

# The Indian Child Welfare Act (ICWA) and The Michigan Indian Family Preservation Act (MIFPA): Notice Requirements, Procedural Issues, and Removal Standards

Presented by:

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# Agenda for today

- ▶ General overview of ICWA/MIFPA
- ▶ Notice Requirements
- ▶ Procedural Issues
- ▶ Removal Standards

# Agenda for today

- ▶ **General overview of ICWA/MIFPA**
  - ▶ **Relevant statutes**
  - ▶ **“Indian child”**
  - ▶ **“Child custody proceeding”**
  - ▶ **Requirements of the Court and Department**
- ▶ Notice Requirements
- ▶ Procedural Issues
- ▶ Removal Standards

What are the legal authorities that govern child custody proceedings involving Indian children?

# ICWA

- ▶ Indian Child Welfare Act - 15 USC § 1901
  - ▶ Federal law
  - ▶ Passed in 1978 under the Commerce Clause
    - ▶ Congress charged with protecting Indian tribes and resources, including children (Constitution, statutes, treaties)
- ▶ Purpose:
  - ▶ “[T]o protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum Federal standards* for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.” 25 USC § 1902 (emphasis added)

# Michigan Indian Family Preservation Act (MIFPA)

- ▶ State statute, effective January 2, 2013
  - ▶ MCL 712B.3 et. seq.
- ▶ Mirrors the minimum protections of ICWA, and adds additional procedural and substantive protections for Michigan Indian families
- ▶ When applicable state law contains higher standards than ICWA, the court must apply those higher standards. 25 USC §1921
- ▶ State law can never impair application of federal law. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 at 43 (1989).

# Other Legal Authorities

- ▶ Final Rule (81 FR 38778; 25 CFR 23, *et seq.*)
  - ▶ Federal regulations that govern state court implementation of ICWA
  - ▶ Binding (effective Dec. 12, 2016)
- ▶ BIA Guidelines (80 FR 10146-02)
  - ▶ Less formal, but specific guidance regarding implementation of ICWA
  - ▶ Non-binding, but provide guidance to state courts (Dec. 2016)
- ▶ Michigan Court Rules (chapters 3.900, 5.400)
- ▶ Case law

# When do ICWA/MIFPA apply?

- ▶ ICWA/MIFPA apply where there is a state court case involving both:
  - ▶ A child custody proceeding, and
  - ▶ An Indian child

How do ICWA and MIFPA differ in how they define “Indian child”?

# “Indian child”

## ICWA

- ▶ 25 USC § 1903(4): "Indian child" means any unmarried person who is under age 18 and is either
  - ▶ a member of an Indian tribe
  - ▶ is eligible for membership in an Indian tribe and **is the biological child of a member of an Indian tribe**

## MIFPA

- ▶ MCL 712B.3(k): "Indian child" means an unmarried person who is under the age of 18 and is either of the following:
  - ▶ a member of a [federally recognized] Indian tribe
  - ▶ eligible for membership in an Indian tribe as determined by that Indian tribe
- ▶ MIFPA removes the requirement in ICWA that an Indian child also be the biological member of an Indian tribe

How do ICWA and MIFPA differ in how they define “child custody proceeding”?

# “Child custody proceeding”

## ICWA

- ▶ 25 USC § 1903(1): "child custody proceeding" means shall mean and include:
- ▶ foster care placement -- any action removing an Indian child from his/her parent or Indian custodian for temporary placement in a foster home or institution or in the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand.
- ▶ termination of parental rights
- ▶ preadoptive placement; and
- ▶ adoptive placement

## MIFPA

- ▶ MCL 712B.3(b): "child custody proceeding" includes, but is not limited to, 1 or more of the following
- ▶ foster care placement -- any action removing an Indian child from his or her parent or Indian custodian, and where the parent or Indian custodian cannot have the Indian child returned upon demand but parental rights have not been terminated, for temporary placement in, and not limited to:
  - ▶ foster home or institution
  - ▶ home of a guardian or limited guardian under EPIC
  - ▶ juvenile guardian
- ▶ termination of parental rights
- ▶ preadoptive placement
- ▶ adoptive placement
- ▶ status offense

\*\*Be careful about detaining status offenders.

# ICWA/MIFPA does not apply to:

- ▶ Divorce/custody proceedings
- ▶ Delinquency proceedings (only those offenses that would be a crime if committed by an adult)

How does the court know  
if ICWA/MIFPA apply?

# Requirements of the Court at the Commencement of Proceeding

- ▶ The court is required to ask each participant (including attorneys) in a child custody proceeding whether the participant knows or has reason to know that the child is an Indian child.
  - ▶ Inquiry must be made at the commencement of the proceeding
  - ▶ On the record
  - ▶ Must instruct participants to keep court informed regarding subsequently received information
- ▶ If the court has reason to know that a child is an Indian child, but does not have enough evidence to make a determination, the court must:
  - ▶ Confirm, by way of report, declaration, or testimony included in the record that the agency conducted due diligence to identify and work with Tribes of which there is possible membership to verify whether the child is a member; and
  - ▶ Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition for “Indian child”
- ▶ Final Rule 25 CFR 23.107, MCL 712B.9

# Requirements of the Department

- ▶ The Department is required to “actively seek to determine whether a child at initial contact is an Indian child.” MCL 712B.9(3) (emphasis added)
- ▶ The Department shall exercise due diligence to determine, document, and contact the Indian child’s extended family members. If applicable, these efforts should be done in consultation with the tribe. MCL 712B.9(5) (emphasis added)
- ▶ The Department (or petitioner) shall document all efforts made to determine a child’s eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, tribe, Indian child, GAL, or parent/custodian. MCL 712B.9(7)

What if the Department is not involved or a MDHHS caseworker is not assigned?

# Responsibilities of the Petitioning Party

- ▶ In cases where there is no MDHHS caseworker (such as minor guardianships or delinquency cases):
  - ▶ The petitioner shall document all efforts made to determine the child's membership or eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, tribe, Indian child, GAL, or parent/custodian. MCL 712B.9(7)
  - ▶ On a petition for a minor guardian, if the petition states that it is unknown whether the minor is an Indian child, the Court shall order that the guardianship investigation include an inquiry into Indian tribal membership. MCR 5.404(A)(2)

# Petitions for Minor Guardianships

PCS Code: FGM  
TCS Code: PGM

STATE OF MICHIGAN PROBATE COURT COUNTY	PETITION FOR APPOINTMENT OF GUARDIAN OF MINOR	CASE NO. and JUDGE
--	--	--------------------

Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_

In the matter of \_\_\_\_\_  
First, middle, and last name

Petitioner's name, address and telephone no.

Petitioner's attorney, bar no., address, and telephone no.

1. I, \_\_\_\_\_, am interested in the welfare of the minor and make this  
petition as \_\_\_\_\_  
Relationship to minor (i.e. grandparent, aunt or uncle, friend, limited guardian, etc.)

2. The minor is currently \_\_\_\_\_, is  female,  male, is unmarried, resides in \_\_\_\_\_  
Age \_\_\_\_\_ County \_\_\_\_\_  
at \_\_\_\_\_  
Address \_\_\_\_\_ City/Township \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
and is presently located in \_\_\_\_\_ at \_\_\_\_\_  
County \_\_\_\_\_ Address (only if different than above) \_\_\_\_\_  
City/Township \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

The minor is a citizen of the following foreign country: \_\_\_\_\_

The minor is not an Indian child as defined in MCR 3.002(12).  
 It is unknown whether the minor is an Indian child as defined in MCR 3.002(12).

4. An action within the jurisdiction of the family division of circuit court involving the family or family members of the minor  
has been previously filed in \_\_\_\_\_ Court, Case Number \_\_\_\_\_  
was assigned to Judge \_\_\_\_\_, and  remains  is no longer pending.

5. The persons interested in this proceeding are: Note: If a parent is incarcerated and under the jurisdiction of the Michigan Department of Corrections, the petitioner must comply with MCR 2.004(B).

NAME	RELATIONSHIP	ADDRESS AND TELEPHONE NUMBER			
	Parent/Age _____	Street address	City	State	Zip Telephone no.
	Parent/Age _____	Street address	City	State	Zip Telephone no.

JIS Code: PGI

STATE OF MICHIGAN PROBATE COURT COUNTY	PETITION FOR APPOINTMENT OF GUARDIAN OF MINOR INDIAN CHILD (INVOLUNTARY GUARDIANSHIP)	CASE NO. and JUDGE
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Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_

In the matter of \_\_\_\_\_  
First, middle, and last name

Name of tribe and Identification no. (if one)

Petitioner's name, address, and telephone no.

Petitioner's attorney, bar no., address, and telephone no.

1. I, \_\_\_\_\_, am interested in the welfare of the minor and  
make this petition as \_\_\_\_\_  
Relationship to minor (i.e. grandparent, aunt or uncle, friend, limited guardian, etc.)

This is not a voluntary guardianship under MCL 712B.13. The following active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. (Specify efforts below. Attach separate sheet if needed.)

3. The minor is currently \_\_\_\_\_, is  female,  male, is unmarried, resides in \_\_\_\_\_  
Age \_\_\_\_\_ County \_\_\_\_\_  
at \_\_\_\_\_  
Address \_\_\_\_\_ City/Township \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
and is presently located in \_\_\_\_\_ at \_\_\_\_\_  
County \_\_\_\_\_ Address (only if different than above) \_\_\_\_\_  
City/Township \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

The minor is a citizen of the following foreign country: \_\_\_\_\_

4. An action within the jurisdiction of the family division of circuit court involving the family or family members of the minor  
has been previously filed in \_\_\_\_\_ Court, Case Number \_\_\_\_\_  
was assigned to Judge \_\_\_\_\_, and  remains  is no longer pending.

# Agenda for today

- ▶ General overview of ICWA/MIFPA
- ▶ **Notice Requirements**
- ▶ Procedural Issues
- ▶ Removal Standards

# Important points about notice

- ▶ Proper notice is the **most important procedural aspect** of an ICWA/MIFPA case.
- ▶ If notice is not done correctly from the outset, then the trial court runs the risk of conditional reversal, delayed permanence for the child, and having to re-do the entire case from the beginning.

Whose responsibility is it to  
provide notice to the tribe?

# Notice Requirements

- ▶ If the court has reason to know that a child is an Indian child, the petitioner must notify the parent, Indian custodian, and the child's tribe:
  - ▶ Registered mail, return receipt requested
  - ▶ Must notify of proceeding and right to intervene, as well as information required by the Final Rule
  - ▶ MCL 712B.9(1); MCR 3.920(C), 25 CFR 23.111(d)
- ▶ The court should also make a record of notice. More on this later. See *In re Johnston and Jenkins Minors*, Docket No. 345016 (April 18, 2019) (no record of what notice sent, which tribes notified, no proof of service -- termination conditionally reversed).

# Notice Requirements

- ▶ Please note that MIFPA makes **no distinction** on notice between voluntary and involuntary proceedings (i.e. voluntary v. involuntary guardianships, termination v. release of parental rights, adoptive placement, etc.).

# Notice requirements if the tribe is unknown

- ▶ If the tribe is unknown, notice must be given, at a minimum, to the Secretary of Interior and any tribe located in the County (including service area).
- ▶ ***For Michigan, Wisconsin, Minnesota, and Iowa:*** Midwest Regional Director, Bureau of Indian Affairs, 5600 American Blvd. W, Suite 500, Bloomington, MN 55437 (modified 9/1/21)

# What if information provided is too vague to identify a particular tribe?

- ▶ A respondent father identified himself as “Anishinaabe.” Notice given only to BIA (or Secretary of the Interior). CoA held this is insufficient as “Anishinaabe” can refer to many tribes both inside and outside of Michigan. *In re NEGP*, 245 Mich App 126 (2001).
- ▶ Questions?
  - ▶ MHDDS Native American Affairs Division
  - ▶ Michigan Agency of BIA, 2845 Ashmun St., Sault Ste. Marie, MI 49783, (906) 632-6809

# How do I know who to send it to at the tribe?

- ▶ The BIA annually updates all tribal contacts for ICWA notice. Notice *must* be given to the proper agent.
- ▶ This list can be found at the BIA website:
  - ▶ <https://www.bia.gov/bia/ois/dhs/icwa/agents-listing/>
  - ▶ Google search: “Bureau of Indian Affairs ICWA tribal agents”

# Notice in general

- ▶ No foster care placement or termination of parental rights may be held until at least 10 days after receipt of the notice by the parent or Indian custodian and tribe or secretary. MCL 712B.9(2)
- ▶ The parent or Indian custodian and tribe shall be granted, upon request, up to 20 additional days to prepare for the proceeding. *Id.*
- ▶ If the court later discovers a child is an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the secretary. *Id.*
- ▶ If the court finds that a parent or the tribe has been prejudiced by lack of notice, all prior decisions are vacated and the court shall proceed from the first hearing. *Id.*

# Recordkeeping duties of the trial court

- ▶ The record must include:
  - ▶ Original or copy of each actual notice personally served or sent via registered mail;
  - ▶ Original or legible copy of the return receipt or other proof of service showing delivery of the notice
- ▶ It is also helpful (for appellate reasons) that the record include:
  - ▶ Any additional correspondence between the petitioner, court, and the tribe or other person or entity entitled to notice under ICWA
- ▶ *In re Morris*, 491 Mich 81 (2012)



# Other notice issues

- ▶ If the parent or Indian custodian does not understand written notice or is unable to comprehend the English language, notice must be given to the area director of the nearest BIA regional office so that the BIA can ensure notice is given in a language that the parent/custodian understands.
- ▶ A parent cannot waive notice to the child's tribe.
- ▶ Notice must contain the information required by the Final Rule, 81 Fed Reg at 38871. **\*see handouts\***
  - ▶ JC48
  - ▶ DHHS-5598

**MDHHS-5598, AMERICAN INDIAN/ALASKA NATIVE (AI/AN)  
CHILD/PARENT TRIBAL ENROLLMENT/ELIGIBILITY VERIFICATION**  
Michigan Department of Health and Human Services  
(Revised 5-22)

ATTN: Indian Child Welfare Matter/ICWA Tribal Agent  
INSERT NAME OF AGENT  
INSERT ADDRESS OF AGENT  
INSERT CITY/STATE/ZIP CODE OF AGENT

Specific Tribe, if known.  
If multiple tribes identified, this verification request must be sent to the identified tribe's ICWA Tribal Agent cited in the Federal Register ICWA Designated Tribal Agent Listing.

Please utilize this form to verify Indian ancestry in appropriate cases. If a court case has been initiated, please also utilize the DHS-120 and attach this form. Pursuant to the Indian Child Welfare Act (ICWA) 25 USC 1901 et seq., Michigan Indian Family Preservation Act (MIFPA) MCL 712B. 1 – 41, 45 CFR 1355 Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations, and Bureau of Indian Affairs (BIA) ICWA Final Rule 25 CFR 23, please be advised that the Michigan Department of Health and Human Services (MDHHS) is seeking enrollment/eligibility verification.

**SECTION 1 – INDIAN CHILD (Caseworker completes this section)**

Child's Name		Date of Birth
Caseworker's Name	Caseworker's Signature	Date
Caseworker's Email Address		Caseworker's Telephone Number
Supervisor's Name	Supervisor's Signature	Date
Supervisor's Email Address		MDHHS County
MDHHS County Office Mailing Address	City	State Zip Code

**SECTION 2 – TRIBAL CHILDREN'S PROTECTIVE SERVICES (CPS) INFORMATION REQUEST AND/OR MEMBERSHIP/ELIGIBILITY VERIFICATIONS (Tribe completes this section)**

Please return verification response to child's caseworker regarding child, mother, and father's membership/eligibility status in the tribe. Child's Biological Family History is attached to assist with determination of membership or eligibility for membership status of the child and parents (see page 3-4).

MDHHS-5598 (Rev. 5-22) 1  
Previous edition obsolete.

JIS Code: NPI

STATE OF MICHIGAN JUDICIAL CIRCUIT - FAMILY DIVISION COUNTY	NOTICE OF PROCEEDINGS CONCERNING AN INDIAN CHILD	CASE NO. PETITION NO. JUDGE
Court address		Court telephone no.

In the matter of \_\_\_\_\_ Date of birth \_\_\_\_\_  
First and last name(s), alias(es)

TO: \_\_\_\_\_ (Name and telephone no. of natural father or Indian custodian. State if unknown.)

\_\_\_\_\_ (Name and telephone no. of natural mother or Indian custodian. State if unknown.)

\_\_\_\_\_ (Name and telephone no. of ICWA Designated Tribal Agent. See list [here](#). State if unknown.)

\_\_\_\_\_ (Use only if identity of parents, custodian, or tribe is unknown. If grandparent(s) are known, please attach a sheet with name(s) and date(s) of birth.)

Bureau of Indian Affairs, Midwest Regional Office  
Norman Pointe II  
5800 West American Blvd., Suite 500  
Bloomington, MN 55437  
(612) 725-4571 or 4572

**TAKE NOTICE:**

- A hearing will be held concerning the Indian child named above on \_\_\_\_\_ Date and time \_\_\_\_\_ at \_\_\_\_\_ Location \_\_\_\_\_
- This hearing will concern  removal from the home or placement in foster care.  termination of parental rights.
- A copy of the petition is attached to this notice.
- You have the absolute right to intervene in this proceeding and, absent objection by either Indian parent, you have the right to petition the court to have this case transferred to the Tribal court of the \_\_\_\_\_ Tribe. The Tribal court may decline the transfer.

Approved, SCAO  
Form JC 48, Rev. 3/23  
25 USC 1912, MCR 3.920(C)(1)  
Page 1 of 2

Distribute form to: Indian Tribe  
Court  
Michigan Department of Health and Human Services  
Additional copies as needed

# Agenda for today

- ▶ General overview of ICWA/MIFPA
- ▶ Notice Requirements
- ▶ **Procedural Issues**
  - ▶ **Exclusive jurisdiction of the tribe**
  - ▶ **Rights of the tribe**
  - ▶ **Common questions**
- ▶ Removal Standards

When does the tribal court  
have jurisdiction over  
ICWA/MIFPA cases?

# Exclusive Jurisdiction of Tribe

- ▶ A tribe has exclusive jurisdiction in a child custody proceeding involving an Indian child if the child resides or is domiciled within the reservation.
- ▶ If the child is a ward of the tribal court, the tribal court retains exclusive jurisdiction, even if the child leaves the reservation.\*
- ▶ If a child is domiciled on a reservation, but is temporarily off the reservation, the state court may exercise limited emergency jurisdiction to prevent imminent physical damage to the child.
- ▶ Absent good cause to the contrary or an objection by either parent, the state court **MUST** transfer a case to tribal court upon the petition of either parent, Indian custodian, or child's tribe.
- ▶ MCL 712B.7

\*MIFPA added this language to clarify tribal jurisdiction when a ward subsequently changes residence or domicile.

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What are the rights of the  
tribe in ICWA/MIFPA cases?

# The rights of the tribe

- ▶ The right to intervene at any time in a state court proceeding. 25 CFR 23.111(d)(6)(iii)
  - ▶ This means that they are a party to the case and as a party, the tribe has the right to notice, discovery, participation, questioning and calling of witnesses, presentation of evidence, etc.
- ▶ The right to petition the court for transfer of the child custody proceeding to Tribal court. 25 CFR 23.111(d)(6)(vi)
- ▶ The right to participate in any proceeding subject to ICWA/MIFPA. This is not limited to attorneys, but applies to any official tribal representative. MCL 712B.7(7)
- ▶ The right to full faith and credit to the public acts, records, judicial proceedings of any Indian tribe to Indian child custody proceedings in the same manner and extent given to other entities. MCL 712B.7(8)
- ▶ The right to participate in identification/provision of culturally appropriate services, case planning, identification of appropriate placement, and developing family preservation strategies. MCR 3.002
- ▶ The right to determine eligibility for or membership in the tribe. 25 CFR 23.108(b)
- ▶ The right to be granted, upon request, up to 20 additional days to prepare for the proceeding. MCL 712B.9(2)

# Common Questions

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If the tribe chooses not to intervene, does ICWA/MIFPA still apply?

# YES!

- ▶ “The application of ICWA to the state-court proceedings does not depend on whether the tribe chooses to intervene.”  
*In re Morris*, 491 Mich. 81, 124 (2012),  
Appendix n. 6

What if the family doesn't  
participate in tribal activities?  
Does ICWA/MIFPA still apply?

# YES!

- ▶ *In re Elliot*, 218 MichApp 196 (1996)
  - ▶ Child’s Indian heritage not discovered until termination. Court adjourned, tribe intervened. Court proceeded to termination without application of the higher ICWA standards:
  - ▶ “It may be true that if this matter were to be tried under the [ICWA], there would be an opportunity for the provision of expert testimony regarding the placement of the child in an Indian versus non-Indian home. However, in reviewing the file, I note that there has never been any particular involvement on the part of [the mother] or her child in a Native American reservation or family or lifestyle.” *Id.* at 200.
  - ▶ COA said trial court committed clear legal error by creating its own exception to applicability of ICWA.
  - ▶ “[A]n “existing Indian family” exception would be in direct conflict with the concept of tribal sovereignty and the important public policy of improving tribal ties reflected in the ICWA.” *Id.* at 206.

What if there is not a request  
to remove an Indian child?  
Does ICWA/MIFPA still apply?

# YES!

- ▶ “Even in those cases in which the child is not removed from the home . . . Agencies and courts should follow the verification and notice provisions of these guidelines. Providing notice allows tribes to intervene as early as possible in a child custody proceeding and provides an opportunity for the tribe to bring resources to bear to assist the family in *preventing the breakup of the family.*” See BIA Guidelines, 80 FR 10152 (emphasis added)

If the child is removed from only one parent and placed with another parent, does ICWA/MIFPA still apply?

# YES!

- ▶ *In re Detmer/Beaudry*, 321 Mich.App. 49 (2017):
  - ▶ One child, AB, was removed from the mother and placed with a nonrespondent father. Another child, KD, was voluntarily placed with nonrespondent father.
  - ▶ Does ICWA/MIFPA apply when a child is placed with a nonrespondent parent? Does this constitute a “removal”?
  - ▶ Case moot, but CoA considered it because the issue was of paramount public significance, is likely to recur, and is likely to evade appellate review (because this was a temporary placement)
  - ▶ “*Sanders* is a shield to protect the rights of a nonadjudicated parent, not a sword to pierce the rights of an adjudicated parent or child.” *Id.* At 6.
  - ▶ “Removal” means the instance when a court orders that a child be physically transferred or moved from the care and residence of a parent or custodian to the care and residence of some other person or institution.
  - ▶ Contrast with *In re England*, 314 MichApp 245 (2016) where there was no removal because the child did not change residences.

# Removal? Other scenarios to consider:

- ▶ Ordering a parent out of the home
  - ▶ Removal?
  - ▶ Results in a break up of the Indian family
- ▶ Ordering a parent to have no-contact with the child, or suspension of parenting time
  - ▶ Removal?
  - ▶ Significantly impairs the rights of parent and child to a parent-child relationship

# Agenda for today

- ▶ General overview of ICWA/MIFPA
- ▶ Notice Requirements
- ▶ Procedural Issues
- ▶ **Removal Standards**
  - ▶ **Findings required for removal**
  - ▶ **Emergency v. nonemergency removals**
  - ▶ **Placement considerations**

# Removal of an Indian child

- ▶ Michigan is a “dual burden” state, where the state must meet both federal and state requirements to remove a child or terminate parental rights. *In re England*, 314 Mich.App. 245 (2016)
- ▶ Preliminary Hearing, PLUS
  - ▶ MCR 3.965
- ▶ Removal Hearing
  - ▶ MCR 3.967

# Preliminary Hearing (MCR 3.965)

- ▶ First, the removal for a non-Indian child (MCR 3.965(C)(2)):
  - ▶ Substantial risk of harm
  - ▶ No other provision or other arrangement reasonably available to adequately safeguard child
  - ▶ Conditions of child custody adequate to safeguard child from risk of harm
  - ▶ Contrary to the welfare
  - ▶ Reasonable efforts to prevent removal
  - ▶ Probable cause for allegations in petition
- ▶ These findings made at a preliminary hearing
- ▶ Removal of an Indian child requires all of this, **PLUS . . .**

# Removal Hearing (MCR 3.967)

- ▶ For an Indian child to remain in protective custody, the court must find (MCR 3.967(D), MCL 712A.15(2)):
  - ▶ Clear and convincing evidence, including at least one qualified expert witness who has knowledge about the child-rearing practices of the child's tribe, that:
    - ▶ Active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family
    - ▶ These efforts have proved unsuccessful
    - ▶ Continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
  - ▶ Active efforts must take into account the prevailing social and cultural conditions and way of life of the child's tribe
- ▶ These findings are made at a Removal Hearing (which may be combined with a Preliminary Hearing or any other hearing)

# Emergency v. Nonemergency Removals

## Nonemergency

- ▶ Petition for removal filed
- ▶ Prelim held pursuant to MCR 3.965(B)
- ▶ Removal Hearing (MCR 3.967) must be completed before the court may enter an order removing the child from the home (MCR 3.967(B))
- ▶ Typically combined with prelim or adjourned prelim, but can be combined with any hearing.

## Emergency Protective Custody

- ▶ Pick-up order (jc05b) (MCR 3.963), emergency removal petition (MCR 3.965, 3.974)
- ▶ Prelim held within 24 hours of removal or request filed with court pursuant to MCR 3.965 or 3.974 (for cases where petition already authorized)
  - ▶ The court can decide placement on an emergency basis without making the findings required by ICWA/MIFPA
- ▶ Removal Hearing (MCR 3.967) must be completed within 14 days after removal to determine whether continued custody away from a parent is appropriate. Maybe adjourned 20 days at request of a parent or Indian custodian or if court adjourns pursuant to MCR 3.923(G)

# Emergency Removals

## Resides/Domiciled on Reservation

- ▶ State court can exercise limited emergency jurisdiction to prevent **“imminent physical damage or harm to the Indian child”**
- ▶ Emergency jurisdiction ends when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the Indian child.
- ▶ MCL 712B.7(2)

## Not residing/domiciled on reservation

- ▶ Child may be removed in an emergency situation when the child is at a **“substantial risk of harm or is in surroundings that present an imminent risk of harm”** and removal is necessary to protect the child’s health and safety.
- ▶ MCL 712A.14a, 14b

Does the court have to  
comply with ICWA/MIFPA  
regarding notice and the  
removal hearing in an  
emergency?

# NO.

- ▶ In emergency situations (those removals that require a pick-up order), the Court must conduct a preliminary hearing within 24 hours.
- ▶ The court does not have to provide notice as required by ICWA/MIFPA for the preliminary hearing.
- ▶ The removal hearing must be completed within 14 days after removal (absent a request for an additional 20 days by the tribe or Indian custodian). Notice must be provided and the higher standards must be applied for this hearing.

# What is “clear and convincing evidence”?

- ▶ “The clear and convincing standard is ‘the most demanding standard applied in civil cases[.]’ . . . [and] requires evidence *[that is] so clear, direct, weighty, and convincing as to enable the [fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.*” *Hunter v. Hunter*, 484 Mich. 247, 265 (2009) (emphasis added)
- ▶ The evidence must show that the particular conditions in the home that are likely to result in serious emotional or physical damage to the child. There must be a causal relationship between the conditions and the damage that is likely to result. Final Rule, 25 CFR 23.121(c)-(d).
- ▶ Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, age of custodian, inadequate housing, substance abuse, or nonconforming social behavior is not enough. *Id.*

# What happens if these requirements are not followed?

- ▶ The Indian child, parent/custodian, or tribe may petition any court of competent jurisdiction to *invalidate the action*.  
MCL 712B.15(5), MCL 712B.39
- ▶ If the court finds that a child was improperly removed from a parent/custodian or improperly retained after a visit, the court *shall* decline jurisdiction and return the child to the parent immediately. The only exception is to prevent a substantial and immediate danger or threat of danger. MCL 712B.19

Does the court have to give any consideration to where an Indian child is placed?

# YES!

- ▶ The court must ensure that the placement preferences listed in MCL 712B.23(6) are followed.

# Placement of Indian children

- ▶ Least restrictive setting that most approximates a family and which his/her special needs, if any, may be met.
- ▶ Within a reasonable proximity to his/her home, taking into account any special needs of the child.
- ▶ Absent good cause, foster care or pre-adoptive placement must follow this order of preference:
  - ▶ A member of the Indian child's extended family
  - ▶ A foster home licensed, approved, or specified by the Indian child's tribe
  - ▶ An Indian foster home licensed or approved by the department
  - ▶ An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs
  - ▶ MCL 712B.23(1)
- ▶ **IMPORTANT NOTE:** The tribe can change the order of placement if it chooses. MCL 712B.23(6). Unlike ICWA, MIFPA does not require a formal tribal resolution.

# Placement of Indian Children (cont.)

- ▶ Initial placements may not comply with ICWA/MIFPA if based on an emergency removal or because a placement was not initially available.
- ▶ In these cases, the court must make sure that DHHS is diligently and in good faith continuing to search for a compliant placement so the child may be moved to that placement as soon as possible. MCL 712B.23 (4).
- ▶ This requires DHHS to contact the child's tribe for assistance in locating a compliant placement.
- ▶ All efforts made by the DHHS to find a compliant placement must be provided to the court in writing or stated on the record.
- ▶ The court must address the efforts to place the child according to placement preferences at every hearing until the placement meets these requirements.

# Return of an Indian Child

- ▶ Non-Indian child: no longer a substantial risk of harm
- ▶ Indian child: when removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. MCL 712B.29

Questions?

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