)(3).
[78] MCR 3.976(E)(3).

recognizes "Another Planned Permanent Living Arrangement" (APPLA) as an acceptable permanency goal.

An APPLA goal is an arrangement that provides a child who is at least 14 years old with a long-term relationship with a caring adult. The adult might be a relative, friend, or mentor. Similarly, an APPLA for children who appear likely to eventually emancipate from foster care "APPLA(E)" may be appropriate for a child over age 16 whose permanency plan does not include a goal of leaving foster care and transitioning into the home of a permanent family. The goal for APPLA(E) children is to leave foster care and become self-supporting, with guidance from a supportive adult. Any APPLA(E) plan should include the following components: (1) information about the adult who will assist and support the child; (2) for each existing relationship the child has with an adult, a description of the adult's and siblings' active participation in the life of the child; (3) a description of how the relationships will be maintained; (4) the services and supports developed for the child; and (5) the child's detailed independent living plan.

Any APPLA plan should contain components to give the youth information about available support services and address the child's ongoing needs for housing, medical care, and educational services. "Independent living" or "emancipation" are *not* considered appropriate permanency plans; rather, an appropriate plan must identify an adult who will maintain a long-term relationship with the child. The court should inform any youth age 16 or older with a goal of APPLA or Juvenile Guardianship of the services and opportunities available to them under the Young Adult Voluntary Foster Care Act (YAVFCA) which they can voluntarily opt into at the age of 18. Under YAVFC, the youth can continue to receive financial support through the age of 21 if they maintain compliance with the program eligibility requirements. The court should also ensure that the L-GAL has spoken with the youth about their plans prior to aging out, and advised the youth about resources available under the YAVFCA and other federal and state programs.

At the conclusion of the permanency planning hearing, the court should assure that the existing permanency plan for the case is up-to-date and workable, and that a realistic back-up, or concurrent plan has been identified.

J. Termination of Parental Rights Hearing

A request to terminate parental rights may be contained in an initial petition or a supplemental petition filed at any time during the course of a protective proceeding.

If the original permanency plan is reunification, but a supplemental petition to terminate parental rights is filed, the committee recommends that the court continue to designate reunification as the permanency plan until after the court issues a ruling on the termination petition. At that point, the court should reconsider what permanency plan is most appropriate for the child. Persons who have standing to request the termination of parental rights include the prosecutor (whether or not acting as legal counsel to DHS); the child's guardian, custodian, or foster parent; the Children's Ombudsman; and the child.[79]

[79] MCL 712A.19b(1), (6).

If DHS files a new petition involving a child whose parent(s) has previously lost parental rights to a sibling of the child (even if the previous termination was voluntary), DHS and the court must give special treatment to the new petition. The law requires that DHS include a request for termination of parental rights in the new petition if the sibling's earlier termination proceeding proved any of the following: abandonment of a young child; criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate; battering, torture, or other severe physical abuse; loss or serious impairment of an organ or limb; life-threatening injury; murder or attempted murder; voluntary manslaughter; or aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.[80]

A parent may not request termination of his or her own parental rights.[81] A petition may request the termination of one parent's rights, leaving the other parent's rights intact.[82] Some Michigan courts have allowed a parent to petition for termination of the parental rights of a *noncustodial* parent [83] even though the primary intent of MCL 712A.2(b) is to protect a child from abuse or neglect by a primary caregiver.

The court may not consider a petition for termination of parental rights until after the adjudication phase has been completed.[84] This means that a statutory ground for jurisdiction under MCL 712A.2(b) must be proved before the court can consider the statutory grounds for termination set forth in MCL 712A.19b(3). There is some overlap between the grounds for jurisdiction and the grounds for termination, but they are not identical. A petition requesting that the court take jurisdiction is not proper if it recites only a statutory ground for termination.

DHS and private agencies sometimes take the position that reunification services should be suspended when a petition to terminate parental rights is filed. If the agency elects not to continue services, it must state a sufficient reason for discontinuing services.[85] The court has discretion to order continuation of services pending a termination hearing. The committee recommends, as a best practice, that the court order services to continue pending the termination hearing, so that parents receive every opportunity to preserve their parental rights.

The court also has discretion to suspend parenting time upon the filing of a petition to terminate parental rights.[86] In exercising this discretion, the court should consider how recent and frequently visitation has occurred, and whether the child will experience distress as a result of contact, or no contact, with the parent.

While it is desirable to have all hearings in a case conducted by the same judge, it is critically important to have the termination hearing conducted by someone who is familiar with the case because the evidence from all hearings is considered as though they were "a single continuous proceeding" for purposes of deciding a petition to terminate parental rights.[87]

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[80] MCL 722.638(1)(b)(i)-(ii).
[81] *In re Swope*, 190 Mich App 478; 476 NW2d 459 (1991).
[82] *In re Marin*, 198 Mich App 560; 499 NW2d 400 (1993).
[83] *In re Huisman*, 230 Mich App 372; 584 NW2d 349 (1998).
[84] *In re Riffe*, 147 Mich App 658; 382 NW2d 842 (1985).
[85] *In re Terry*, 240 Mich App 14; 610 NW2d 563 (2000).
[86] MCL 712A.19b(4); MCR 3.977(D).
[87] *In re Sharpe*, 68 Mich App 619; 243 NW2d 696 (1976).

Unless termination is sought at the initial dispositional hearing, the committee recommends, as a best practice, that the court convene a separate pretrial conference before conducting a hearing on a petition for termination of parental rights.

Before a termination hearing starts, the judge or judicial officer should make sure that appropriate notice has been provided to the parties, which includes nonrespondent legal parents, of a termination proceeding, as required by MCR 3.921(B)(3). A new summons is required.[88] If personal service of a notice of a termination proceeding is impractical or cannot be achieved, the court may authorize service by publication. The request to serve a party by publication must be supported by testimony or a motion and affidavit detailing the attempts to achieve personal service.[89]

At the beginning of the termination hearing, the presiding officer should identify the parties present. The hearing may proceed in the absence of properly served parties who fail to appear. A party who is in the custody of the Michigan Department of Corrections should be allowed to participate in the entire hearing by telephone, as required by MCR 2.004. The court rule does not apply to prisoners in county jails or in the custody of other states, although best practice and recent appellate case law suggest that due process requires allowing such prisoners to participate by telephone, if possible. Children may be excused from termination hearings at the court's discretion.

Because a termination hearing is considered a dispositional phase hearing, the Michigan Rules of Evidence do not apply, except those regarding privileges.[90] One notable exception to that general rule requires that the ground(s) for termination must be established by legally admissible evidence if termination is sought as an initial disposition or requested in a supplemental petition on the basis of different circumstances.[91]

If the case involves an Indian child, as defined by the MIFPA,[92] the petitioner must present testimony from at least one qualified expert witness who is familiar with the customs and child-rearing practices of the child's tribe.

The court may take notice of its own records in deciding a termination case. If newly generated reports are offered into evidence, they may be considered, provided the parties have had an opportunity to examine them and an opportunity to cross-examine the individuals who wrote the reports, if the report preparer is reasonably available.[93]

Some of the statutory grounds for termination of parental rights refer to a " … reasonable time considering the age of the child." The committee recognizes that children of different ages have different needs, and those needs typically become more complex as the child matures. If expert testimony is presented, the expert should be asked specifically about the child's needs, and the court should make specific findings relating to those needs. Evidence regarding the best interests

[88] MCR 3.920(B)(2)(b).
[89] MCR 3.920(B)(4)(b).
[90] MCR 3.977(H)(2).
[91] MCR 3.977(E)(3); MCR 3.977(F)(1)(b).
[92] MCL 712B.1 *et seq.*
[93] MCR 3.977(G)(2).

of the child may be presented at any stage of the hearing, but a statutory ground must be proven before the court considers the child's best interests.[94]

As with the adjudication phase hearing, the committee recommends that the parent(s)' attorney be given the last opportunity to cross-examine witnesses, and allowed to present a closing argument after the court hears the L-GAL's recommendation about the best interests of the child.

At the completion of a termination hearing, the court must make specific findings on the record or in writing.[95] The court's findings of fact must include a citation to the statutory ground(s) for termination.[96] Petitions for termination of parental rights often cite more than one ground. Some of the grounds are similar enough so that the same evidence may prove multiple grounds.[97] In this situation, the court should specify which ground the evidence supports, or indicate that the same evidence has proven more than one ground. Each statutory ground alleged in the petition should be addressed individually.

In addition to finding statutory grounds for termination, the court must also find by a preponderance of evidence that termination of parental rights is in a child's best interests.[98] The court's best interests finding should be based on evidence in the whole record.[99]

In determining whether the termination of a parent's rights is in the child's best interests, the court may consider, among other things, the child's bond to the parent, the child's need for permanency and stability and the parent's ability to parent. The court must also consider whether the child is placed with a relative.[100]

If there are conflicts in the testimony, the court should address the credibility of the competing witnesses when making its findings. MCR 3.977(I)(1) requires that if findings are not made on the record, they should be made within 28 days, and no later than 70 days after the termination hearing commenced.

The burden of proof for termination of parental rights for Indian children is "evidence beyond a reasonable doubt, supported by the testimony of at least one qualified expert witness that continued custody of the child by the parent is likely to result in serious emotional or physical harm to the child."[101] According to the federal Indian Child Welfare Act, if a state law provides a higher standard of protection to the parents or Indian custodian than does the ICWA, the state standard shall apply.[102] Michigan appellate courts have interpreted this provision to mean that, in cases involving Indian children, at least one statutory ground must be proved by clear and convincing evidence *and* the court must find, by evidence beyond a reasonable doubt that continued custody by the parent will result in serious physical or emotional harm to the child.[103]

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[94] *Fritts v.Krugh*, 354 Mich 97; 92 NW2d 604 (1958).
[95] MCR 3.977(I)(1).
[96] MCR 3.977(I)(3).
[97] MCL 712A.19b(3).
[98] *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).
[99] *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000).
[100] *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).
[101] 25 USC 1912(f).
[102] 25 USC 1921.
[103] *In re Elliott*, 218 Mich App 196; 554 NW2d 32 (1996).

In termination proceedings involving Indian children, the court must also find that "active efforts" have been made to provide rehabilitative and remedial services to prevent the breakup of the Indian family.[104] Those active efforts must be proved by clear and convincing evidence.[105] The Michigan Supreme Court held that there is no requirement that "active efforts" be contemporaneous with the petition to terminate parental rights.[106]

The committee recommends, as a best practice, that courts schedule sufficient time for hearing a termination petition so that the hearing can be completed without an adjournment. The committee also recommends that if the court denies a petition for termination of parental rights, the court also should schedule the next dispositional review hearing within 28 days to identify a new permanency planning goal and determine what efforts should be made to accomplish the new goal.

A child whose parental rights have been terminated can be made a permanent court ward or a permanent state ward. Permanent state wards are committed to the Department of Human Services. That commitment vests the superintendent of the Michigan Children's Institute with decision-making authority regarding the child's care and custody. Until such children are adopted or dismissed, the court should conduct periodic posttermination review hearings to assure that they achieve a permanent placement in a timely fashion, consistent with the time frames set forth at MCL 712A.19c.

If the court terminates the rights of the parent, it must advise the parent that he/she has the right to appeal that decision to the Court of Appeals within 14 days and if indigent, the right to court-appointed appellate counsel.[107] If the parent requests the appointment of appellate counsel, the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also order transcripts of all the hearings prepared at public expense.[108] The court should also ensure that appellate counsel has access to the complete file, including the social file.[109]

K. Miscellaneous Hearings

The circumstances of an individual case may necessitate further nonstandard hearings. Each time the matter comes before the court, the presiding officer should take the opportunity to evaluate all aspects of the case, consider compliance with the case plan, decide if additional evaluations or modifications of the existing court orders are needed, discuss the existing permanency plan, and determine if additional steps are required for concurrent planning.

All hearings should be conducted in a manner consistent with due process. The presiding officer should ensure that the parties received timely notice and a meaningful opportunity to be heard. In certain circumstances, the court should allow the parties to participate via telephone. To assure

[104] *In re Morgan*, 140 Mich App 594; 364 NW2d 754 (1985).
[105] *In re JL*, 483 Mich 300, 16, 770 NW2d 853 (2009).
[106] *Id.*
[107] MCR 3.977(J)(1)(a)(b); MCR 3.993(A)(2).
[108] MCR 3.977(J)(2)(b).
[109] See the Child Welfare Appellate Guide at:
http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/ChildWelfareAppellateGuide.pdf

due process protection to the parties, the court should determine that all parties have received notice and an appropriate opportunity to participate in the hearing. Incarcerated parties must be afforded an opportunity to participate by telephone.[110] In emergency circumstances, the court has discretion to allow other parties to participate by electronic means. If possible, the same judicial officer should preside over every hearing in a case. The court should balance the need to get the matter resolved as promptly as possible against the possibility that a brief adjournment may allow a more meaningful opportunity for the parties to participate and yield better information that the court can use to make an informed decisions.

Some miscellaneous hearing types, and the areas of special emphasis for each type, are as follows:

1. Putative Father Hearing

Putative fathers are not included in the definition of "father" under MCR 3.903(A)(7). However, at the inception of a child protective proceeding there are several good reasons to identify the child's father and establish him as the legal father as expeditiously as possible. These include establishment of child support, determination of whether the ICWA will apply if the putative father becomes the legal father, and the legal father's right to participate in case planning as required by *In re Mason.*[111] Efforts to identify and locate the child's father are also encouraged by the Absent Parent Protocol published by SCAO.

MCR 3.921(D) provides a procedure a court can use to encourage a putative father to become a legal father eligible to participate in the proceedings. The putative father's hearing is a two-step process.[112]

The first step involves the court taking "initial testimony" about the tentative identity and address of the child's father. The rule does not specify who should testify, but presumably the best source of information would be the child's mother. If the court finds probable cause to believe that a particular individual is the child's father, the court must serve that individual with a notice of a hearing.

The notice of hearing may be served in "any manner reasonably calculated to provide notice to the putative father, including publication of the notice if his whereabouts remain unknown after diligent inquiry."[113] Any notice by publication must **not** include the name of the putative father.

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[110] MCR 2.004.
[111] *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).
[112] Note that MCL 722.1431 *et seq.* established procedures for revocation of paternity. The act provides mothers, prosecutors, or acknowledged, alleged, fathers with certain limited rights to revoke and/or determine paternity if done so before the child's third birthday. The act also allows a court to: Revoke an acknowledgment of parentage; set aside an order of filiation or a paternity order; determine that a child was born out of wedlock, or make a determination of paternity and enter an order of filiation as provided for under section 7 of the Paternity Act, MCL 722.717. If the court has jurisdiction pursuant to the Juvenile Code (MCL 712A.1 *et seq.*) and a termination of parental rights petition has been filed, the court cannot take action under the Revocation of Paternity Act without first making a determination that it is in the child's best interests to do so.
[113] MCR 3.921(D)(1).

The notice of hearing must identify the child and the mother, and contain a statement that the putative father's failure to attend the hearing will constitute a denial of interest in the child and may result in the termination of parental rights.[114]

The court rule does not specify other parties who should attend a putative father hearing. The committee suggests that the prosecutor or DHS's legal representative assist with presenting the necessary testimony, and that the child's L-GAL be present to address the child's best interests.

At the conclusion of the hearing, the court has several options:

- If the preponderance of evidence identifies a particular individual as the child's father, that individual may be given 14 days (or longer in the court's discretion) to formally establish himself as the child's legal father.
- If there is probable cause to believe that some other individual is the child's father, the court may give notice to that individual and schedule another putative-father hearing.
- If a putative father fails to appear after receiving notice, the court may proceed with the case without giving him further notices, not even notice of a proceeding to terminate parental rights.
- If the court determines that the father's identity cannot be established, the court may proceed to hear the case without further attempts to identify or give notice to the child's father.

If the identified person appears at the putative father hearing and the court allows him a specified period to establish himself as the legal father, but he fails to do so within the specified time, the court may find that he has waived any right to receive further notice or to participate in the proceedings. This court-ordered waiver specifically includes a waiver of notice of a hearing to terminate parental rights.[115]

2. Section 21 Hearing

MCL 712A.21 provides that, at any time while a juvenile is under the court's jurisdiction, any interested person may file a written petition for a rehearing upon all matters decided by the court. As a best practice, the committee recommends that the court require the prosecutor to appear at any Section 21 hearing.[116] A petition for the rehearing of a termination of parental rights order must be filed not later than 20 days after the date of entry of the order terminating parental rights. After a Section 21 hearing, the court may affirm, modify, or set aside any existing court order. Section 21 hearings may be convened for such purposes as adjusting parenting time or changing custody. The parties should be afforded the usual due process rights for Section 21 hearings. If necessary, a

[114] MCR 3.921(D)(1)(d).
[115] MCR 3.921(D)(3).
[116] MCR 3.914(A).

Section 21 hearing may be adjourned to secure attendance of necessary parties. If the hearing is adjourned, the court should state the reason for the adjournment and enter necessary temporary orders.

3. Supplemental Petition regarding non-respondent parent

At any stage of the proceedings, a new petition or supplemental petition may be filed to name the other parent (or parents) as an additional respondent. If such a petition is filed, a person who was previously considered a nonrespondent parent must have the opportunity to have a hearing at which a trier of fact will determine whether the allegations have been proved by a preponderance of evidence.[117] There is no right to a jury trial in this situation. Often the new allegations are heard at the same time as the contested termination hearing; however, any new allegations must be proved by legally admissible evidence.[118]

The purpose of the contested hearing on a supplemental petition is not to establish jurisdiction over the child; it is to determine whether a parent who was not previously a respondent should become a respondent, and to establish facts that may later be considered *res judicata*. Once the court has assumed jurisdiction over the child, whether the jurisdiction is based on the actions of one or both parents, the court has the authority to issue dispositional orders. Section 18 of the Juvenile Code gives the court the authority to issue orders affecting adults, even nonparent adults; [119] however, this authority does not allow the court to enter an order terminating parental rights of a newly added respondent. But any new allegations proven at the contested hearing may later be treated as established for purposes of termination. If the supplemental petition seeks termination as the initial disposition, the statutory grounds for termination must be proved by legally admissible evidence.[120] That means that if a petition to terminate the parental rights of a newly added respondent requests termination on a statutory ground not previously proved, the statutory termination ground must be proved by legally admissible evidence.[121]

4. Absent Without Legal Permission (AWOLP) Hearing

Children under the court's abuse/neglect jurisdiction sometimes leave their court-ordered placements without authority or are reported as missing from care. If the court is notified that a child is absent from placement, the committee recommends as a best practice that the court conduct a hearing to determine what efforts are being made to locate the child. When a child who is absent without legal permission (AWOLP) is located, the court should conduct a hearing as soon as possible to determine whether the child can safely be returned to the original placement, or whether the original placement should be changed.[122] All interested parties should be notified and given an opportunity to participate in an AWOLP hearing. The court should consider ordering a physical examination of the child and evaluate the child's

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[117] For cases involving an Indian child, as defined by ICWA, the higher burden of proof set forth in that statute will apply.
[118] MCR 3.977(E)(3).
[119] MCL 712A.6; MCL 712A.18(1)(g).
[120] MCR 3.977(E)(3).
[121] MCR 3.977(F).
[122] Best practices are described at:
http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/AWOLP/FAQandBestPractices.pdf

need for further services. Each local court must have a SCAO-approved AWOLP plan, and follow the procedures set forth in that plan. When AWOLP children are found, those who are under court jurisdiction as a result of a protective proceeding may not be placed in secure detention facilities unless they are also charged with a delinquent offense.[123]

5. Foster Care Review Board Appeal Hearing (Change of Placement)

If there is a dispute (about where a child should be placed) between a current foster parent and an agency supervising the child, the dispute can be reviewed by a local Foster Care Review Board panel. Either party may appeal the panel's determination to the circuit court. The court then must conduct a hearing to determine whether the proposed change in placement is in the child's best interests. Such hearings are governed by MCR 3.966(C). Notice of the hearing must be given to the foster parents, all interested parties, and the prosecutor, if the prosecutor has previously appeared in the case.

In cases that have been selected for review by a Foster Care Review Board (FCRB) panel, the court shall ensure that all parties have an opportunity to review the FCRB panel's recommendations, and to file objections to those recommendations before a dispositional order is entered. The court must file the FCRB report in the confidential portion of the case file, and may adopt some or all of the FCRB recommendations in entering a dispositional order.[124]

6. Ordering a Juvenile Guardianship

Historically, the Probate Code provided authorization to create guardianships for minors. That authority still exists at MCL 700.5204 (for full guardianships) and MCL 700.5205 (for limited guardianships). The Juvenile Code also has specific authority to appoint a juvenile guardian for a minor during a child protective proceeding.[125]

A juvenile guardianship may be established in a child protection proceeding either before or after a termination of parental rights. MCL 712A.19a(7)-(15) govern juvenile guardianships in cases where parental rights have *not* been terminated. MCL 712A.19c(2)-(14) apply when parental rights *have* been terminated. For both types of juvenile guardianships, the legal standard is whether appointing a guardian is in the child's best interests. Upon appointment of a guardian, the court must terminate the underlying protective proceeding after conducting a final review hearing.[126] The court may conduct the final review hearing at any time within the required statutory timeframes.[127]

The court may order a **pretermination** juvenile guardianship as an alternative placement plan at a permanency planning hearing. Alternative placement plans are appropriate when the court determines that the child should not be returned home, and either the agency

[123] MCL 712A.15(4).
[124] MCR 3.973(E)(5).
[125] MCL 712A.19a(7)(c), and MCL 712A.19c(2).
[126] MCL 712A.19a(10).
[127] MCL 712A.19.

demonstrates that termination is clearly not in the child's best interests or the court does not order the agency to initiate a termination petition.

For **posttermination** juvenile guardianships, the court must either obtain the consent of the superintendent of the Michigan Children's Institute (MCI), or determine that the superintendent's decision to withhold consent was arbitrary and capricious.[128] The post-termination guardianship also requires termination of the protective proceeding, provided the court has completed a review hearing.[129]

The Guardianship Assistance Program (GAP) provides funding for eligible juvenile guardianships.[130] One important condition to receive GAP funding is that DHS must first rule out reunification and adoption as appropriate permanency goals for the child.[131]

MCL 712A.19a(15) provides that if a juvenile guardianship that was created under the juvenile code is terminated, custody of the child shall be "restored" to DHS. The Legislature presumably intended that the protective proceeding that preceded the guardianship should resume from the point it had reached at the time the juvenile guardian was appointed. A case review at the time the abuse and neglect case reopens would be desirable to determine the current status of parties and a new case service plan. If parental rights have previously been terminated and the guardianship is ended pursuant to MCL 712A.19c(13), the same problems do not arise, because the child simply reverts to the preguardianship status of being an MCI ward.

7. Custody Hearing

During the course of a child protective proceeding, the court may modify a pre-existing order regarding custody. Section 2(a) of the Juvenile Code provides that the court has authority to issue orders " … superior to and regardless of the jurisdiction of another court … ." This may happen when, for example, the same court or another court already has continuing jurisdiction over a child for other reasons, such as a divorce, paternity, or a child custody proceeding. Orders entered in the course of a protective proceeding terminate upon dismissal of the protective proceeding.

If another court has prior continuing jurisdiction over the child, that court's orders, if any, will control the child's placement when the protective proceeding ends. If someone files a request for a change of custody during the course of the protective proceeding, the court may address it only by applying the rules and evidentiary standards that govern similar types of proceedings.[132] All family courts are required to have a Family Division plan approved by the State Court Administrator. The jurisdiction's Family Division plan may provide guidance as to who should hear a motion to change a pre-existing custody order. Any change to a pre-existing order should address all issues, including custody, support, and parenting time. The judge who originally heard the case should also hear the motion, if possible.

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[128] MCL 712A.19c(3), (6).
[129] MCL 712A.19c(9).
[130] MCL 722.871-722.881.
[131] MCL 722.873.
[132] *In re AP*, 283 Mich App 574, 598; 770 NW2d 403, 416 (2009).

IV. INDIAN CHILDREN

At the earliest possible stage of an investigation, the petitioner should determine whether the Indian Child Welfare Act (ICWA) and Michigan Indian Family Preservation Act (MIFPA)[133] apply to the child(ren) for whom court intervention is being sought. If the child is a tribal member or is eligible for tribal membership in a federally recognized tribe, the child is considered an "Indian child" and the MIFPA and ICWA apply. The caseworker must collect information about which tribe is involved, give notice to the tribe at the earliest possible date, obtain information about the tribe's placement preferences, and identify a possible qualified expert witness who has knowledge of the tribe's child-rearing practices. The MIFPA requires testimony from a qualified expert witness if the removal of the child is requested. If an Indian child resides on a reservation or is subject to the jurisdiction of a tribal court, the tribal court has exclusive jurisdiction and the state court should not proceed to hear the case. However, state courts may exercise limited emergency jurisdiction if an Indian child who resides or is domiciled within a reservation, and who is temporarily off the reservation, has been removed by the state in an emergency situation to prevent imminent physical damage or harm to the child. The emergency jurisdiction terminates when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.[134]

Some children have affiliations with more than one tribe because tribes are entitled to establish their own eligibility criteria for tribal membership. If it appears that the child is a member or might be eligible for membership in more than one federally recognized tribe, the court should give notice to all such tribes. The court should encourage the tribal representatives to reach an agreement about notices required by MIFPA and tribal participation at the hearings. If the tribes cannot agree, the court should make a finding, based on the factors listed in the Bureau of Indian Affairs' Guidelines for State Courts,[135] identifying the tribe that has the most significant contacts.

The court should ensure that an Indian child's placement is consistent with the placement preferences listed in MIFPA unless good cause to deviate from the placement preference has been established by the party requesting the deviation.[136] If the tribe's placement preference plan is different from the hierarchy set forth in MIFPA, the tribe's placement preference must be followed.[137]

In *In re Morris*, the Michigan Supreme Court clarified several issues related to notice under the Indian Child Welfare Act (ICWA).[138]

The Court held that:

(A) "Sufficiently reliable information of virtually any criteria on which [tribal] membership might be based [suffices] to trigger the [ICWA] notice requirement."

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[133] MCL 712B.1 *et seq.*

[134] MCL 712B.7(2). The court must also comply with the protective custody hearing requirements outlined in Michigan court rules and statutes in addition to MIFPA.

[135] Guidelines for State Courts, Indian Child Custody Proceedings; Federal Register Vol. 44, No 228, Nov 22, 1979, p. 67584ff.

[136] MCL 712B.23. MIFPA sets forth the burden of establishing good cause (712B.23[3]) and what constitutes good cause (712B.23[4] and [5]).

[137] MCL 712B.23(6). 25 USC 1915(c) notes the preference of a parent or child shall be considered where appropriate while MIFPA does not, and therefore, ICWA would be considered as providing a higher level of protection and should be followed in this regard.

[138] *In re Morris,* 491 Mich 81; 815 NW2d 62 (2012).

(B) "A parent [of an Indian child] may not waive the [separate and independent ICWA] rights . . . to an Indian child's tribe. The trial court must [maintain a documentary record] that at a minimum, . . . includes (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice."

(C) "The proper remedy for ICWA-notice violations is to conditionally reverse the trial court and remand for resolution of the [ICWA] notice issue."

See **Appendix A** for more information on ICWA and MIFPA.

V. INCARCERATED PARTIES

The caseworker should notify the court of the party's prisoner number, location, and telephone number of the prison so that the court can make necessary arrangements for telephone testimony. [139] The committee recommends that DHS caseworker staff receive initial training and refresher training at regular intervals regarding the requirements of MCR 2.004. Prisoners incarcerated in other states should be allowed to participate in hearings by telephone, if possible.[140]

VI. CHILD SUPPORT

The court may consider the diversion of child support or a reimbursement order to offset the cost of an out-of-home placement. The diversion of child support or an order for reimbursement for court services should be based on the court's determination of what is in the child's best interests.[141] A parent's obligation to pay child support is not extinguished by an order terminating parental rights.[142] If no child support order exists, the court has the authority to enter an order consistent with the Michigan Child Support Guidelines.[143]

If the parents are receiving an adoption support subsidy, the subsidy will continue even if the adopted child is removed from their care. However, the court may consider the amount of the support subsidy in determining the amount of reimbursement to be paid by the parents for placement or court services.

VII. SUMMARY OF RECOMMENDATIONS

The committee's work revealed that the following changes are likely to facilitate more effective child welfare practices and procedures:

1. The committee recommends that MCR 3.921(D)(1) be amended to require the court to take initial testimony about the tentative identity of the child's father if the child has no legal father.

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[139] MCR 2.004 requires such participation for domestic relations cases and all proceedings that involve custody, guardianship, neglect, foster care, and termination. The rule states that notification shall be made by the "party seeking the order."
[140] See, for example, *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).
[141] Diverting child support, rather than ordering reimbursement under MCL 712A.18(3), may eliminate the court's ability to retain a 25% administrative share of collections.
[142] *In re Beck*, 488 Mich 6; 793 NW2d 562 (2010).
[143] MCR 3.973(F).

2. The committee recommends that the Michigan Court Rules be amended to require that a pretrial conference be held within 21 days after the entry of a denial by a respondent.

3. The committee recommends that the court advise a parent who requests court-appointed counsel that he or she may be required to reimburse the funding unit for all or part of the costs of appointed counsel.

VIII. FUTURE CONSIDERATIONS FOR THE COURTS

In general, the committee believes that family division judges have broader authority to issue orders than older appellate decisions would suggest. Until 1998, protective proceedings were heard in Probate Court, where a specific statutory authorization is required before an order can be issued. But after the 1998 transfer of jurisdiction over these cases to circuit court, which is a court of general jurisdiction, the court now has the authority to " … make any order proper to fully effectuate the circuit courts' jurisdiction and judgments,"[144] even absent a specific statutory authorization.

The reassessment report states, "[c]ourts should stop assigning referees to handle preliminary hearings." Following this recommendation would bring Michigan courts more closely in line with the "one family, one judge" concept. However, it may not be possible to attain this goal. A shift to a system in which judges conducted all hearings in all cases would require a substantial increase in the number of judges. The economic resources needed to obtain additional judgeships to absorb the work now done by referees are simply not available, at either the state or county level, and will not be available in the foreseeable future.

[144] MCL 600.611.

APPENDIX A

Michigan Supreme Court

State Court Administrative Office
Child Welfare Services Michigan
Hall of Justice
P.O. Box 30048
Lansing, Michigan 48909
Phone (517) 373-8036

Kelly Howard
Director

MEMORANDUM

DATE: April 18, 2013

TO: Chief Circuit Court Judges
Presiding Family Division Judges
Circuit Court Administrators
Family Division Administrators

FROM: Kelly Howard

RE: 2012 PA 565: Michigan Indian Family Preservation Act

The Governor recently signed into law 2012 PA 565, which creates the Michigan Indian Family Preservation Act (MIFPA). The new law, which took effect on January 2, 2013, codifies the federal Indian Child Welfare Act (ICWA) into state law and clarifies the court proceedings subject to the Act.

The legislative revisions may require changes to court practice. The Michigan Supreme Court has adopted some rule amendments (subject to public comment and a future public hearing) to make the court rules consistent with the new statutory provisions. A summary of the new law and a chart comparing the state and federal laws follows.

If you have any questions, please contact me at howardk@courts.mi.gov or (517) 373-8671, or Maribeth Preston at prestonm@courts.mi.gov, or (517) 373-9272.

2012 PUBLIC ACT 565 (introduced as SB 1232): Michigan Indian Family Preservation Act

A. Purpose and Scope of the Law

The law is designed to strengthen and enhance the requirements of the federal Indian Child Welfare Act,[1] clarify the court proceedings subject to the Act, and protect the stability and security of Indian tribes and families. ICWA is the federal law that governs the removal and out of home placement of Indian children. In 1978, Congress enacted ICWA in response to the fact that Indian children were being removed from their homes at a much higher rate than non-Indian children during that time period. ICWA established minimum federal requirements that apply to state court proceedings involving Indian children who are members, or eligible for membership, in a federally-recognized tribe.

ICWA and MIFPA[2] apply to the following proceedings:

1. Foster care placements
2. Termination of parental rights
3. Guardianship
4. Pre-adoptive placement
5. Adoptive placements
6. Status offenses by an Indian child

Although ICWA and MIFPA refer to these proceedings as "child custody proceedings," the acts do not apply to Michigan domestic relations child custody proceedings between parents, or to juvenile delinquency proceedings other than status offenses, such as truancy. To avoid confusion with Michigan's domestic relations proceedings, this memo refers to the covered proceedings listed above as "identified proceedings," rather than "child custody proceedings."

B. MIFPA Requirements in Identified Proceedings

The central components of MIFPA are as follows:

1. *Indian Child Defined*. An Indian child is an unmarried person, under age 18, who is either a member of an Indian tribe or eligible for membership in an Indian tribe as determined by that tribe.

2. *Exclusive and Limited Emergency Jurisdiction*. An Indian tribe has exclusive jurisdiction in any identified proceeding involving an Indian child who resides or is domiciled within the tribe's reservation. State courts may exercise limited emergency jurisdiction if the Indian child is temporarily off the reservation and the state removes the child in an emergency situation to prevent imminent physical damage or harm to the child. The court must comply with the emergency removal hearing requirements outlined in MCL 712A.14, 14a, and 14b. The emergency jurisdiction terminates when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.[3]

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[1] 25 USC 1901-1963

[2] MIFPA amends the Juvenile Code by adding section MCL 712B.1 – 712B.41. See Appendix A

[3] MCL 712B.29(1), (2)

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3. *Transfer of Jurisdiction.* For an Indian child not domiciled or residing on the reservation, the parent, Indian custodian, or tribe may request that the case be transferred to tribal court. The court must transfer the case unless there is good cause to the contrary, either parent objects, or the tribal court declines the transfer. MIFPA clarifies that good cause to deny a transfer must be shown by the person opposing the transfer through clear and convincing evidence that either the tribe does not have a tribal court, or that the requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship that the tribe is unable to mitigate.

4. *Notice Requirements.* MIFPA requires the Department of Human Services (DHS) to actively seek to determine at initial contact whether a child is an Indian child, and exercise due diligence to determine, document, and contact the child's extended family members. When MIFPA applies to a child's case, the child's tribe and family must have an opportunity to be involved in the decisions affecting services for the child. DHS is required to provide initial notice of a court proceeding to the parent, Indian custodian, and the child's tribe by registered mail, return receipt requested.[4] If the identity or location of the parent, custodian, or tribe is unknown, DHS must provide notice to the Secretary of the Interior, who then must provide the notice of the court proceedings to the parent, Indian custodian and the tribe within 15 days. MIFPA also requires DHS to contact in writing any tribe(s) located in the county where the child is located. No foster care placement or termination of parental rights proceeding may occur until at least 10 days after receipt of notice by the parent, Indian custodian, and tribe, or Secretary. The parent, Indian custodian, or tribe may request an additional 20 days to prepare for the proceeding.

If the petitioner or court later discover that a child may be an Indian child, all proceedings must be suspended until return receipt of proper notice is received by the tribe or Secretary of the Interior. If the court determines after a hearing that the parent or tribe was prejudiced by lack of notice, the prior decisions of the court shall be vacated and the case shall proceed from the first hearing. The petitioner has the burden of proving lack of prejudice.

5. *Intervention and Participation in State Court Proceedings.* Tribal intervention and participation in MIFPA/ICWA proceedings is a right. MIFPA clarifies that a tribal representative who participates in the proceeding does not have to be an attorney as long as the person is designated as an official tribal representative. This person may be someone from the tribal child welfare council, the tribal social services, a department, tribal elder or other tribal designee.

6. *Heightened Standards for Removal of Child From Home.* Before authorizing the removal

[4] For ICWA notice requirements and minimum required court file documentation, please see Appendix B. Appendix B contains the Appendix from the *In re J.L. Gordon, Minor*, 491 Mich 81 (2012), which provides an overview of the notice process.

or continued removal of an Indian child from the child's home, the court must find by clear and convincing evidence, including testimony from at least one Qualified Expert Witness (QEW), both of the following:

(a) *Active Efforts* were made to prevent the removal, and that those efforts were unsuccessful. MIFPA defines active efforts as an ongoing, vigorous, and concerted level of case work that takes into account the prevailing social and cultural values, conditions, and way of life of the tribe and that uses the available resources of the tribe, tribal and other Indian child welfare agencies, extended family members, other Indian caregivers, and other culturally appropriate service providers.
(b) *Serious Emotional or Physical Damage to the child is likely to result if the child remains in the custody of the parent or Indian Custodian.*

7. *Heightened Standards for Termination of Parental Rights.* To order that parental rights be terminated, in addition to finding active efforts were made to provide remedial services and rehabilitative programs, the court must find evidence beyond a reasonable doubt, including testimony from at least one QEW, that continued custody with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

8. *Qualified Expert Witness*. MIFPA establishes the following preferences in selecting a QEW:

(a) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs and how those customs pertain to family organization and child rearing practices.
(b) A person with knowledge, skill, experience, training, or education and who can speak about the child's tribe and its customs and how those customs pertain to family organization and child rearing practices.

9. *Placement Preferences*. Absent a finding of good cause,[5] MIFPA requires **foster care or preadoptive placement** of an Indian child to follow a specific order of preference:

(a) A member of the child's extended family.
(b) A foster home licensed, approved, or specified by the child's tribe.
(c) An Indian foster home licensed or approved by the department.
(d) An institution for children approved by an Indian tribe or operated by an Indian organization that has a suitable program to meet the child's needs.

Absent good cause, MIFPA requires the **adoptive placement** of an Indian child to be in the following order of preference:

(a) A member of the child's extended family.

[5] The court may find good cause to deviate from the placement preferences only if the preferred placements have been investigated and exhausted, and (a) a request for deviation was made by a child of sufficient age, or (b) a child has an extraordinary physical or emotional need as established by an expert witness.

(b) A member of the child's tribe.

(c) An Indian family.

10. *Guardianships*. For guardianships determined to be **involuntary** and where the court knows or has reason to know the child is an Indian child, MIFPA permits the court to order DHS or a court employee to conduct an investigation and file a written report. This includes guardianships ordered under the Estates and Protected Individuals Code ("EPIC guardianships") and those ordered under the Juvenile Code ("juvenile guardianships"). In addition to information required under EPIC,[6] MIFPA requires the report to include at least the following information:

(a)Whether or not the child is an Indian child;
(b)The identity and location of the child's parents, if known.
(c)f the child is an Indian child, the report must also address all of the following:
(*i*) The tribe or tribes of which the child is a member or eligible for membership. (*ii*) Whether 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.

For **voluntary** guardianships, the court must certify that the terms and consequences of the guardianship were explained and understood by the parent(s) or Indian custodian. The consent may be withdrawn at any time by sending written notice to the court indicating that the parent or Indian custodian wants the child returned.

MIFPA sets forth additional requirements and considerations for the various types of guardianship hearings at MCL 712B.25, MCL 712B.13 and MCL 712B.15.

11. *Copy of Adoption Orders to BIA and Tribal Registrar.* MIFPA requires that any state court entering a final decree or order in any Indian child adoptive placement provide a copy of the order to the tribal enrollment officer of the appropriate tribe, in addition to the Secretary of the Interior, Bureau of Indian Affairs (BIA). The order is required to include the following information:

a. The name and tribal affiliation of the child;
b. The names and addresses of the biological parents;
c. The names and address of the adoptive parents; and
d. The identity of any agency having files or information relating to the adoptive placement.

If the court record contains an affidavit from the biological parent(s) requesting that their identity remain confidential, the court shall include that affidavit with the information sent to the BIA and tribe. The Secretary of the Interior, or tribe, must ensure the confidentiality of this information is maintained.

[6] MCL 700.5204.

C. Differences between MIFPA and ICWA

The chart in Appendix C describes the differences between MIFPA and ICWA.

D. Amendments to Court Rules and SCAO Court Forms

On March 20, 2013, the Supreme Court adopted revisions of the Michigan Court Rules to implement MIFPA's definitions and references. The order was given immediate effect and posted for public comment. SCAO is also in the process of preparing new court rules to reflect the MIFPA statutory standards, and procedures relating to guardianships and adoptions. In addition, SCAO is preparing revised court forms to reflect the statutory changes.

APPENDIX B
SCAO Approved Court Forms

Form #	Form Name
JC 01	Complaint (Request for Action, Delinquency Proceedings)
JC 02	Complaint (Request for Action, Child Protective Proceedings)
JC 03	Order Appointing Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem
JC 04a	Petition (Delinquency Proceedings)
JC 04b	Petition (Child Protective Proceedings)
JC 05a	Order to Apprehend and Detain (Delinquency Proceedings/Minor Personal Protection)
JC 05b	Order to Take Child(ren) into Protective Custody (Child Protective Proceedings)
JC 06	Waiver of Attorney or Request for Appointment of Attorney
JC 07	Appearance of Attorney/Guardian Ad Litem/Lawyer-Guardian Litem
JC 11a	Order After Preliminary Hearing (Child Protective Proceedings)
JC 11b	Order After Pretrial Hearing (Child Protective Proceedings)
JC 12a	Proof of Service/Non Service
JC 12b	Proof of Service/Non Service
JC 15	Motion and Authorization/Denial

Form #	Form Name
JC 17	Order of Disposition (Child Protective Proceedings)
JC 17a	Order of Disposition, Child in Home (Child Protective Proceedings)
JC 19	Order Following Dispositional Review/Permanency Planning Hearing (Child Protective Proceedings)
JC 21	Summons: Order to Appear (Child Protective Proceeding)
JC 23	Waiver of Summons/Notice of Hearing
JC 29	Order to Transfer Jurisdiction
JC 32	Publication of Hearing
JC 34	Financial Statement
JC 36	Request and Order to Terminate Court Jurisdiction
JC 37	Request for Financial Information
JC 38	Order for Reimbursement
JC 39	Order for Assignment of Wages
JC 40	Order for Contempt of Court
JC 41	Motion and Order to Close Proceedings to Public
JC 42	Request and Order for Review of Referee Recommendations

Form #	Form Name
JC 44	Advice of Rights After Order Terminating Parental Rights (Juvenile Code)
JC 45	Notice of Hearing
JC 46	Motion for Alternate Service
JC 47	Order for Alternate Service
JC 48	Notice of Proceedings Concerning an Indian Child
JC 53	Notice to Putative Father
JC 58	Order Cancelling Wage Assignment
JC 60	Notice of Intent to Intercept State Income Tax
JC 61	Order to Intercept State Income Tax
JC 62	Order to Cancel State Income Tax Intercept
JC 63	Order Following Hearing to Terminate Parental Rights (Child Protective Proceedings)
JC 65	Order Removing Alleged Abuser from Child's Home (Child Protective Proceedings)

Form #	Form Name
JC 75	Order Following Emergency Removal Hearing (Child Protective Proceedings)
JC 76	Order After Post-Termination Review/Permanency Planning Hearing (Child Protective Proceedings)
JC 79	Publication of Hearing, Notice to Putative Father
JC 81	Request and Order for Court-Appointed Appellate Counsel
JC 82	Affidavit of Service Performed by Lawyer-Guardian Ad Litem
JC 83	Affidavit of Efforts to Locate Absent Parent
JC 92	Acceptance of Appointment (Juvenile Guardian)
JC 93	Letters of Juvenile Guardianship
JC 94	Annual Report of Juvenile Guardian on Condition of Child
CCFD 20	Order Regarding Voluntary Foster Care Agreement
CCFD 21	Order Regarding Voluntary Foster Care Agreement