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Frank Vandervort
vort@umich.edu

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Child Protection Law and Procedure

Frank E. Vandervort

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I. Overview

§24.1 Child protective proceedings involving non-Indian children are primarily governed by the Child Protection Law (CPL), MCL 722.621 et seq.; the Juvenile Code, MCL 712A.1 et seq.; and subchapter 3.900 of the Michigan Court Rules. Taken together, these sources of authority establish a comprehensive scheme for reporting cases of suspected abuse and neglect, investigating those reports, and responding, when necessary, with appropriate legal action. For child protective proceedings concerning Indian children, see chapter 25. While these statutes form the primary authority for handling child protection proceedings, practitioners must be aware that federal law, specifically Title IV-E of the Social Security Act, 42 USC 670 et seq., and the policy established by the Michigan Department of Health and Human Services (DHHS) for handling child protection cases are increasingly influential in the courts' handling of child protection cases. *See, e.g., Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 782 NW2d 747 (2010); *Department of Human Servs v Rood (In re Rood)*, 483 Mich 73, 763 NW2d 587 (2009). In 2006, Michigan was sued in the federal court

for the Eastern District of Michigan by Children's Rights, Inc., a New York nonprofit organization that sought to reform the state's handling of child protection cases. *See Dewayne B v Granholm*, No 06-13548, 2007 US Dist LEXIS 28265 (ED Mich Apr 17, 2007). In 2008, the court approved a consent decree agreed on by the parties settling the lawsuit. The decree established a monitoring system, and the state's child welfare system remains under the ongoing supervision of the federal court. That settlement agreement was revised and updated in July 2011. This consent decree affects virtually every aspect of the DHHS's operations of children's protective services and foster care programs.

Although anyone who has information that a child needs the court's protection has standing to initiate a proceeding, MCL 712A.11; *People v Gates*, 434 Mich 146, 452 NW2d 627, *cert denied,* 497 US 1004 (1990), a child protection case typically begins when Children's Protective Services (CPS) files a petition with the court.

On receiving a report of suspected child maltreatment, CPS must conduct an investigation and, depending on the findings of that investigation, take one of several possible actions. These actions range from simply closing the case without any further involvement to petitioning the family court for jurisdiction over the child.

If a petition is filed, the court must determine whether there is sufficient evidence to bring the child within the court's jurisdiction under MCL 712A.2(b) of the Juvenile Code. The primary provisions of that section address child abuse, child neglect, emotional maltreatment, educational neglect, and dependency, which includes circumstances in which a child is homeless or not domiciled with a legally responsible adult, has repeatedly run away from home, has been involved in commercial sexual activity (i.e., prostitution), or committed a delinquent act at the behest of a parent or other adult, or the legally responsible adult has died or is permanently incapacitated.

If the court determines that there is insufficient evidence to invoke the court's jurisdiction, the court must dismiss the petition. MCL 712A.18. If the court finds there is a preponderance of the evidence that one of the jurisdictional bases articulated in MCL 712A.2(b) is established, the court may take temporary custody of the child. When proceeding under the Juvenile Code, the family court "may issue orders affecting a party as necessary." MCL 712A.2(i). In a child protective proceeding, the parties include the petitioner; the DHHS; the child; the parent, guardian, or legal custodian; and any licensed child care agency acting as an agent of the DHHS.

In a limited number of factual circumstances, a petition may seek the termination of parental rights at the initial dispositional hearing. MCL 712A.19b(4), .19a (limiting initial petitions requesting termination of parental rights at disposition to cases involving aggravated circumstances). The court may not terminate a parent's rights unless the petition requests termination. *Department of Human Servs v Holm (In re SLH)*, 277 Mich App 662, 747 NW2d 547, *leave denied,* 482 Mich 1007, 756 NW2d 86 (2008). Although the majority of petitions filed seek only temporary custody of the child, the CPL requires that, in certain circumstances, the DHHS must seek termination of parental rights at the initial dispositional

hearing. MCL 722.638. These cases involve the most egregious forms of abuse or neglect (e.g., torture, criminal sexual conduct involving penetration) or situations in which a court has previously terminated the parent's rights in another child and the subsequent child is at risk of maltreatment at the hands of the parent.

In the absence of aggravated circumstances as defined in MCL 722.638, the court will generally assert only temporary jurisdiction over the child. When it does so, the court must establish a treatment plan intended to assist the parents in regaining custody of the child. The court must conduct periodic review hearings to determine whether progress is being made by the parent and whether continued wardship of the child is warranted.

If the child remains in foster care, the court must conduct a permanency planning hearing (PPH) one year after the original petition was filed and once a year after that for as long as the child is a temporary ward of the court. At the PPH, the court must determine whether the agencies involved have made reasonable efforts to finalize the permanency plan. The court has five basic options at this stage: (1) return the child to parental custody, (2) direct that a petition to terminate parental rights be filed, (3) place the child in a juvenile guardianship that is intended to be permanent, (4) place the child permanently with a relative who is willing to care for the child (with a continuing wardship), or (5) order some other unspecified permanent resolution to the child's situation (when options 1 through 4 are unavailing for the child).

When a child cannot be reunified with his or her parent safely, the court must consider alternative permanent options such as a juvenile guardianship, termination of parental rights, or another planned permanent living arrangement. If the court does not implement another permanency plan, it has authority to terminate parental rights if one of the statutory bases is established by clear and convincing evidence. If a basis for termination is established under MCL 712A.19b(3), the court must then determine whether entry of an order terminating parental rights would serve the child's best interests. MCL 712A.19b(5). If the court finds by clear and convincing evidence both that there is a legal basis for terminating a parent's rights and that it would be in the child's best interests to do so, the court must enter an order terminating the parent's rights. *Id.* The determination regarding the child's best interests may be made based on the whole record of the case but should consider a number of specific factors. *In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000); *In re White*, 303 Mich App 701, 846 NW2d 61 (2014).

If the court terminates parental rights, it must conduct periodic postermination review hearings for as long as the child remains a permanent ward of the court or a ward of the Michigan Children's Institute (MCI), the state's adoption agency. The purpose of such a hearing is for the court to monitor progress toward the achievement of an appropriate permanency plan for the child, and the court must make findings regarding whether reasonable efforts to that end have been made by the Michigan DHHS and its contract agencies.

A dispositional order placing the child under the court's temporary jurisdiction, an order terminating parental rights, and any final order may be appealed to the Michigan Court of Appeals as of right. MCR 3.993. An order issued after a

preliminary hearing that removes a child from his or her home is not appealable by right. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014). Only orders of disposition are appealable by right. *Id.* All other appeals are by leave. This includes an order removing a child from the parental home after a preliminary hearing. *Id.* (citing MCR 7.205(F)). Issues concerned with the assertion of temporary jurisdiction must be appealed directly and may not be raised after a supplemental petition seeking termination of parental rights has been granted because the court has determined this to be a collateral attack. *In re Hatcher*, 443 Mich 426, 505 NW2d 834 (1993). However, a parent does not violate the rule against collateral attacks on the assertion of jurisdiction when raising a violation of *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 852 NW2d 524 (2014) (abolishing the one-parent doctrine), for the first time on appeal. This is because a *Sanders* attack is an attack on the court's exercise of dispositional authority and not on its exercise of jurisdiction. *In re Kanjia*, 308 Mich App 660, 866 NW2d 862 (2014). *Sanders* is to be given full retroactive application to all cases on appeal at the time that decision was announced. *Id.*

Adoption proceedings regarding the child may not be finalized while an appeal of the decision to terminate parental rights is pending. *Family Independence Agency v Kucharski (In re JK)*, 468 Mich 202, 661 NW2d 216 (2003).

II. Family Court Practice Regarding Juvenile Matters

§24.2 Pursuant to MCL 600.1021(1)(e), the family division of the circuit court has exclusive jurisdiction over child protective proceedings. Most aspects of child protection practice are covered by the CPL, MCL 722.621 et seq.; the Juvenile Code, MCL712A.1 et seq.; and the court rules regarding juvenile matters, MCR 3.901 et seq. However, there are a number of other statutes, both federal and state, of which the practitioner should be aware.

At the federal level, practitioners should be familiar with the Child Abuse Prevention and Treatment Act, 42 USC 5101 et seq., which establishes a federal funding scheme for child abuse prevention, CPS, and related programs. Titles IV-B, 42 USC 621 et seq., and IV-E, 42 USC 670 et seq., of the Social Security Act establish federal funding streams for child abuse prevention, family preservation, foster care, and adoption services. Although these funding statutes do not typically apply directly to individual child protection cases, they are playing a larger role in courts' decision-making. *See Suter v Artist M*, 503 US 347 (1992) (holding that "reasonable efforts" requirement in federal act does not grant individual right). *But see Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, n8, 782 NW2d 747 (2010) (discussing possible loss of federal funding if Department of Human Services (now DHHS) fails to comply with Title IV-E); *Department of Human Servs v Rood (In re Rood)*, 483 Mich 73, n47, 763 NW2d 587 (2009) (discussing federal "reasonable efforts" requirement and noting that under current Department of Human Services (now DHHS) appropriation legislation, if there is conflict between state and federal law, federal law prevails to ensure that Michigan maximizes its federal funding); *In re Hicks*, 315 Mich App 251, 890 NW2d 696 (2016) (discussing interaction of "reasonable efforts" and "reasonable accommodations" under Americans with Disabilities Act and Section 504 of

Rehabilitation Act). In addition, some provisions of the federal funding statutes grant individually enforceable rights. *See* 42 USC 674(d)(3) (granting individual right to sue for violation of Multiethnic Placement Act as amended by Interethnic Adoption Provisions). In cases involving American Indian children, the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 et seq., and the federal Indian Child Welfare Act (ICWA), 25 USC 1901 et seq. apply. For a more detailed discussion of relevant federal legislation, see Frank E. Vandervort's chapter "Federal Child Welfare Legislation" in *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* (Donald N. Duquette & Ann M. Haralambie eds, 2d ed 2010).

Other state statutes that are important to child protection practice include the Children's Ombudsman's Act, MCL 722.921 et seq.; the Foster Care and Adoption Services Act, MCL 722.951 et seq.; the Foster Care Review Board Act, MCL 722.131 et seq.; the foster care licensing provisions, MCL 722.111 et seq.; the guardianship of minors provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq.; the Subsidized Guardianship Assistance Act, MCL 722.871 et seq.; and the statute establishing the MCI, which acts as the state's adoption agency. MCL 400.210 et seq. Each of these statutes may become important to the proceeding, depending on the procedural posture of the case and the facts at issue.

Moreover, the Michigan Court Rules play a crucial role in how child protection cases are handled. Pursuant to MCR 3.901(A)(2), "[o]ther Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides." *See, e.g., Family Independence Agency v Jones (In re PAP)*, 247 Mich App 148, 640 NW2d 880 (2001) (summary judgment rule, MCR 2.116, does not apply to child protective proceedings because it has not been specifically incorporated by reference into subchapter 3.900). This is the obverse of the rule that applies to most family law proceedings. *See generally* MCR 3.201(C) ("Except as otherwise provided in this subchapter, practice and procedure in domestic relations actions is governed by other applicable provisions of the Michigan Court Rules."). Unlike most family law actions, the child is a party to a child protective proceeding, MCR 3.903(A)(19)(b), and is entitled to full and active participation in the proceeding through his or her lawyer–guardian ad litem (L-GAL), MCL 712A.17d. *Cf. In re Clausen*, 442 Mich 648, 685–691, 502 NW2d 649 (1993) (child lacks standing to bring action under Child Custody Act).

Juvenile proceedings have evolved into a highly technical subspecialty of family law practice with an increasingly complex body of rules, statutes, and caselaw. Before embarking on the representation of parties in child protection proceedings, the practitioner is well advised to carefully consider this body of law. Association with a more experienced practitioner is also advised. In addition, the State Bar of Michigan's Children's Law Section, the Child Advocacy Law Clinic at the University of Michigan Law School, and the Chance at Childhood Program at Michigan State University are helpful sources of information and collegial support for those new to child protection practice.

III. Constitutional Issues

A. Constitutional Protection for Family Relationships

§24.3 Child protective proceedings by their nature involve the intrusion of the state into the affairs of family life. As such, every child protective proceeding implicates important constitutional rights of both the parent and the child.

Familial relationships have long been accorded constitutional protection. *See, e.g., Meyer v Nebraska*, 262 US 390, 399 (1923). This unique relationship is an element of the liberty protected by the due process clause and enjoys the status of a fundamental constitutional right. *See, e.g., Troxel v Granville*, 530 US 57 (2000); *Stanley v Illinois*, 405 US 645 (1972); *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 852 NW2d 524 (2014); *Department of Human Servs v Rood (In re Rood)*, 483 Mich 73, 763 NW2d 587 (2009); *Reist v Bay County Circuit Judge*, 396 Mich 326, 241 NW2d 55 (1976).

The rights at issue in a child protective proceeding are the reciprocal rights of a parent and his or her child to remain together as a family. *Duchesne v Sugarman*, 566 F2d 817, 825 (2d Cir 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children[; i]t is the interest of the parent in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent") (citations and internal quotation marks omitted). The Michigan Supreme Court has observed that "[t]he interest of parent and child in their mutual support and society are of basic importance in our society and their relationship occupies a basic position in this society's hierarchy of values." *Reist,* 396 Mich at 341–342.

The law presumes that a fit parent acts in his or her child's best interests. *In re Deng*, 314 Mich App 615, 623, 887 NW2d 445 (2016) (citing *Troxel v Granville*, 530 US 57, 68 (2000)). However, once a parent is adjudicated unfit in a child protective proceeding, "the state may interfere with a parent's right to direct the care, custody, and control of a child." *Deng,* 314 Mich App at 623.

B. Substantive Due Process

§24.4 Substantive due process precludes the government from depriving an individual of a liberty or property interest arbitrarily. *In re TK*, 306 Mich App 698, 859 NW2d 208 (2014). Generally, the state must accord a child's parents a great deal of deference in making child-rearing decisions. *See, e.g., Troxel v Granville*, 530 US 57 (2000). The state is not, however, without authority to intervene to protect its *parens patriae* interest in a child's welfare. Thus, in the child protection context, courts have held that there is no substantive due process right to familial integrity. *Martin v Children's Aid Soc'y*, 215 Mich App 88, 544 NW2d 651 (1996); *Doe v Oettle*, 97 Mich App 183, 293 NW2d 760 (1980). The court does not violate substantive due process when it orders a juvenile guardianship at a permanency planning hearing. *TK.*

C. Procedural Due Process

1. In General

§24.5 The law entitles parents and children to procedural due process in determining whether child maltreatment has occurred and whether termination of parental rights is the appropriate response. If parental rights are terminated using proper procedures and standards of evidence, the parent's liberty interests no longer include the right to care and custody of the child. *In re LaFlure*, 48 Mich App 377, 386–387, 210 NW2d 482 (1973). However, the exact parameters of procedural due process are unclear and are somewhat dynamic, changing as our conception of fairness evolves. Procedural due process requires that both parents and children be afforded "fundamental fairness" when the state seeks to intervene into family life. *Id.*

In analyzing due process issues, the court applies the three-pronged test of *Mathews v Eldridge*, 424 US 319 (1976). First, the court must consider the nature of the private interest at stake. Next, the court weighs the government's interest. Finally, the court considers the risk that the chosen procedure will result in an erroneous decision. *See, e.g., Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 852 NW2d 524 (2014); *Department of Human Servs v Rood (In re Rood)*, 483 Mich 73, 92–93, 763 NW2d 587 (2009); *In re Vasquez*, 199 Mich App 44, 501 NW2d 231 (1993).

As noted in §24.3, the interest of parent and child in the preservation of their relationship unencumbered by the state is substantial. Conversely, the state has an "urgent interest" in the protection of children's welfare. *Lassiter v Department of Soc Servs*, 452 US 18, 26 (1981). In analyzing whether a particular procedure measures up to the requirements of due process, the court will look at the particular procedure that is challenged as well as other procedures in place to protect the parent and the child from an erroneous deprivation of their relationship. For example, in considering whether the appointment of an attorney is necessary in a termination proceeding, the court looked to the fact that only a limited pool of individuals or entities could petition to terminate parental rights, that the petition had to state specifically what factual basis underlies the request to terminate, and that the parent must be given a period of time to file a written response. *See id.* at 28; *see also Vasquez,* 199 Mich App at 48–49.

Both the U.S. Supreme Court and the Michigan courts have addressed several specific procedural due process claims, at times reaching differing conclusions.

2. Right to a Hearing

§24.6 Before the state may remove a child from parental custody and place that child in foster care, the parent is entitled to a hearing regarding his or her fitness. *Stanley v Illinois*, 405 US 645 (1972); *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 852 NW2d 524 (2014) (*Stanley* forbids one-parent doctrine, under which court could enter dispositional orders affecting one parent based on other parent's unfitness). This is true even if the custodial parent is a father who, while he has a relationship with the children, has not legally established paternity. *Stanley.* Before the court makes a finding of parental unfitness,

the court may not assume that the parent's and the child's interests diverge. *Santosky v Kramer*, 455 US 745, 760 (1982); *In re Clausen*, 442 Mich 648, 687, 502 NW2d 649 (1993) (parents' rights and child's rights come into conflict "only when there is showing of parental unfitness"). Due process prohibits the court from entering a default judgment against a parent who does not appear at the adjudication hearing intended to adjudicate his or her fitness as a parent. *In re Collier*, 314 Mich App 558, 887 NW2d 431 (2016) (citing *Sanders*). Thus, when the parent failed to appear, the court removed his attorney, with whom he had not communicated for a period of one month, and entered a default judgment of adjudication against him. The court violated his right to due process. *Collier,* 314 Mich App at 569–570.

3. Right to Counsel at Public Expense

§24.7 In *Lassiter v Department of Soc Servs*, 452 US 18, 31–32 (1981), the U.S. Supreme Court held that the state is not required as a matter of due process to appoint counsel at public expense in every termination of parental rights case. Rather, this decision may be made case by case. The Michigan Court of Appeals, however, has "recognized that the United States Constitution guarantees a right to counsel in parental rights termination cases." *Department of Human Servs v Williams (In re Williams)*, 286 Mich App 253, 275, 779 NW2d 286 (2009) (citing *Family Independence Agency v Weaver (In re KMP)*, 244 Mich App 111, 121, 624 NW2d 472 (2000)). Moreover, the Michigan Supreme Court has held that due process requires the appointment of counsel at public expense to permit a parent to prosecute an appeal of the termination of his or her parental rights. *Reist v Bay County Circuit Judge*, 396 Mich 326, 241 NW2d 55 (1976). Under Michigan law, the court must inform the parent at the preliminary hearing that he or she is entitled to the appointment of an attorney at public expense. MCR 3.965(B)(6); *Department of Human Servs v Rood (In re Rood)*, 483 Mich 73, 763 NW2d 587 (2009).

Both the Juvenile Code and the applicable court rules require that the "respondent" be appointed an attorney at public expense if he or she is unable to retain one. MCL 712A.17c(4); MCR 3.915(B). It should be noted that a *respondent* is the "parent, guardian, legal custodian or nonparent adult who is alleged to have committed an offense against a child." MCR 3.903(C)(12). The terms *guardian, legal custodian,* and *nonparent adult* are terms of art. The term *guardian* is defined under MCR 3.903(A)(11) as a person appointed guardian of a child by a Michigan court pursuant to MCL 700.5204 or .5205, by a court of another state under a comparable provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian. A *juvenile guardian* is defined in MCR 3.903(A)(13). A *legal custodian* means either a person with legal custody of the child granted through a legal proceeding or an individual who has been granted a power of attorney pursuant to MCL 700.5103. MCR 3.903(A)(14). The term *nonparent adult* is intended as a practical matter to include the boyfriend or girlfriend of the child's parent, although the definition is broad enough to encompass a host of others. *See* MCR 3.903(C)(7). A parent becomes a respondent entitled to appointed counsel when the petitioner identifies an act or omis-

sion by that parent that converts his or her status from that of a nonoffending parent into that of a respondent and thereby subjects that party to the termination of his or her parental rights to the child at issue. *See Williams* (where no allegations were made against child's father in initial petition, he was not entitled to counsel until he was named as "respondent" in supplemental petition to terminate his rights). Before accepting a plea of admission or no contest, the court must inform the parent that he or she has the right to counsel. *Department of Human Servs v Holm (In re SLH)*, 277 Mich App 662, 747 NW2d 547, *leave denied,* 482 Mich 1007, 756 NW2d 86 (2008). Failure to do so renders the parent's plea defective. *Id.*

The court's duty to appoint counsel is triggered by the parent's request that the appointment be made. *In re Hall*, 188 Mich App 217, 469 NW2d 56 (1991). Once an indigent parent requests an attorney be appointed, it is error for the court to fail to do so and to continue with proceedings. *See, e.g., Rood.* In assessing whether a respondent is indigent and entitled to appointed counsel, the court may not impute to the respondent income earned by people who bear no legal responsibility to contribute to the respondent's legal expenses, even if those individuals reside in the same household as the respondent. *Williams.* To continue representation by appointed counsel, the parent must maintain a relationship with the attorney. However, in *Weaver,* in which the trial court removed counsel at a termination hearing because the client was not present, the court remanded for findings of fact regarding why the attorney was removed, where the client had attended a hearing two months earlier. Similarly, when the court removed counsel and entered a default judgment of adjudication because the parent failed to appear at the adjudication hearing and failed to communicate with counsel for only one month, the court violated the parent's due process rights. *In re Collier*, 314 Mich App 558, 887 NW2d 431 (2016). Thus, an attorney appointed to represent a parent may be required to proceed to represent the client at adjudication despite the fact that the parent does not appear. However, when the parent-client does not communicate with the attorney for 16 months, the attorney may withdraw from the representation or be removed by the court. *Collier,* 314 Mich App at 572 (citing *Hall,* 188 Mich App at 222).

The court does not violate a parent's rights by refusing to appoint appellate counsel based on an untimely request. *Department of Soc Servs v Conley (In re Conley)*, 216 Mich App 41, 549 NW2d 353 (1996). Similarly, a parent's rights were not violated by the court's refusal to appoint new counsel midtrial. Because the right to counsel is personal, a parent lacks standing to raise ineffective assistance of counsel by the child's attorney. *Family Independence Agency v Pantaleon (In re EP)*, 234 Mich App 582, 595 NW2d 167 (1999), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000).

4. Standard of Evidence at Termination

§24.8 When termination of parental rights is requested, due process requires that the standard of evidence be at least clear and convincing. *Santosky v Kramer*, 455 US 745 (1982); *see* MCL 712A.19b(3); MCR 3.977.

Michigan law permits a party to file a petition and seek termination of parental rights at the initial disposition in a limited number of very serious cases. MCL 712A.19a, .19b(4). If such a petition is filed, the court may terminate parental rights only if it finds that there is a legal basis to terminate supported by clear and convincing legally admissible evidence. MCR 3.977(E). Similarly, if the child is made a ward of the court based on one form of abuse or neglect and a supplemental petition seeking termination on the basis of some changed circumstance is filed, that new circumstance must be proven by clear and convincing legally admissible evidence. MCR 3.977(F); *see Family Independence Agency v Gilliam (In re Gilliam)*, 241 Mich App 133, 613 NW2d 748 (2000); *In re Snyder*, 223 Mich App 85, 566 NW2d 18 (1997). However, if termination is sought based on a continuation of the same neglect or abuse that originally brought the child within the court's jurisdiction, an order terminating parental rights may be based on any relevant evidence. MCR 3.977(H)(2).

The appointment of a juvenile guardian pursuant to MCL 712A.19a(7) at a permanency planning hearing is not a de facto termination of parental rights and thus does not violate a parent's right to due process of law. *In re TK*, 306 Mich App 698, 859 NW2d 208 (2014).

The family court has subject-matter jurisdiction to consider the termination of parental rights of a parent who is suspected of murdering the other parent, even if the surviving parent has not been convicted of the crime. Determining criminality in the absence of a criminal charge or conviction does not violate the parent's due process rights. *Family Independence Agency v Unger (In re MU)*, 264 Mich App 270, 690 NW2d 495 (2004), *leave denied,* 472 Mich 871, 692 NW2d 846 (2005).

5. Right to a Transcript at Public Expense

§24.9 Due process and equal protection entitle an indigent parent to a transcript of proceedings provided at public expense if necessary to prosecute an appeal in a termination of parental rights case. *MLB v SLJ*, 519 US 102 (1996); *Reist v Bay County Circuit Judge*, 396 Mich 326, 241 NW2d 55 (1976). However, the state need only provide a record of "'sufficient completeness to permit proper [appellate] consideration'" of the parent's claims. *MLB,* 519 US at 112 (quoting *Mayer v Chicago*, 404 US 189, 198 (1971)).

6. Right to Remain Silent

§24.10 In *Baltimore City Dep't of Soc Servs v Bouknight*, 493 US 549 (1990), the court held that when a parent is the court-ordered custodian of a child in a protective proceeding, that parent may not assert the Fifth Amendment privilege against self-incrimination to decline to produce the child when ordered to do so by the court. Similarly, Michigan courts have long held there is no Fifth Amendment right to remain silent in a child protective proceeding. *Department of Soc Servs v Stricklin*, 148 Mich App 659, 384 NW2d 833 (1986).

7. Right to Confrontation

§24.11 The Sixth Amendment right to confront adverse witnesses does not apply to child protective proceedings. *In re Brock*, 442 Mich 101, 108, 499 NW2d 752 (1993). The purpose of child protective proceedings, the court reasoned, is to protect the child and not to punish a perpetrator of a crime. Such proceedings are not criminal, so the Sixth Amendment does not require a face-to-face confrontation.

8. First Amendment Free Exercise Clause

§24.12 Although a fit parent has the right to direct the religious upbringing of his or her child, once the parent is adjudicated unfit in a child protection proceeding, the parent's right to direct the child's upbringing, including the right to direct the child's religious upbringing, must give way to the court's authority to enter orders in the interests of the child and society. *In re Deng*, 314 Mich App 615, 887 NW2d 445 (2016). Thus, the family court could order that a child be immunized over the parent's First Amendment Free Exercise Clause objections. *Id.*

9. Miscellaneous Due Process Rights

§24.13 Due process guarantees a parent an "adjudication hearing before the state can interfere with his or her parental rights." *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 415, 852 NW2d 524 (2014). Where a petition makes allegations against only one parent, the other parent cannot stipulate to the court's assertion of jurisdiction. *Department of Human Servs v Holm (In re SLH)*, 277 Mich App 662, 747 NW2d 547, *leave denied,* 482 Mich 1007, 756 NW2d 86 (2008) (where petition made allegations of sexual abuse against children's father and no allegations against children's mother, mother could not stipulate to jurisdiction of court; while mother was party, she was not respondent). The family court has authority to order the removal of a gravely ill child's life support as long as adequate procedural due process is ensured. *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 208–213, 640 NW2d 262 (2001). A parent has a due process right to receive proper notice of a child protective proceeding. *Id.* at 173.

The Michigan Rules of Evidence do not apply in the dispositional phase of a child protection proceeding. The admission of and reliance on hearsay in the dispositional phase does not offend due process as long as the hearsay relied on meets the test of fairness, reliability, and trustworthiness. *In re Kantola*, 139 Mich App 23, 361 NW2d 20 (1984); *In re Hinson*, 135 Mich App 472, 354 NW2d 794 (1984).

The DHHS or its contract agencies may not deliberately create the grounds for termination of parental rights. To do so violates the parents' right to due process of law. *In re B*, 279 Mich App 12, 756 NW2d 234 (2008) (where state workers reported parents to federal authorities, knowing parents would be deported and thereby virtually ensuring termination of parental rights, agency violated parents' right to due process of law).

IV. Reporting and Investigating Suspected Child Maltreatment

A. Definitions

§24.14 Michigan's CPL defines *child abuse* as

> harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy.

MCL 722.622(g). A *child* means "a person under 18 years of age." MCL 722.622(f). A *person responsible for the child's health or welfare* is a parent, legal guardian, person age 18 or older who resides for any length of time in the same home in which the child resides, a nonparent adult, or an individual working in a licensed or registered day care facility, a foster home, or a court-operated facility (e.g., a detention center).MCL 722.622(x) (renumbered from MCL 722.622(w), effective April 6, 2017, by 2016 PA 491). *Sexual abuse* is defined by reference to the criminal sexual conduct statutes and may involve sexual contact with or sexual penetration of a child. MCL 722.622(z) (renumbered from MCL 722.622(y), effective April 6, 2017, by 2016 PA 491). Similarly, *sexual exploitation* is defined as "allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging or engaging in the photographing, filming, or depicting of a child engaged in a listed sexual act as defined in … MCL 750.145c." MCL 722.622(aa) (renumbered from MCL 722.622(z), effective April 6, 2017, by 2016 PA 491). The term *maltreatment* is not defined in the CPL, although it is typically defined as encompassing cruel, rough, or bad treatment. *See American Heritage Dictionary of the English Language* (4th ed 2000); *Black's Law Dictionary* 978 (8th ed 2004).

Child neglect is

> harm or threatened harm to a child's health or welfare by a parent, legal custodian, or any other person responsible for a child's health or welfare that occurs through either of the following:
>
> (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.
>
> (ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.

MCL 722.622(k).

A reoccurring problem in child protection practice is the role of unrelated persons who reside with or have regular contact with children in their familial homes. For example, a parent's live-in paramour is often the person responsible for the harm done to the child. *See, e.g., In re Powers*, 208 Mich App 582, 528 NW2d 799 (1995). The legislature has sought to address this problem by defining abuse and neglect in a way that encompasses these individuals by labeling them "nonparent adults." A *nonparent adult* is

> a person who is 18 years of age or older and who, regardless of the person's domicile, meets all of the following criteria in relation to a child:
>
> (i) Has substantial and regular contact with the child.
>
> (ii) Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare.
>
> (iii) Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree.

MCL 722.622(v) (renumbered from MCL 722.622(u), effective April 6, 2017, by 2016 PA 491). A nonparent adult may be named as the respondent in a petition. MCR 3.903(C)(12). Moreover, a nonparent adult's harm of a child may provide a basis for family court jurisdiction, MCL 712A.2(b)(2), and the termination of parental rights if the court determines that the child would likely suffer harm from the nonparent adult if placed in the parent's home. *See, e.g.,* MCL 712A.19b(3)(b)(iii); *In re Brown*, 305 Mich App 623, 853 NW2d 459 (2014).

B. Reporting

§24.15 Michigan law mandates that certain professionals (e.g., physicians, social workers, teachers) report to CPS when they have "reasonable cause to suspect child abuse or child neglect." MCL 722.623(1)(a)–(b). This legal duty is not an unconstitutionally overbroad intrusion on a professional's First Amendment right to freedom of association. *People v Cavaiani*, 172 Mich App 706, 432 NW2d 409 (1988). The CPL broadly abrogates most legally recognized privileges. MCL 722.631; *In re Brock*, 442 Mich 101, 119, 499 NW2d 752 (1993) ("The physician-patient privilege is a statutory creation in derogation of common law, and hence will be narrowly construed.… Exceptions to statutory privileges should be broadly construed."). For example, the psychologist-patient privilege is abrogated so that a psychologist must report suspected abuse or neglect.

Mandated reporters are only required to report child abuse, including sexual abuse, when the suspected perpetrator is a parent, legal guardian, teacher, teacher's aide, or other person responsible for the child's health and welfare. In *People v Beardsley*, 263 Mich App 408, 688 NW2d 304 (2004), the court held that defendant school administrators were not obligated to report to CPS that they had reasonable cause to suspect that sexual contact between a 12-year-old boy and a 13-year-old girl had occurred at the school during school hours. The court reasoned that the incident did not constitute a reportable incident of *child abuse* as that term is defined in MCL 722.622 because *sexual abuse* is defined as sexual contact or penetration "with a child," implying that the other person involved in the contact or penetration is an adult responsible for the child's welfare.

Clergy have a limited duty to report suspected child maltreatment. A member of the clergy is required to report only if he or she receives the information regarding possible child abuse outside "a confession or similarly confidential communication." MCL 722.631. However, if the clergy member is acting in any other capacity listed in MCL 722.623 (e.g., as a family counselor), he or she must report suspected abuse or neglect. MCL 722.631.

In addition to cases in which professionals must exercise their judgment regarding "reasonable cause," the CPL specifies two situations that as a matter of law give rise to reasonable cause for suspicion of abuse. The first involves the pregnancy of a child under age 12 or sexually transmitted infection in a child who is between the age of 1 month and 12 years. MCL 722.623(8). The second is when a child is born exposed to either alcohol or a controlled substance that was not prescribed for a medical reason. MCL 722.623a. The law excludes from the definition of *neglect* a parent's failure to procure medical treatment for a child based on religious objections, although the court has authority to order medical treatment even over the parent's objection. MCL 722.634. Similarly, if a child is surrendered pursuant to the Safe Delivery of Newborns Act, MCL 712.1 et seq., as a matter of law the child has not been neglected. MCL 722.628(16).

While some professionals must report suspected child abuse or neglect, any person may make such a report. MCL 722.624.

C. Civil and Criminal Liability Regarding Reporting

§24.16 Anyone who in good faith reports potential child abuse or neglect is immune from civil liability for doing so. MCL 722.625; *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722, 373 NW2d 204 (1985). Similarly, one who cooperates with a CPS investigation is entitled to immunity. *Britton v Mills*, 248 Mich App 244, 639 NW2d 261 (2001).

On the other hand, a person who is mandated to report and fails to do so is civilly liable for the damages proximately caused by that failure. MCL 722.633(1); *Williams v Coleman*, 194 Mich App 606, 488 NW2d 464 (1992). Such a failure is a misdemeanor and may result in criminal charges. MCL 722.633(2); *People v Cavaiani*, 172 Mich App 706, 432 NW2d 409 (1988). Moreover, one who is mandated to report and who fails to do so risks loss of his or her professional license. *Becker-Witt v Board of Examiners of Soc Workers*, 256 Mich App 359, 663 NW2d 514 (2003).

Making an intentionally false report of suspected child maltreatment may be prosecuted as a misdemeanor or a felony. *See* MCL 722.633(5). Similarly, one who knowingly disseminates a CPS report is guilty of a crime. MCL 722.633(3). In at least one case a Michigan attorney has been sued, albeit unsuccessfully, for "disseminating" a protective services report when he attached the report to pleadings filed in a related domestic relations matter. *See Zimmerman v Owens*, 221 Mich App 259, 561 NW2d 475 (1997).

D. The Department of Health and Human Services' Response

1. In General

§24.17 All DHHS employees involved in investigating child abuse or child neglect cases must be trained in their legal duties to protect the state and federal constitutional and statutory rights of children and families from the initial contact of an investigation through the time services are provided. MCL 722.628(17). On receipt of a report of suspected abuse or neglect, the DHHS must commence an investigation within 24 hours. MCL 722.628(1). The purpose

of its investigation is to determine whether the child was in fact abused or neglected. MCL 722.628(2). If the child who is the subject of the investigation is not in the parent's physical custody (e.g., the child is at school), the CPS worker must notify the parent of the investigation unless doing so would "endanger the child's health or welfare." MCL 722.628(1).

At the time a DHHS investigator contacts an individual about whom a report of child abuse has been made or contacts an individual responsible for the health and welfare of a child who is the subject of a child abuse report, the investigator must state his or her name, whom he or she is representing, and the specific complaints or allegations made against that individual. MCL 722.628(2).

During the investigation, the CPS worker will interview the child if the child is able to talk. The interview with the child must not take place in the presence of the alleged perpetrator. MCL 722.628c. Contact with the child may take place in the school setting; the law requires that school officials cooperate with the investigation. MCL 722.628(8). Before meeting with the child, however, the CPS worker must meet with a designated member of the school's staff to "review … the department's responsibilities." MCL 722.628(9)(a).

After meeting with the school personnel, the CPS worker may meet with the child. In doing so, the CPS worker may not search the child's body if that search would require the child to expose "his buttocks or genitalia or her breasts, buttocks, or genitalia" unless the CPS worker has previously obtained a court order to search these parts of the child's body. MCL 722.628(10). If such a search is necessitated by the allegations or other evidence, CPS should obtain either parental permission or a court order for a medical assessment. Absent parental permission or a court order, neither a CPS worker nor a police officer has the authority to authorize a medical evaluation of the child for possible abuse. *See, e.g., Britton v Mills*, 248 Mich App 244, 639 NW2d 261 (2001).

2. Access to Medical, Mental Health, and Friend of the Court Records

§24.18 When conducting an investigation, CPS will frequently seek access to confidential information. The CPL requires that a "school or other institution" cooperate with CPS when it is conducting a child maltreatment investigation. MCL 722.628(8). The attorney general has opined that CPS is entitled to such records. OAG No 6976 (Mar 26, 1998) (access to community mental health records). Access to Friend of the Court (FOC) records is provided by court rule. MCR 3.218(C). Similarly, the FOC has access to CPS records pursuant to MCL 722.627(2)(t).

CPS will generally seek access to otherwise confidential records via releases of information; however, the CPL requires that CPS cooperate with the court and take the steps necessary to prevent further harm to the child. MCL 722.628(2). If a parent refuses access to records CPS thinks are necessary to its investigation, CPS may take legal action to obtain any necessary information.

There are two situations in which access to information is controlled by statute when a release is not provided, and these procedures must be used before court

action is taken. When CPS seeks information from records that are protected by the confidentiality provisions of the Michigan Public Health Code or the Michigan Mental Health Code, the legislature has established a procedure for CPS to obtain that information. *See* MCL 330.1748a, 333.16281. Pursuant to these provisions of law, CPS must make a request of the holder of the records that demonstrates a "compelling need" for access. The holder must then examine its records and release to CPS any information that pertains to the child abuse or neglect allegation. If CPS believes there is additional information of importance to its investigation in those records, CPS may seek a court order for further access to the records.

Counsel should become familiar with certain provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d-7(b), and the federal regulations implemented in response to it, 45 CFR 164.512. HIPAA seems to broadly except from its application state action aimed at preventing and responding to child maltreatment. In relevant part, it provides, "Nothing in [42 USC 1320d et seq.] shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of … child abuse … or public health investigation or intervention." 42 USC 1320d-7(b); *see also* 45 CFR 164.512. However, the precise application of HIPAA to child protective proceedings in Michigan has yet to be addressed by our courts.

CPS caseworkers must be given access to FOC records. MCR 3.218(C). Similarly, if an FOC case exists regarding a child, CPS must notify the FOC in any of the following dispositions: (1) a finding that a preponderance of the evidence indicates child abuse has taken place, (2) an emergency removal of a child is necessary, (3) the family court has taken jurisdiction of a child and the child remains in the child's home, (4) a child is removed from a home and one or more children remain in the home, or (5) other circumstances exist that relate to the safety of a child. MCL 722.628(18). If CPS finds that a parent has made three or more false reports regarding another parent in one year or five cumulative false reports to CPS over more than one year, CPS may report this situation to the FOC. MCL 722.628(20). If CPS finds that a child is found to have been maltreated and that there is an open FOC case regarding that child, CPS must inform the noncustodial parent of the process for changing custody. MCL 722.628(21).

3. Access to Substance Abuse Treatment Records

§24.19 Access to substance abuse treatment records is carefully circumscribed by federal statute and regulations. 42 USC 290dd-2; 42 CFR 2.1 et seq. However, substance abuse treatment providers must report suspected child abuse or neglect. 42 CFR 2.12(c)(6). Once the report has been made, the provider may not share further information with CPS unless the parent has signed a specialized release of information that states that such records are protected by federal law or the agency obtains a court order to access the records. *Id.* If the parent refuses to sign the release, Michigan courts have held that the state's interest in protecting the welfare of the child outweighs the parent's interests in preserving the confidentiality of the records. *In re Baby X*, 97 Mich App 111, 293 NW2d 736

(1980). Therefore, such records will be available to CPS and the court, although it will be necessary to obtain a court order if the parent refuses to release the necessary records.

E. Joint Investigations

§24.20 In any case in which CPS is investigating suspected child maltreatment, it may seek the assistance of law enforcement. MCL 722.628(2); *see People v Wood*, 447 Mich 80, 523 NW2d 477 (1994); State of Michigan Governor's Task Force on Children's Justice, *A Model Child Abuse Protocol: Coordinated Investigative Team Approach*.

In certain situations, Michigan law mandates that CPS refer the matter to law enforcement. MCL 722.623(6). These include cases in which child sexual abuse, sexual exploitation, or human trafficking of a child is suspected or where the individual alleged to have abused the child is not a person who is legally responsible for the child. *Id.* In addition, a joint investigation by CPS and law enforcement is sometimes required. MCL 722.628(3). These cases include situations in which child maltreatment is the suspected cause of a child's death, MCL 722.628(3)(a); the child is suspected of having suffered sexual abuse or sexual exploitation, MCL 722.628(3)(b); the child has been exposed to or had contact with methamphetamine production, MCL 722.628(3)(f); or the abuse or neglect results in a "severe physical injury" that requires medical treatment or hospitalization, MCL 722.628(3)(c). A *severe physical injury* means "an injury to the child that requires medical treatment or hospitalization and that seriously impairs the child's health or physical well-being." *Id.* Similarly, law enforcement must be involved in a joint investigation when such involvement is necessary to protect the child, the CPS worker, or another person, MCL 722.628(3)(d), or when the alleged perpetrator of the abuse is not a person responsible for the child, MCL 722.628(3)(e).

During a joint investigation, either CPS or law enforcement may take a "videorecorded statement" from a child under age 16 regarding the alleged abuse or neglect. MCL 712A.17b(5). If such a videorecorded statement is made during the investigation, it must be admitted in lieu of the child's testimony at all stages of a child protective proceeding except the adjudication. *Id.; In re Brown*, 305 Mich App 623, 853 NW2d 459 (2014) (although trial court failed to admit videorecordings of interviews with children, reversal unwarranted because children's out-of-court statements, which were admitted, were sufficiently trustworthy). When such a statement is taken, it must state the date and time that it was taken, identify the persons present in the room and state whether they were present for the entire interview, and show a running time clock. MCL 712A.17b(5).

The questioning should be full and complete and in accordance with the forensic interview protocol. If appropriate for the witness's developmental level, the questioning should include but need not be limited to all of the following areas:

- the time and date of the alleged offense or offenses
- the location and area of the alleged offense or offenses

- the relationship, if any, between the witness and the respondent
- the details of the offense or offenses
- the names of other persons known to the witness who may have personal knowledge of the offense or offenses

MCL 712A.17b(6).

When a joint investigation is undertaken, it must be conducted in accordance with the county's joint investigation protocol. MCL 722.628(6). *See generally A Model Child Abuse Protocol.* Individuals have a broader array of rights during a police investigation than during a CPS investigation. Evidence gathered during a joint investigation may or may not be available to the state for various proceedings. *See generally Ferguson v City of Charleston*, 532 US 67 (2001).

F. Forensic Interviewing

§24.21 Michigan's CPL requires each county to establish a forensic interviewing protocol. MCL 722.628(6). The state of Michigan has adopted a model protocol, which serves as a template from which individual counties must develop their own protocols. *See* State of Michigan Governor's Task Force on Children's Justice & Department of Health and Human Services, *Forensic Interviewing Protocol (GTF Protocol)*. The purpose of the protocol is "to obtain a statement from a child, in a developmentally sensitive, unbiased, and truth-seeking manner, that will support accurate and fair decision making in the criminal justice and child welfare systems." *Id.* at 1. *See generally People v Katt*, 468 Mich 272, 662 NW2d 12 (2003) (CPS worker who questioned child in proper manner was allowed to testify in criminal proceeding to child's hearsay statements pursuant to residual hearsay exception).

G. Structured Decision Making

§24.22 In determining whether a child has been abused or neglected, Michigan uses a two-step decision-making process. Based on the findings of this two-step process, the worker must classify the case as falling into one of five categories. MCL 722.628d. The category into which the case falls prescribes the agency's response.

The first step in this process is for the CPS worker to determine what level of evidence exists regarding whether or not the child has been abused or neglected. If no evidence of maltreatment is present, the case is categorized as a category V case and the matter is closed. MCL 722.628d(1)(a). If there is some evidence of maltreatment, the worker engages in the second step of the analysis, which is to conduct a risk assessment. The risk assessment asks, What is the risk of future harm to the child? The finding with regard to current abuse or neglect is combined with the risk of future harm to the child to form the basis for categorizing the case in one of four remaining categories. MCL 722.628(12). The four remaining categories are described in MCL 722.628d(1)(b)–(e):

- Category IV—community services recommended. The investigation determines that there is some but less than a preponderance of the evidence of

abuse or neglect, and the risk assessment indicates that there is a future risk of harm to the child. In this case the DHHS must assist the family to access community services, but the family's participation is voluntary.

- Category III—community services needed. There is a preponderance of the evidence that abuse or neglect took place, and the risk assessment demonstrates a low or moderate risk of future harm to the child. The DHHS must assist the family in obtaining services that are commensurate with the risk to the child. However, if the family does not participate in the services or does not benefit from the services, the DHHS must consider reclassifying the case as a category II case. Finally, it is important to note that in a category III case, although the agency has found that child maltreatment has taken place, the perpetrator of the abuse or neglect is not listed on the central registry. *See* MCL 722.622(d).
- Category II—CPS required. The investigation results in a finding that a preponderance of the evidence indicates maltreatment occurred, and the risk assessment results in a finding of high or intensive risk of future harm to the child. In this case the DHHS must open a protective services case and must provide services necessary to address the family's problems. The perpetrator of the maltreatment must be listed on the central registry.
- Category I—court petition required. The investigation results in a preponderance of the evidence that maltreatment occurred and that one of the following is also true:
  - The harm to the child requires that a petition be filed with the court. *See* MCL 722.637–.638.
  - The child is not safe in the home.
  - The case was categorized as a category II case, and the family did not cooperate with the required services.
  - There is a felony assault or child abuse in the first or second degree.

When a case is categorized as falling into category I, the DHHS must petition the court, open a CPS case, provide services to the child and family, and list the perpetrator on the central registry.

H. Listing on Central Registry

§24.23 Cases that are determined to be category I or II cases require that the parent or nonparent adult be listed on the central registry. MCL 722.628d. The DHHS retains exclusive control over listing an individual on the central registry. *In re Harper*, 302 Mich App 349, 839 NW2d 44 (2013). When a case requires listing on the central registry, the DHHS must notify each person who is listed as a perpetrator of child abuse or child neglect. MCL 722.627(4). That notice must be sent via registered mail with return receipt requested and with delivery restricted to the named individual. MCL 722.627(4). Any person who is listed on the central registry has 180 days to request that his or her name be removed. MCL 722.627(6). That 180 day time limit to request a hearing to

amend or remove from the central registry may be extended up to 60 days by the DHHS on a showing of good cause for the delay. *Id.*

If a CPS investigation fails to find a preponderance of the evidence that a child has been abused or neglected or if the family court denies a petition on its merits after adjudication, an individual must not be listed or if listed, must be removed from the central registry. MCL 722.627(7). A person may only be listed on the central registry for 10 years if he or she is required to be listed in a case other than a case in which the agency must petition the court, *see* MCL 722.637, .638. MCL 722.627(7)(a). Where the person who must be listed is the perpetrator of child abuse or child neglect of the sort that the law mandates a petition pursuant to MCL 722.637 or .638, that person must be listed on the central registry until there is credible evidence that the individual is dead. MCL 722.627(7)(b). If an individual was listed on the central registry before March 31, 2015, for a case other than a mandated petition case as provided for in MCL 722.637 and .638, the DHHS may remove the individual from the central registry after 10 years. MCL 722.627(7)(c).

V. Petitions

A. Petition Requirement

§24.24 Absent exigent circumstances, a request to invoke the protective jurisdiction of the family court must be in writing. MCR 3.961(A), .963(B)(1). Thus, a child protective proceeding is commenced when a petition is filed asking the court to assert jurisdiction over the child. *People v Gates*, 434 Mich 146, 452 NW2d 627, *cert denied,* 497 US 1004 (1990). The contents of the petition form the basis for any preliminary action by the court to protect the child. *In re Hatcher*, 443 Mich 426, 505 NW2d 834 (1993). The child protection jurisdiction of the family court is purely statutory, so if the petition is inadequate to form a basis for jurisdiction under MCL 712A.2(b), the court may not obtain jurisdiction by the consent of the parties. *In re Youmans*, 156 Mich App 679, 401 NW2d 905 (1986).

The court rules require that a petition include basic information regarding the child and his or her parents (e.g., names, addresses) as well as "[t]he essential facts that constitute an offense against the child," MCR 3.961(B)(3), and a citation to the relevant provisions of the Michigan Juvenile Code, MCR 3.961(B)(4). If the child is or may be eligible for membership in an American Indian tribe, the petition must state that information. MCR 3.961(B)(5); *see also In re IEM*, 233 Mich App 438, 592 NW2d 751 (1999). The petition must include a specific prayer for relief if removal from the familial home or termination of parental rights is requested. MCR 3.961(B)(6). If the petition involves an Indian child, the petition must specifically describe the active efforts that have been provided to prevent the breakup of the Indian family and the documentation, including attempts, to identify the child's tribe. *Id.* Otherwise, the petition may simply request that the court take appropriate action regarding the child. Finally, the petition must indicate whether a family court case involving the child "is or was pending." MCR 3.961(B)(7).

B. Standing to File a Petition

§24.25 A *petitioner* is "the person or agency who requests the court to take action" regarding a child. MCR 3.903(A)(22). Any person may approach the court with information indicating that a child may be in need of the court's protection. MCL 712A.11(1); *see People v Gates*, 434 Mich 146, 161, 452 NW2d 627, *cert denied,* 497 US 1004 (1990). Thus, the prosecuting attorney, acting on behalf of the people of the state of Michigan, has standing to file a petition even over the objections of the DHHS. *In re Jagers*, 224 Mich App 359, 568 NW2d 837 (1997). A parent who is the custodial parent of a child has standing to seek termination of the other parent's rights. *In re Huisman*, 230 Mich App 372, 584 NW2d 349 (1998), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000). However, parents cannot petition under the Juvenile Code to terminate their own parental rights over a child for whom they no longer wish to provide care. *In re Hill*, 206 Mich App 689, 522 NW2d 914 (1994); *In re Swope*, 190 Mich App 478, 476 NW2d 459 (1991).

C. Contents of the Petition

§24.26 There are two basic types of child protection petitions: initial and supplemental. When it is alleged the child has suffered particularly severe forms of abuse or neglect, the DHHS is statutorily mandated to file a petition. MCL 722.637–.638. When the DHHS determines that a child has been "severely physically injured [as defined in MCL 722.628(3)(c)], sexually abused, or allowed to be exposed to or have contact with methamphetamine production," the agency must file a petition seeking court jurisdiction of the child, MCL 722.637(1), unless the agency determines that the parent or legal guardian of the child "is not a suspected perpetrator of the abuse" and the parent or legal guardian did not neglect the child, the parent or legal guardian has no historical record of a pattern of neglect or failure to protect, and the child is safe in the parent's or legal guardian's home. MCL 722.637(2).

In certain "aggravated circumstances," the agency must file a petition and must seek termination of parental rights at the initial dispositional hearing. MCL 722.638. The termination provisions of the Juvenile Code include parallel provisions permitting the family court to terminate parental rights when these "aggravated circumstances" are present. *See* MCL 712A.19b(3)(k)–(n). When a petition seeks the termination of parental rights at the initial disposition, the petitioner must prove a basis to terminate by clear and convincing legally admissible evidence. MCR 3.977(E).

Absent one or more "aggravated circumstances," a petition may seek only temporary jurisdiction and the parent must be provided an opportunity to address the problems that bring the child within the court's protective jurisdiction. MCL 712A.19a(2). To meet its obligations in such a case, the DHHS must make "reasonable efforts" to reunite the parent with his or her child. *Id.*

The vast majority of initial child protective petitions seek temporary jurisdiction and court involvement aimed at providing rehabilitative services to the parent and child. *See* MCL 712A.18, .18f. Such a petition must be proved by a prepon-

derance of the legally admissible evidence. MCR 3.972(C)(1). If the court asserts jurisdiction over the child, there is a period of as much as one year during which the family is provided services to assist the parent to regain custody of his or her child. During this time the statute requires that if the DHHS "becomes aware of additional abuse or neglect of a child who is under the jurisdiction of the court and if that abuse or neglect is substantiated …, the [department] shall file a supplemental petition with the court." MCL 712A.19(1).

The supplemental petition may seek continued temporary jurisdiction and a finding that the additional abuse or neglect in fact occurred or it may seek the termination of parental rights. For example, if a child is made a temporary ward of the court due to parental substance abuse that results in neglect and, after the child is in foster care, she discloses that she was physically abused while in the parent's care, the DHHS would be required to investigate the new allegation. If the allegation is substantiated and the physical abuse involved only minor injuries, the agency would have to file a petition but could seek continued temporary jurisdiction. However, if the physical abuse involved serious injuries, the agency might seek termination of parental rights. If, in its supplemental petition, the agency seeks the termination of parental rights, it must prove that the new allegation of physical abuse provides a basis to terminate with clear and convincing legally admissible evidence. MCR 3.977(F)(1)(b); *Family Independence Agency v Gilliam (In re Gilliam)*, 241 Mich App 133, 613 NW2d 748 (2000); *In re Snyder*, 223 Mich App 85, 566 NW2d 18 (1997).

If the court asserts temporary jurisdiction over the child and after a period of time that child's parent fails to make substantial progress toward rehabilitation and reunification, the agency may file a supplemental petition seeking the termination of parental rights. *See* MCL 712A.19b(1). The statutory basis for termination must be proved by clear and convincing evidence, but the rules of evidence do not apply and the court may consider any relevant and material evidence. MCR 3.977(H)(2).

VI. Jurisdiction

A. Subject-Matter Jurisdiction

§24.27 The family court's power to hear child protection proceedings is not inherent but is derived from the Michigan Constitution and statutes. Mich Const 1963 art 6, §15; MCL 712A.2(b); *see also Fritts v Krugh*, 354 Mich 97, 92 NW2d 604 (1958), *overruled in part on other grounds by In re Hatcher*, 441 Mich 880, 491 NW2d 580 (1992), *remanded,* 443 Mich 426, 505 NW2d 834 (1993); *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 415, 852 NW2d 524 (2014). The legislature has vested exclusive jurisdiction over child protective proceedings in the family division of circuit court. MCL 600.1021(1)(e). The court's subject-matter jurisdiction is triggered when "the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *Hatcher,* 443 Mich at 437. In general, the Juvenile Code grants the family court subject-matter jurisdiction in protective proceedings when

- the parent fails to provide proper care,
- the parent's home is an unfit place for the child to live,
- the child is deemed "dependent" and "is in danger of substantial physical or psychological harm" (i.e., the child is homeless or not domiciled with a legally responsible person, the child has repeatedly run away from home and is beyond the control of a legally responsible adult, the child was involved in "commercial sexual activity," the child engaged in a delinquent act at the behest of a legally responsible adult, or the child's parent is deceased or incapacitated and unable to care for the child), or
- the parent has placed the child in guardianship and has failed to comply with reunification plans.

MCL 712A.2(b).

The court does not have jurisdiction over unborn children. *In re Dittrick Infant*, 80 Mich App 219, 263 NW2d 37 (1977). Jurisdiction may not be conferred by the consent of the parties. *Hatcher,* 443 Mich at 433. In a case in which the petition alleged sexual abuse by the child's father, the mother's stipulation to the court's assertion of jurisdiction was insufficient to confer jurisdiction. *In re Bechard*, 211 Mich App 155, 535 NW2d 220 (1995). See also *Department of Human Servs v Holm (In re SLH)*, 277 Mich App 662, 747 NW2d 547, *leave denied,* 482 Mich 1007, 756 NW2d 86 (2008), where the father was named as the perpetrator of sexual abuse and the nonrespondent mother's plea that he committed the acts of abuse was insufficient to properly invoke the court's jurisdiction. The state must adjudicate a parent as unfit before interfering with his or her parental rights. *Sanders* (overruling one-parent doctrine, under which court could enter dispositional orders affecting one parent based on other parent's unfitness); *see also Stanley v Illinois*, 405 US 645 (1972) (parent is entitled to hearing regarding fitness before court may order children removed from custody).

The court rules may not expand or limit the court's jurisdiction. *In re Prater*, 189 Mich App 330, 333, 471 NW2d 658 (1991) (citing *In re Albring*, 160 Mich App 750, 408 NW2d 545 (1987)). A county's family court is a single court, so the termination of a parent's parental rights divests the court of jurisdiction over a child custody matter regarding that same child. *Foster v Foster*, 237 Mich App 259, 602 NW2d 610 (1999). A judge presiding over a juvenile matter has the authority to hear actions under the Child Custody Act, MCL 600.1021(3), but must abide by the procedural requirements particular to the Child Custody Act or to proceedings under the Juvenile Code. *See* MCR 3.205; *Department of Human Servs v Johnson (In re AP)*, 283 Mich App 574, 770 NW2d 403 (2009). The family courts of different counties have concurrent jurisdiction. *See* MCR 3.205(A) (if subsequent court has "separate jurisdictional grounds," waiver of original court's jurisdiction is not required); *Krajewski v Krajewski*, 420 Mich 729, 362 NW2d 230 (1985). When a petition is filed, the court must ascertain at the preliminary hearing whether another court has continuing jurisdiction of the child. MCR 3.965(B)(10). If another court does have continuing jurisdiction, that prior court must be notified of the subsequent action. MCR 3.205(B).

Regarding educational neglect under MCL 712A.2(b)(1), in *Michigan Ass'n of Intermediate Special Educ Adm'rs v Department of Soc Servs*, 207 Mich App 491, 526 NW2d 36 (1994), the court upheld rulings of the state child welfare agency (now the DHHS) that declined involvement in cases in which parents and school officials disagree about educational programs. Such disagreements, the court held, do not constitute abuse or neglect under the Juvenile Code.

The precise meaning of the clause "without proper custody and guardianship" in MCL 712A.2(b)(1) has been the subject of considerable litigation. The early caselaw held that a parent who placed his or her child with a relative who was able to provide proper care for the child and did so was not neglectful. *See In re Taurus F*, 415 Mich 512, 330 NW2d 33 (1982); *In re Nelson*, 190 Mich App 237, 475 NW2d 448 (1991); *In re Ward*, 104 Mich App 354, 304 NW2d 844 (1981).

But two developments in the law have called the precedential value of this line of cases into question. First, the court itself has indicated that a parent's efforts to provide care of a child through relatives who were seemingly able to provide adequate care did not defeat the court's neglect jurisdiction. *In re Systma*, 197 Mich App 453, 495 NW2d 804 (1992). In a case in which the child's parent had executed a power of attorney transferring parental authority to the child's putative father or, alternatively, the putative father's mother, the power of attorney was insufficient to defeat the court's protective jurisdiction. *In re Webster*, 170 Mich App 100, 427 NW2d 596 (1988). Second, and more important, after *Taurus F, Nelson,* and *Ward* were decided, the legislature significantly changed the language of MCL 712A.2(b)(1). The earlier version of the statute did not define "without proper custody or guardianship." In 1988, the legislature defined this clause to mean that the child is placed with another person "who is *legally responsible* for the care and maintenance" of the child. *Id.* (emphasis added). (Although *Nelson* was decided after the amendment, it was based on the statutory provision as it was written before the amendment.) Presumably, then, a parent's act of placing the child with another person without also providing some form of legal authority does not defeat the court's child protection jurisdiction. *See generally* MCL 700.5204(2)(b) (permitting court to appoint guardian for minor in this situation).

When the court has appointed a plenary guardian for a child's parent, a presumption arises that the child is at a substantial risk of harm to his or her mental well-being and is without proper custody or guardianship. Unrebutted, the presumption will support a finding that the child comes within the court's protective jurisdiction. *In re Middleton*, 198 Mich App 197, 497 NW2d 214 (1993). The family court's subject-matter jurisdiction is established by the contents of the petition after the court has found probable cause to believe that the allegations in the petition are true. *Hatcher,* 443 Mich 426. A court hearing child protection cases should not assume jurisdiction until sufficient allegations are made in a petition. *In re Youmans*, 156 Mich App 679, 401 NW2d 905 (1986); *In re Adrianson*, 105 Mich App 300, 306 NW2d 487 (1981).

When a petition is filed pursuant to MCL 712A.2(b)(2), the petitioner need not show that the parent's neglect of the child is culpable. *In re Jacobs*, 433 Mich 24, 444 NW2d 789 (1989). Thus, in a case in which the neglect resulted from the

mother's physical incapacity after a car accident, the court's assertion of jurisdiction was proper. *Id.* The lack of need to demonstrate culpability and the Juvenile Code's grant of jurisdictional authority in cases in which a parent fails to intervene to eliminate a known risk to the child combine in one of the more contentious areas of child protection practice—domestic violence and the failure of a victim to protect the children from harm. The court has addressed the effect of domestic violence on the court's authority to assert jurisdiction. *In re Miller*, 182 Mich App 70, 80, 451 NW2d 576 (1990) ("Evidence of violence between parents in front of the children is certainly relevant to showing … that the home is an unfit place for the children by reason of criminality or depravity."); *In re Parshall*, 159 Mich App 683, 406 NW2d 913 (1987) (termination of rights is proper when parent permits abusive environment to continue). *See generally Family Independence Agency v Sours (In re Sours)*, 459 Mich 624, 593 NW2d 520 (1999) (discussing failure to comply with domestic violence component of treatment plan as basis for termination of parental rights); *Family Independence Agency v Osborne (In re Osborne)*, 459 Mich 360, 589 NW2d 763 (1999).

Michigan's DHHS has established a best practices protocol that seeks to balance the safety of the children with the rights of the nonabusive parent. Michigan Children's Protective Services Manual 711-5, "Child Neglect," at 5–6.

The family court has subject-matter jurisdiction where a parent is suspected of murdering the other parent, even if the surviving parent has not been convicted of the crime. *Family Independence Agency v Unger (In re MU)*, 264 Mich App 270, 690 NW2d 495 (2004), *leave denied,* 472 Mich 871, 692 NW2d 846 (2005). The inclusion of "criminality" within a home as a basis for jurisdiction under MCL 712A.2(b)(2) is not synonymous with a criminal conviction. Instead, the court acquires jurisdiction over the children when a preponderance of the evidence shows that the surviving parent engaged in criminal behavior and that the behavior rendered the home or environment unfit. *MU,* 264 Mich App at 279–280.

The court may assert jurisdiction over a child whose parent perpetrated abuse on the child even if the parent was incarcerated for that act and does not have regular contact with the child because the child is still at risk from that incarcerated parent. *Family Independence Agency v Plovie (In re Ramsey)*, 229 Mich App 310, 581 NW2d 291 (1998).

The court's assertion of jurisdiction may not be collaterally attacked. *Hatcher,* 443 Mich 426. When, however, it is unclear when the order of adjudication was issued, there was no collateral attack. *In re Wangler/Paschke*, 498 Mich 911, 870 NW2d 923 (2015).

B. Personal Jurisdiction

1. In General

§24.28 To obtain personal jurisdiction, Michigan law requires that a summons be served on a "respondent" to a child protective proceeding and any "nonrespondent parent." MCL 712A.12–.13; MCR 3.920(B)(2)(b). For purposes of a petition seeking temporary jurisdiction of a child, "'respondent' means the parent, guardian, legal custodian, or nonparent adult who is alleged to have com-

mitted an offense against a child." MCR 3.903(C)(10). If the petition seeks the termination of parental rights, the term *respondent* means the child's mother or legal father. MCR 3.977(B); *see In re Foster*, 226 Mich App 348, 573 NW2d 324 (1997) (legal custodian lacks standing in termination of parental rights proceeding). A guardian or legal custodian of the child who is not a respondent (i.e., is not alleged to have harmed the child) is only entitled to notice of the proceedings. MCR 3.920(B)(2)(b); *see* MCR 3.920(C); *Department of Human Servs v Williams (In re Williams)*, 286 Mich App 253, 779 NW2d 286 (2009) (discussing distinction between "respondent" parent and non-"respondent" parent).

A summons must be personally served. MCR 3.920(B)(4). If personal service is "impracticable or cannot be achieved," the court may order an alternative form of service. MCR 3.920(B)(4)(b). The decision regarding the use of an alternative form of service may be made ex parte and may be based on either testimony or an affidavit. *Id.* In *Family Independence Agency v Al-Murisi (In re SZ)*, 262 Mich App 560, 686 NW2d 520 (2004), the court held that although MCR 3.920(B)(4)(b) provides for substituted service on a parent in a child protective proceeding if the court finds, on the basis of testimony or a motion and an affidavit, that personal service is impracticable or cannot be achieved, the controlling statute, MCL 712A.13, requires neither testimony nor a motion and an affidavit. Because the issue of service is a jurisdictional one, the court held that the statutory provision governs, and the trial court did not err in relying on petitioner's motion and proofs of nonservice when it decided that personal service was impracticable. Personal jurisdiction over a parent is established by proper service of the summons and the original petition. *In re Dearmon/Haverson-Dearmon*, 303 Mich App 684, 847 NW2d 514 (2014). As such, failure to re-serve the parent a copy of an amended petition does not deprive the court of jurisdiction. *Id.*

Once the court has secured jurisdiction over the child based either on a plea, *see* MCR 3.971, or an adjudication, it will hold a dispositional hearing to decide what actions to take regarding the child "and, when applicable, against *any* adult."MCR 3.973(A) (emphasis added). If "the person meeting the definition of 'any adult' is a presumptively fit parent, the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the petition." *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 414 n10, 852 NW2d 524 (2014) (overruling interpretation of MCR 3.973(A) under which court could enter dispositional orders affecting one parent based on other parent's unfitness). An order regarding a person other than the child who is the subject of the petition "is not effective and binding" until that individual has been provided notice or summoned and given the opportunity to be heard. MCL 712A.18(4).

2. Putative Fathers

§24.29 For purposes of a child protective proceeding, a *father* means one of the following: (1) a man married to the mother at any time from conception to birth, unless a court has determined that the minor is not the issue of the marriage; (2) a man who legally adopts the minor; (3) a man who by an order of filiation or by a judgment of paternity is judicially determined to be the father of

the minor; (4) a man judicially determined to have parental rights (e.g., an "equitable parent," *see Atkinson v Atkinson*, 160 Mich App 601, 408 NW2d 516 (1987)); or (5) a man who has properly acknowledged paternity pursuant to the Acknowledgment of Parentage Act, MCL 722.1001 et seq.MCR 3.903(A)(7). If a child has a legal father, that child's alleged putative father has no standing to participate in a child protective proceeding. *Family Independence Agency v Jefferson (In re KH)*, 469 Mich 621, 677 NW2d 800 (2004), *overruling In re Montgomery*, 185 Mich App 341, 460 NW2d 610 (1990). If the child's legal father is not the biological father and does not wish to participate in the proceedings, the court may make a finding in the child protective proceeding that the child was born out of wedlock. *Id.* Such a determination satisfies the Paternity Act requirement that a prior determination be made that the child was born during a marriage but is not an issue of the marriage. MCL 722.711(a); *see Girard v Wagenmaker*, 437 Mich 231, 470 NW2d 372 (1991). In such a case, the parties may proceed under the Paternity Act or under the Acknowledgment of Parentage Act to establish the putative father's paternity. *KH,* 469 Mich at 637. Conversely, if the court terminates the parental rights of a legal father who is not the child's biological father, its act does not constitute a finding that the child was "born out of wedlock" such that an alleged putative father may pursue paternity under the Paternity Act. *Family Independence Agency v Heier (In re CAW)*, 469 Mich 192, 665 NW2d 475 (2003).

Until the child's natural father has legally established his relationship to the child or meets the definition of a putative father, he is not entitled to notice or participation in protective proceedings. MCR 3.903(A)(24) (defining *putative father* as "a man who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7)"); *Family Independence Agency v Hosler (In re NEGP)*, 245 Mich App 126, 626 NW2d 921 (2001); *In re Gillespie*, 197 Mich App 440, 496 NW2d 309 (1992).

If at any point in a child protective proceeding the court determines that a child has no legal father as defined in MCR 3.903(A)(7), the court may make efforts to identify the child's putative father and to notify the putative father of the proceedings. To do so, the court must first take testimony on the identity of the father and then must provide the putative father with notice, either by personal service if his whereabouts are known or may be ascertained after diligent inquiry or by publication if he cannot be located. MCR 3.921(D)(1). The notice must include the child's name, the name of the child's mother, the date and place of the child's birth, the fact that a petition has been filed with the court, the time and place of the hearing, and a statement that the natural father's failure to attend the hearing constitutes a denial of interest in the child and a waiver of notice of all further proceedings. MCR 3.921(D)(1)(a)–(d).

Once notice has been properly served, the court may make any one of the following findings: (1) notice has been properly provided, (2) the putative father is the child's natural father and has 14 days to establish a legal relationship with the child (which may be extended for good cause), (3) another reasonably identifiable man is the child's father, or (4) the natural father of the child cannot be determined. MCR 3.921(D)(2). If after proper notification, the child's natural father

fails to appear or if he appears but fails to establish a legal relationship with the child pursuant to the court's order that he do so, the court may find that he waives the right to all subsequent notice, including notice of termination proceedings. MCR 3.921(D)(3).

A putative father's failure to timely establish his legal relationship with his child and his conduct before establishing paternity may be considered in determining whether to terminate his parental rights. *Department of Human Servs v Davis (In re Jordan)*, 278 Mich App 1, 747 NW2d 883 (2008). In *Jordan,* the child's father did not comply with the court's order to establish his paternity of the child within 14 days. In fact, he did not establish paternity until shortly before a termination of parental rights petition was filed. The court terminated his rights based in part on his conduct before he actually established paternity. The father appealed, arguing that it was improper for the court to consider his actions before he established paternity because he did not yet owe the child a legal duty. The court of appeals rejected this argument, holding that his failure to establish paternity in a timely manner could be used as evidence of his failure to provide proper care and custody. "[T]he actions of a dilatory father," the court concluded, "occurring before he gets around to perfecting paternity may be used against him in termination proceedings." *Id.* at 30.

The Revocation of Paternity Act, MCL 722.1431 et seq., requires that at least some questions about the paternity of a child who is the subject of a child protective proceeding to be litigated by way of a motion within that proceeding. MCL 722.1443. Once a petition for termination of parental rights has been filed, however, the court must first determine whether a proceeding under the Revocation of Paternity Act would serve the child's best interests. MCL 722.1443(15).

C. Notice Defects

§24.30 The notice provisions of the Juvenile Code in MCL 712A.12–.13 are jurisdictional, and failure to provide proper notice renders a child protection proceeding void. *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 173–176, 640 NW2d 262 (2001); *Family Independence Agency v Terry (In re Terry)*, 240 Mich App 14, 610 NW2d 563 (2000); *In re Brown*, 149 Mich App 529, 386 NW2d 577 (1986). Statutory notice requirements will be strictly construed. *Family Independence Agency v Harris (In re Atkins)*, 237 Mich App 249, 602 NW2d 594 (1999) (citing *In re Kozak*, 92 Mich App 579, 285 NW2d 378 (1979)). However, it is not a jurisdictional defect to fail to provide notice pursuant to the relevant court rule. *In re Mayfield*, 198 Mich App 226, 497 NW2d 578 (1993).

In general, the family court must personally serve a parent unless doing so is found to be impractical after reasonable efforts have been made to locate and serve the parent. *In re Adair*, 191 Mich App 710, 478 NW2d 667 (1991). Notice is a personal right, so a parent who is properly served lacks standing to object to the service received by the other parent. *Terry,* 240 Mich App at 21. Because notice is a personal right, notice served on a party's attorney is insufficient to confer jurisdiction over the party. *Atkins.*

If a party appears at a hearing and properly waives notice in writing, the court has satisfied the relevant notice requirements. *In re Slis*, 144 Mich App 678, 375 NW2d 788 (1985); *see* MCR 3.920(E). Unless a specific objection to the method of notice is placed on the record, a parent waives any defects in service by appearing and participating in the proceeding. MCR 3.920(G). Those same amendments specifically provide for notice to incarcerated parents. *See* MCR 3.920(A)(2) (incorporating by reference MCR 2.004).

VII. Venue

§24.31 The family court has jurisdiction of a child "found within the county" who has suffered abuse or neglect. MCL 712A.2(b); *In re Mathers*, 371 Mich 516, 124 NW2d 878 (1963). The "found within the county" language refers to the county "in which the offense against the child occurred … or in which the minor is physically present." MCR 3.926(A). Thus, for example, if a child is abused in county A and then taken to a hospital in county B, either county is a proper venue. In such a case, the rules provide for the transfer of the case to the county where the child resides. MCR 3.926(B). The rules establish a set of criteria for determining which among competing counties is the county of residence. *See* MCR 3.926(B)(2). If a child is placed in a particular county by court order, that county is not the child's county of residence unless the placement is for the purposes of adoption. MCR 3.926(B)(3); *see Anderson v Schafer (In re BZ)*, 264 Mich App 286, 690 NW2d 505 (2004) (where parents consented to out-of-home placement with paternal grandmother in Isabella County, MCR 3.926(B)(3) applied and directly contradicted parents' argument that child was not "found within" Kent county for jurisdictional purposes). Regardless of where the case is heard, the county that orders a disposition is responsible for any costs that result from that disposition. MCR 3.926(C).

A change of venue may be granted for the convenience of the parties or if a fair trial cannot be had in the county where the case is pending. MCR 3.926(D). The court may bifurcate a proceeding, allowing the case to be tried in one county and then transferred immediately after adjudication to another county, where a disposition will be entered. MCR 3.926(E). This process clearly violates the "one family, one judge" rule articulated by the legislature. MCL 600.1023. Because parents have assigned counsel in the majority of child protection cases and an LGAL must be appointed by the court to represent the child's interests, MCL 722.630, transfer of a case after adjudication but before disposition has very serious implications for continuity of and effective representation. *See Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 225, 640 NW2d 262 (2001) ("[T]he right to an attorney would be meaningless if a minor child who is the subject of a proceeding that can change … her life could not expect that the attorney representing her will do so effectively."); *In re Shaffer*, 213 Mich App 429, 540 NW2d 706 (1995) (child is entitled to zealous advocacy). *See generally* MCR 2.630 (requiring single judge in civil proceeding unless death, illness, or disability prevents that judge from presiding). Transfer should take place before rather than after adjudication.

VIII. Protective Custody and Preliminary Inquiries and Hearings

A. Protective Custody

§24.32 Michigan law permits a law enforcement officer to take a child into protective custody without a court order at any time if the officer determines that the child is at a substantial risk of harm or is in surroundings that present an imminent risk of harm and immediate removal is necessary to protect the child's health and safety. MCL 712A.14a. The officer must immediately attempt to notify the DHHS. *Id.* If a child is taken into protective custody pursuant to this process, either the officer or a representative of the DHHS must immediately contact the court and obtain an ex parte order placing the child into protective custody. MCL 712A.14a(2).

To ensure that a judicial officer is always available, each court must designate a judge or referee whom the law enforcement officer or DHHS worker can contact when the court is closed. MCL 712A.14a(3), (4). The law enforcement officer or DHHS worker must submit either a petition or an affidavit to the designated judge or referee, setting out the substantial or imminent risk to the child's well-being. MCL 712A.14a(3). The judge or referee may then order an ex parte order authorizing the DHHS to take the child into protective custody. MCL 712A.14a(1). If such an order is issued, the child will remain in protective custody until a preliminary hearing is held. MCL 712A.14a(3). Such an order may be issued only if the court finds that each of the following is true:

1. there is reasonable cause to believe the child is at a substantial risk of harm or is at imminent risk in his or her surroundings;
2. the circumstances are such that they warrant the issuance of an ex parte order;
3. reasonable efforts have been made under the circumstances to maintain the child in the family home;
4. no remedy other than protective custody will protect the child's welfare; and
5. continuing to reside in the family home is contrary to the child's welfare.

MCL 712A.14b(1).

Any ex parte order thus issued must be supported by written findings of fact. MCL 712A.14b(2). To expedite these matters, the petition or affidavit and the order may be issued electronically.

It is important to note that typically a referee of the court cannot issue an order; rather, referees generally make only recommendations that must be reviewed and approved by a judge of the court. *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 640 NW2d 262 (2001). However, for the limited purpose of issuing an ex parte order to place a child into protective custody pending a preliminary hearing, a referee may issue an order. MCL 712A.14a(3).

Additionally, a hospital may detain a child whose welfare would be endangered by release. MCL 722.626(1); *see, e.g., In re Albring*, 160 Mich App 750, 408 NW2d 545 (1987).

If sufficient proofs establish reasonable grounds to believe that a child's conditions or surroundings merit such action, the court may issue a written order permitting "a child protective services worker, an officer, or other person deemed suitable by the court" to take the child into protective custody pending a hearing. MCR 3.963(B)(1); *see* MCL 712A.15; *Albring*. Such an order may be issued "electronically or otherwise." MCR 3.963(B)(1). Before doing so, the petitioner must present either a petition or an affidavit that provides the court reasonable cause to believe each of the following: (1) the child is at a substantial risk of harm or is at imminent risk of harm due to his or her surroundings, and immediate removal is necessary to protect the child's health and safety; (2) the circumstances warrant issuing an order pending a hearing (see MCR 3.965 for a child not yet under the court's jurisdiction; see MCR 3.974(C) for a child already under the court's jurisdiction); (3) reasonable efforts consistent with the circumstances have been made; (4) protective custody is the only remedy that will protect the child; and (5) continuing to reside in the home is contrary to the child's welfare. MCR 3.963(B)(1). The U.S. District Court for the Western District of Michigan has held that the Fourth Amendment was violated when CPS workers and police officers entered a private home to remove children based only on a verbal authorization of a family court referee. *See O'Donnell v Brown*, 335 F Supp 2d 787 (WD Mich 2004). Protective custody orders may include an order to enter a "specified premises" to secure custody of that child. MCR 3.963(B)(2). A child taken into custody because of alleged maltreatment may not be housed in a secure facility intended to hold children alleged to have committed delinquent acts. MCL 712A.14a(1), .15(4)

B. Preliminary Inquiries

§24.33 When a petition presented to the court does not seek the child's removal from the physical custody of the parent or legal guardian, "the court may conduct a preliminary *inquiry* to determine the appropriate action to be taken on the petition." MCR 3.962(A) (emphasis added). A preliminary inquiry "consists of an informal review of the petition by the juvenile court to determine the appropriate course of action." *In re Hatcher*, 443 Mich 426, 434, 505 NW2d 834 (1993). *See generally In re Bechard*, 211 Mich App 155, 535 NW2d 220 (1995). At such an inquiry, the court may (1) deny authorization of the petition, (2) refer the case to receive alternative services, or (3) authorize the filing of the petition with the court. MCR 3.962(B). In a peremptory order, the Michigan Supreme Court has held that where a petition filed by the DHHS sought only a court-ordered medical examination and did not seek removal of the child from the home or other relief, the trial court erred by ordering the medical evaluation. *Department of Human Servs v Kyle (In re Kyle)*, 480 Mich 1151, 746 NW2d 302 (2008). "Referring the matter to 'alternative services' does not include granting the only relief sought by the petition." *Id.* at 1151. The preliminary inquiry rule does not provide the family court with the authority to grant the only relief requested in the petition without a trial. *Id.* Preliminary inquiries do not require the court to hold any form of hearing and, in some counties, these inquiries take place ex parte with no verbatim record of the court's action.

C. Preliminary Hearings

§24.34 A preliminary hearing is a formal review of a petition. *In re Hatcher*, 443 Mich 426, 434, 505 NW2d 834 (1993). A preliminary hearing must be held within 24 hours after a child is taken into protective custody or within 24 hours after the submission of a petition alleging severe physical injury or sexual abuse when the child has not been taken into protective custody. MCR 3.965(A). When the petition does not allege severe physical or sexual abuse and the child has not been taken into protective custody, the preliminary hearing may be scheduled as the court's docket permits, although it should be scheduled as soon as possible.

There are a number of specific procedural requirements for the preliminary hearing. MCR 3.965(B). While most preliminary hearings are conducted with the parties in the courtroom, MCR 3.904 authorizes the use of two-way interactive video to facilitate preliminary hearings. Moreover, MCR 2.004 provides a mechanism for incarcerated parents to participate via telephone or video conference. *See generally Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 782 NW2d 747 (2010) (discussing consequences of court's failure to utilize MCR 2.004 to involve incarcerated parent in child protective proceedings).

The court must appoint an L-GAL to represent a child at the preliminary hearing. MCL 712A.17c(7), 722.630; MCR 3.965(B)(3). The L-GAL must receive a copy of the petition at the preliminary hearing. *Id.* The child may not waive representation by the L-GAL. MCL 712A.17c(7).

Similarly, the court must inform the respondent parent of the right to counsel, including the right to be represented at the preliminary hearing. MCL 712A.17c(4); MCR 3.915(B)(1)(a), .965(B)(6); *Department of Human Servs v Rood (In re Rood)*, 483 Mich 73, 763 NW2d 587 (2009) (where mother requested appointment of counsel at preliminary hearing and court failed to appoint counsel until two weeks before hearing on supplemental petition to terminate parental rights, court's failure was error requiring reversal of order terminating parental rights). A parent who is not named as a respondent (i.e., is not alleged to have committed an offense against the child), is not entitled to court-appointed counsel. *See Department of Human Servs v Williams (In re Williams)*, 286 Mich App 253, 799 NW2d 286 (2009) (discussing distinction between respondent parent and nonrespondent parent in context of right to court-appointed counsel). If at any time the petitioner makes allegations against a nonrespondent parent, that parent becomes a respondent and will be entitled to appointed counsel. *Id.* Unless the respondent is a minor, he or she may waive counsel. MCL 712A.17c(6). A minor respondent may not waive counsel if the minor respondent's parent or guardian ad litem objects. *Id.*

The court must advise a nonrespondent parent of the right to seek placement of the child in his or her home. MCR 3.965(B)(8).

A procedural requirement of the preliminary hearing that is easily overlooked but is critical is the determination of the child's Native American heritage and whether the ICWA and the MIFPA may apply to the case. The court must inquire whether the child or the parent is a member of or eligible for membership

in an American Indian tribe or band. MCR 3.965(B)(2); *see generally Family Independence Agency v Conselyea (In re TM)*, 245 Mich App 181, 628 NW2d 570 (2001); *In re IEM*, 233 Mich App 438, 592 NW2d 751 (1999). For more information about the effects of the ICWA and the MIFPA on child protective proceedings, see chapter 25.

In essence, the court must answer two questions at a preliminary hearing. First, the court must determine whether to authorize the petition for filing. MCR 3.965(B)(12). If it does, it must determine whether to place the children outside the familial home. MCR 3.965(B)(12), (C).

The court may authorize the petition for filing if, after the preliminary hearing, the court determines that there is probable cause to believe (1) that one or more of the allegations in the petition is true and (2) those allegations, if proven, would bring the child within the court's protective jurisdiction pursuant to MCL 712A.2. MCR 3.965(B)(11). The Michigan Rules of Evidence do not apply to this determination, and the court may consider any relevant evidence. *Id.* A petition is "authorized to be filed" when the petitioner has received the court's written permission to file the petition formally alleging child maltreatment. MCR 3.903(A)(21).

If the court authorizes the petition and a nonrespondent parent is being added as an additional respondent, the allegations against the second parent must be filed in an amended petition. MCR 3.961(C)(1); *see also* MCR 3.903(C)(2) (defining *amended petition*). If the amended petition contains a request for removal, the court must hold a preliminary hearing to determine the appropriate action to be taken on the petition. MCR 3.961(C)(3). If the either the amended petition or supplemental petition is authorized, the court shall proceed against each respondent parent under MCR 3.971 or .972. MCR 3.961(C)(3).

If the court authorizes the petition, it must then determine the child's placement. MCR 3.965(B)(12), (13), (C). Whatever decision the court makes regarding the child's placement, it must detail its reasons for the finding either on the record or in writing. MCR 3.965(C)(3). The law presumes that a child should be placed in the most family-like setting that will meet his or her needs. MCL 712A.1(3); MCR 3.965(C)(3). Thus, on authorizing a petition, the court may release a child to a parent, guardian, or legal custodian. MCR 3.965(B)(13)(a). If the court does so, it "may order such reasonable terms and conditions" as are necessary to safeguard the child's welfare. *Id.*

Alternatively, the court may order the child placed outside the familial home. The standard for placement at the preliminary hearing is set out in MCL 712A.13a(9). The court may order a child placed in foster care after a preliminary hearing if all of the following conditions apply:

1. placement with a parent would present a substantial risk of harm to the child's life, physical health, or mental well-being;
2. no services can be provided to the family that would keep the child safe in the home;

3. continuing the child's placement in the home is contrary to the child's welfare;
4. reasonable efforts consistent with the situation have been made to maintain the family; and
5. conditions in the court-ordered placement will safeguard the child's health and welfare.

MCL 712A.13a(9).

In making the "reasonable efforts determination" required by MCL 712A.13a(9)(d), "the child's health and safety must be of paramount concern to the court." MCR 3.965(C)(4). This determination must be made "at the earliest possible time" but not later than 60 days after the date of the removal. MCR 3.965(C)(4). The court rule, MCR 3.965(C)(4), and the CPL, MCL 722.638, delineate certain factual circumstances, referred to in the court rule as "aggravated circumstances," in which reasonable efforts to prevent the child's removal from the home are unnecessary. In general, these "aggravated circumstances" involve allegations of serious abuse or neglect of the child or a sibling of the child.

The parties have the right to a hearing regarding placement. MCR 3.965(C)(1). The respondent must be given subpoena power and must be allowed to cross-examine witnesses and offer evidence regarding placement. *Id.* The relevant statute and court rule seem to be at odds regarding the proper criteria for the placement of children in or out of home care, with the statute providing narrower grounds for placement than the court rule.

The Juvenile Code provides the court with authority to remove children from their homes under certain circumstances:

> If a petition alleges abuse by a person described in subsection (4) [a parent, guardian, or legal custodian], … the court shall not leave the child in or return the child to the child's home … unless the court finds that the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being.

MCL 712A.13a(5). For purposes of this section of the law, the term *abuse* is defined essentially the same as that term is defined in the CPL. MCL 712A.13a(17); *cf.* MCL 722.622(g). As this provision makes clear, there is a statutory presumption that, when a petition alleges "abuse," the child will be removed from parental custody. However, the statute is silent regarding the placement of a child when neglect is alleged. The question then arises whether the legislature intended to restrict the court's authority to place a child when neglect rather than abuse is alleged.

The Juvenile Code provides that it is to be liberally construed to provide children the care they need. MCL 712A.1(3). Thus, the Michigan Supreme Court has held that the family division has "very broad authority" to craft orders to protect the well-being of a child who is subject to its jurisdiction. *In re Macomber*, 436 Mich 386, 393, 461 NW2d 671 (1990) (affirming authority of trial court to issue order at preliminary hearing directing father who allegedly sexually abused his

daughter to leave family home and to pay support). Indeed, the court has noted that "[t]here are no limits to the 'conduct' which the court might find harmful to a child." *Id.* In addition, the court has "jurisdiction over adults as provided in [this chapter] and 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." MCL 712A.6; *but see Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 415, 852 NW2d 524 (2014) (court cannot enter dispositional orders affecting one parent based on other parent's unfitness).

The law prefers, when consistent with a child's welfare, that a child not be removed from the parental home. MCL 712A.1(3). In 1998, the legislature amended the Juvenile Code to specifically provide family courts the authority to remove "a parent, guardian, custodian, nonparent adult, or other person residing in a child's home." MCL 712A.13a(4). The court may invoke this authority when (1) a petition has been filed that alleges abuse on the part of the individual to be removed, (2) the court holds a hearing and finds probable cause to believe the person to be removed perpetrated the abuse, and (3) the court makes a finding on the record that the individual to be ordered out of the home presents a substantial risk of harm to the child. *Id.* In determining whether to order an individual removed from the home, "the court may consider whether the parent who is to remain in the juvenile's home is married to the person to be removed or has a legal right to retain possession of the home." MCL 712A.13a(7).

Because the court may craft orders aimed at protecting a child while maintaining the child in the family's home, counsel should consider what options are available to ensure the child's safety without removal. Each community in the state has a different array of in-home services offered through the DHHS as well as services available through community mental health and various nonprofit programs that may be able to offer assistance aimed at maintaining the child in the home. The court may also, in the context of a child protection proceeding, change custody of the child but must do so pursuant to the Child Custody Act. *Department of Human Servs v Johnson (In re AP)*, 283 Mich App 574, 770 NW2d 403 (2009).

When placement is necessary, the law prefers to place the child with relatives. The court may order placement with a relative at the conclusion of a preliminary hearing. MCR 3.965(C)(5). If it does so, the court may require the agency supervising the child's placement to complete a criminal background check on the relative and report its findings to the court within 7 days. MCR 3.965(C)(5). If the court orders a child placed with a relative, it must order the agency to complete a home study on the relative within 30 days of placement. MCR 3.965(C)(5). Regardless of where the child is placed, when a child is removed from his or her home, the agency providing supervision of the child has 30 days to "identify, locate, notify and consult with relatives" to determine if there is a suitable relative with whom to place the child. MCL 722.954a(2). The agency has 90 days to decide whether to place the child with a relative. MCL 722.954a(4).

The following persons are "related" to a child for purposes of placement:

> an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce.

MCL 712A.18(1)(b). A child may be placed with the parent of a man whom the court has probable cause to believe is the putative father if there is no man with legally established rights to the child. *Id.* When a child is placed with a relative pursuant to a court order, that child is in "foster care." MCL 712A.13a(1)(e). When the court orders a child placed outside the parental home, it may provide the child with necessary medical treatment. *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 178–182, 640 NW2d 262 (2001) (includes withdrawal of life support); *see* MCL 722.124a; *In re Deng*, 314 Mich App 615, 887 NW2d 445 (2016) (in dispositional phase of proceeding, court could order child be immunized over parents' First Amendment Free Exercise Clause objection). An order issued after a preliminary hearing that removes a child from his or her home is not appealable by right. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014).

If a child is removed from the home of the parent, guardian, or legal custodian and the case has not reached disposition, the court must conduct a review hearing regarding that child's placement "within 182 days of the date of the child's removal from the home." MCR 3.972(A).

IX. Pretrial Phase

A. In General

§24.35 In a child protective proceeding, the court may convene one or more pretrial conferences. MCR 3.922(D). Pretrial conferences are governed by MCR 2.401. *See* MCR 3.922(D). There are two basic purposes for such a hearing: resolving the case without a trial by entering a plea, MCR 3.971, or preparing for trial.

On the motion of any party to the proceeding, the court may review a child's placement. If there is a request to remove a child from parental custody who had not previously been removed, the court may review a child's placement. If there is a request to remove a child from parental custody who had not previously been removed, the court must make a placement determination pursuant to MCR 3.965(B) and (C). MCR 3.966(A)(1). If the court has not yet entered a dispositional order pursuant to MCR 3.973, the court must hold a disposition hearing as part of considering the motion regarding placement. MCR 3.966(A)(2).

B. Pleas

§24.36 A parent, guardian, or legal custodian may enter a plea admitting to some or all of the allegations in a petition. Some courts require filing an amended petition with only those allegations that will be admitted. The court rules also permit a plea of no contest. MCR 3.971(A). A plea may be offered at

any time after the petition is filed as long as the petitioner and the child's L-GAL have been apprised of the plea and are provided an opportunity to object before the plea is accepted. *Id.*

Before taking a plea, the court must inform the parent of the allegations, the right to counsel, and the rights given up by entering a plea. MCR 3.971(B). The court must inform the parent of the consequences of entering a plea, that the court will likely assert protective jurisdiction over the child, that the child may be placed outside the parental home, and that the plea may be used at a later stage in the proceedings as a basis on which parental rights may be terminated. MCR 3.971(B)(4); *see Department of Human Servs v Mitchell (In re Mitchell)*, 485 Mich 922, 773 NW2d 663 (2009) (summarily reversing court of appeals decision affirming trial court's order terminating parental rights because, *inter alia,* trial court failed to inform parent at time of plea that his plea could later be used to terminate his parental rights). The court must satisfy itself that the plea is knowingly, understandingly, and voluntarily made. MCR 3.971(C); *see In re Wangler/Paschke*, 498 Mich 911, 870 NW2d 923 (2015) (where court failed to satisfy itself that plea was knowing, understanding, and voluntary, plea was taken in error). A plea must also establish a factual basis for finding that one or more statutory grounds for jurisdiction is true. *Id.*

Before accepting a plea, the trial court must "establish support for a finding that one or more of the statutory grounds alleged in the petition were true." *Wrangler.* When the court purported to take a plea but held the adjudication in abeyance without actually adjudicating the parent and then issued dispositional orders, eventually terminating parental rights, a challenge to the court's plea process did not constitute a collateral attack. *Id.*

When one respondent parent enters a plea giving the court jurisdiction over the child, the court generally has authority to enter orders regarding "any adult" as necessary for the well-being of the child. MCR 3.973(A). However, if the other parent has not been adjudicated, "the court's authority … is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the petition." *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 414 n10, 852 NW2d 524 (2014). MCR 3.973(A) does not permit a court to enter dispositional orders affecting one parent based on the other parent's unfitness. *Sanders.* Furthermore, a parent who is not named as a respondent in the proceeding cannot enter a plea giving the court jurisdiction as to the respondent parent. *Department of Human Servs v Holm (In re SLH)*, 277 Mich App 662, 747 NW2d 547, *leave denied,* 482 Mich 1007, 756 NW2d 86 (2008) (where mother was not respondent, her plea that respondent father had sexually abused couple's daughter was insufficient to confer jurisdiction). The court must establish a basis for the plea either by questioning the parent or, in the case of a no contest plea, through other means. MCR 3.971(C)(2).

If a nonrespondent parent, as defined in MCR 3.903(C)(8), is being added as an additional respondent following a plea under MCR 3.971, the allegations against the second respondent must be filed in a supplemental petition. MCR 3.961(C)(2); *see also* MCR 3.903(C)(13) (defining *supplemental petition*). If the

supplemental petition contains a request for removal, the court must hold a preliminary hearing to determine the appropriate action to be taken on the petition. MCR 3.961(C)(3).

The court rules are silent regarding plea withdrawal. The appellate courts have treated efforts to withdraw pleas as analogous to the withdrawal of pleas in criminal cases. *In re Zelzack*, 180 Mich App 117, 125, 446 NW2d 588 (1989).

C. Preparing for Trial

1. Discovery

§24.37 Discovery is governed by MCR 3.922(A). Requests for materials that are discoverable by right must be filed no later than 21 days before trial. *Id.* The court may excuse a late filing in the interests of justice. *Id.* The court may, on the motion of a party, grant a request for discovery of other materials. MCR 3.922(A)(2).

There are two statutory exceptions to a party's ability to discover material held by the other parties. First, the Juvenile Code provides for the DHHS, law enforcement officers, prosecutors, the attorney general, or other authorities to take a child's "videorecorded statement." MCL 712A.17b. While all parties to the case may view the recording, MCL 712A.17b(7), the recording itself is not discoverable. MCL 712A.17b(11). Second, the law mandates that a child be appointed an L-GAL to represent his or her interests. MCL 712A.17c(7), 722.630. Any material in the L-GAL's file is exempt from discovery. MCL 712A.17d(3).

One important discovery tool is the court's authority to order various assessments. For example, the court may order a medical, dental, or psychological evaluation of the child who is the subject of the petition. MCL 712A.12. The court may also order an evaluation of a parent. MCR 3.923(B).

Unless the party seeking a discovery order for additional material has previously requested and been denied access to the material, the court will not grant a discovery request "absent manifest injustice." MCR 3.922(A)(2). The failure to comply with discovery orders may result in the application of sanctions, including dismissal of the case. *See* MCR 3.922(A)(4) (incorporating by reference MCR 2.313).

The court must authorize depositions before they are conducted. MCR 3.922(A)(3). In *In re Lemmer*, 191 Mich App 253, 477 NW2d 503 (1991), the court held that, because the then effective court rule permitted the discovery of "materials" and not "evidence," the court lacked the authority to permit a deposition of a child who was the subject of a child protective proceeding. The court rule was subsequently rewritten to specifically permit the court to authorize, in addition to "materials" discoverable as of right, "discovery of *any* other materials and *evidence.*" MCR 3.922(A)(2) (emphasis added). Moreover, the Juvenile Code has been amended to specifically provide for taking the videorecorded deposition of a child under age 16 or a minor age 16 or older who is developmentally delayed. MCL 712A.17b. Thus, it appears that the court has discretion to permit the deposition of a child who is the subject of a protective proceeding. MCR 3.922(A)(3).

2. Motion Practice

§24.38 Motion practice in protective proceedings is governed by MCR 2.119 and 3.922(C). Because the summary judgment rule, MCR 2.116, is not specifically incorporated by reference into the juvenile rules, it does not apply to child protective proceedings. *Family Independence Agency v Jones (In re PAP)*, 247 Mich App 148, 640 NW2d 880 (2001). Thus, the court may take jurisdiction of a child only by adjudication or by a plea. *Id.*

Certain matters must be addressed during the pretrial phase of a proceeding. First, the court rules provide a "tender-years" exception to the rule against hearsay:

> *Child's Statement.* Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(25) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x) [renumbered to MCL 722.622(g), (k), (z), or (aa)], performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.
>
> (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.
>
> (b) If the child has testified, a statement denying such conduct may be used for impeachment purposes as permitted by the rules of evidence.
>
> (c) If the child has not testified, a statement denying such conduct may be admitted to impeach a statement admitted under subrule (2)(a) if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement denying the conduct provide adequate indicia of trustworthiness.

MCR 3.972(C)(2). The court may admit hearsay statements made by a child under age 10 or under age 18 if the child suffers from a developmental disability describing abuse or neglect that are imbued with adequate indicia of reliability. *See, e.g., In re Pardee*, 190 Mich App 243, 475 NW2d 870 (1991) (several witnesses were permitted to testify regarding child's statements describing various acts of sexual abuse). In examining the indicia of reliability, the court in *In re Brimer*, 191 Mich App 401, 405, 478 NW2d 689 (1991), stated that "[c]ircumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected for a child of similar age, and a lack of motive to fabricate." *See also In re Martin*, Nos 330231, 330232, 2016 Mich App LEXIS 1253 (June 23, 2016); *In re Brown*, 305 Mich App 623, 853 NW2d 459 (2014) (citing *Department of Human Servs v Nierescher (In re Archer)*, 277 Mich App 71, 82, 744 NW2d 1 (2007)). Adequate indicia of reliability is to be determined with reference to the totality of the circumstances. *Brimer,* 191 Mich App at 405 (citing *Idaho v Wright*, 497 US 805 (1990)). Because the test is the totality of the circumstances, one must

assume that the list set out in *Brimer* is but a partial recitation of the relevant indicators. Each case will need to be considered on its individual merits.

Next, the child's hearsay statements may be admitted without regard to whether the child is available to testify or actually testifies. MCR 3.972(C)(2)(a). If the child testifies, statements denying that child abuse or neglect has occurred may be used to impeach the child on cross-examination. MCR 3.972(C)(2)(b). Similarly, if the child does not testify, reliable statements made by the child denying abuse or neglect may be admitted. Social science research has repeatedly demonstrated that children falsely deny abuse and falsely recant previously asserted allegations. Children's advocates should be prepared to call expert witnesses at pretrial tender-years hearings to explain the research in this area. *See* Ann M. Haralambie, *Child Sexual Abuse in Civil Cases: A Guide to Custody and Tort Actions* 40–41 (1999); Lucy Berliner & Diana M. Elliott, *Sexual Abuse of Children,* in *The APSAC Handbook on Child Maltreatment* 55–78 (John E. B. Myers et al eds, 2002).

Finally, the child's statements describing maltreatment may be admitted through the testimony of any person who heard the child make the statement and need not be admitted only through the testimony of the individual to whom the statement is made. MCR 3.972(C)(2). For example, if the child's lawyer is interviewing the child in the presence of a foster care worker and the child makes statements describing abuse, the child's statement may be admitted through the testimony of the foster care worker.

In determining whether the child's hearsay statement contains adequate indicia of reliability to be admitted pursuant to the tender-years exception established in MCR 3.972(C)(2), the court may view a videorecorded statement made by the child during a forensic interview. *Department of Human Servs v Nierescher (In re Archer)*, 277 Mich App 71, 744 NW2d 1 (2007). In *Archer,* two children were interviewed by a forensic interviewer at a child advocacy center regarding sexual abuse. The state sought to admit the children's statements though the testimony of the forensic interviewer pursuant to MCR 3.972(C)(2). At the pretrial hearing required by MCR 3.972(C)(2), the presiding referee viewed a DVD of the forensic interview over the father's objections that MCL 712A.17b(5) prohibited the admission of the DVD at trial. The court overruled the father's objection because the pretrial tender-years hearing was not the trial. After reviewing the DVD of the interviews, the referee determined that the statements were sufficiently reliable to admit into evidence via the interviewer's testimony. The court then terminated the parents' rights. The parents appealed, arguing that admission of the DVD at the tender-years hearing violated MCL 712A.17b(5). In addition, the mother argued that the admission of the DVD at the pretrial hearing violated her right to due process of law. The court of appeals held that neither MCL 712A.17b(5) nor the due process clause barred the admission of the DVD of the forensic interview at the tender-years hearing. *Archer,* 277 Mich App at 81. In *Brown,* the court of appeals held that the trial court *must* admit videorecordings of forensic interviews during a tender-years hearing.

Even if a child's statements are not admissible pursuant to the tender-years exception in MCR 3.972(C)(2), they may be admissible pursuant to the residual hearsay exception established by MRE 803(24). *See People v Katt*, 468 Mich 272, 662 NW2d 12 (2003) (child's statements describing abuse admitted where they met test for reliability established in MRE 803(24)).

A second issue of interest concerning motion practice addresses the use of "videorecorded statements" and the taking of "videorecorded depositions." A videorecorded statement is a statement recorded by any method of videorecording. MCL 712A.17b(1)(c). A videorecorded statement is different from a videorecorded deposition, which is discussed below. *Id.* The Juvenile Code authorizes the DHHS, law enforcement personnel, the prosecuting attorney, the attorney general, or another person designated under the county's joint investigation protocol to take a videorecorded statement from any child under age 16 or a minor over age 16 if he or she suffers from a developmental disability. MCL 712A.17b(2)(b), (5); *see* MCL 712A.17b(1)(b) (defining *developmental disability*), (d) (defining *witness*). If such a videorecorded statement is taken, it "shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(5); *but see Brown* (although trial court failed to admit videorecordings of forensic interviews, reversal unwarranted because children's out-of-court statements, which were admitted, were sufficiently trustworthy).

As noted, a videorecorded statement differs from a videorecorded deposition. A videorecorded statement is not admissible at trial. MCL 712A.17b(5). On its own motion or on the motion of a party, the court may order the taking of a "videorecorded deposition" of a "witness." MCL 712A.17b(13). Before ordering such a deposition, the court must make a determination on the record that the child witness would suffer psychological harm if required to testify in open court. *Id.; see Department of Soc Servs v Hensley (In re Hensley)*, 220 Mich App 331, 560 NW2d 642 (1996) (court need not utter phrase "psychological harm" before permitting child witness protections as long as it has actually considered issue); *In re Vanidstine*, 186 Mich App 205, 463 NW2d 225 (1990) (court made particularized findings of harm to child; protective measures were properly ordered).

When a videorecorded deposition of a witness is ordered, "[t]he examination and cross-examination of the witness … shall proceed in the same manner as permitted at the adjudication stage." MCL 712A.17b(13). If, however, the court finds that the witness would suffer psychological harm if required to "testify in the presence of the respondent," the court may order that the child be "shielded from viewing the respondent in such a manner as to enable the respondent to consult with his or her attorney and to see and hear the testimony of the witness without the witness being able to see the respondent." MCL 712A.17b(12). The Juvenile Code also permits the court to order that a child witness be screened from the respondent when he or she testifies in the courtroom. *Id.*

Counsel for the petitioner and the L-GAL should consider whether these or other protective measures should be pursued and should file appropriate pretrial motions to protect the child witness when necessary. Recall that the procedures set out in MCL 712A.17b are "in addition to other protections or procedures

afforded to a witness by law or court rule." MCL 712A.17b(18). Moreover, the Michigan Rules of Evidence provide the court with broad authority to control the interrogation of witnesses. MRE 611(a). Thus, the court may take additional steps it deems necessary to ensure the truth-seeking function of a trial. *See* James K. Robinson et al., *Michigan Court Rules Practice: Evidence* 349 (2d ed 2002) (citing cases).

3. Pretrial Notices

§24.39 The court rules require written notice of intent to do the following:

> (a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.
>
> (b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.
>
> (c) use a videotaped deposition as permitted by law.
>
> (d) admit out-of-court hearsay statements under MCR 3.972(C)(2), including the identity of the persons to whom a statement was made, the circumstances leading to the statement, and the statement to be admitted.

MCR 3.922(E); *see also* MCL 712A.17b(4). Notice of these matters must be filed with the court and served on the parties within 21 days after notice of the trial date has been provided but not later than 7 days before the trial. Within 7 days after the receipt of the notice of intent but not later than 2 days before trial, the other parties must provide the court and the parties with written notice of intent to offer rebuttal testimony or evidence in opposition to the request. MCR 3.922(E)(2). The written notice must include the identity of the witnesses to be called. For good cause, the court may shorten the time requirements of this rule.

X. Adjudication/Trial

A. Timing

§24.40 While child protective proceedings are generally informal, MCL 712A.17(1), the adjudication is conducted in a formal manner. The trial in a child protection proceeding is intended to determine whether the child comes within the provisions of the Juvenile Code and is also "a specific adjudication of a parent's unfitness to determine whether the parent is subject to the dispositional authority of the court." MCR 3.903(A)(27). At trial, the Michigan Rules of Evidence that apply to civil proceedings generally apply. MCR 3.972(C)(1). Those rules may be altered by the court rules. *Id.; see, e.g.,* MCR 3.972(C)(2).

The court may not enter a default judgment against a parent in the adjudicative phase of a child protection proceeding. *In re Collier*, 314 Mich App 558, 887 NW2d 431 (2016). In juvenile proceedings, only the court rules in MCR 3.901 et seq. or those that are explicitly incorporated by subchapter 3.900 apply. The rules relating to the entry of default judgments, MCR 2.603 et seq., do not apply to child protective proceedings because they are not explicitly incorporated. In addi-

tion, due process requires an adjudication trial on a parent's fitness before the parent-child relationship may be infringed on. *Collier,* 314 Mich App at 573.

The time frame for trying a child protection case is dictated by the child's placement. If the child remains in parental custody after the preliminary hearing, the court must try the case within six months from the date on which the petition was filed. MCR 3.972(A). If the child is placed outside parental custody, the trial "must commence as soon as possible" but not later than 63 days after placement. *Id.* Where the child is in the home of a legal guardian and the guardian petitions the court to terminate parental rights pursuant to MCL 712A.2(b)(3)–(5) and .19b(3)(d)–(f), the child is not "in placement," so the adjudication may be held within six months of the filing of the petition rather than 63 days. *Russell v Miller (In re Utrera)*, 281 Mich App 1, 9–10, 761 NW2d 253 (2008). The court may continue the case beyond these time frames under certain circumstances. The court rule provides that the case may be continued on the stipulation of the parties if there is good cause. MCR 3.972(A)(1); *see also* MCL 712A.17(1). The court may also continue the trial when the "process cannot be completed" or because the testimony of a witness is needed and that witness in not available. MCR 3.972(A)(2)–(3). The statute requires that any request for a continuance be in writing, filed 14 days before the hearing, and based on a finding on the record of good cause. MCL 712A.17(1). Further, the statute permits the court to adjourn a hearing on it own motion after taking into consideration the child's best interests but limits any continuance to 28 days. *Id.* Continuances in child protective proceedings are disfavored. *See e.g., Utrera.* Thus, continuances may be granted only for good cause. While neither the statute nor the court rules define "good cause," the court of appeals has held that in order for a trial court to find good cause for an adjournment, "'a legally sufficient or substantial reason' must be first be shown." *Id.* at 11 (quoting *FG v Washtenaw County Circuit Court (In re FG)*, 264 Mich App 413, 419, 691 NW2d 465 (2004)).

Although both the statute and the court rules detail time frames to complete the trial, they provide no penalties for failure to do so. Failure to take an action or complete a hearing within the time frame set by the statute or court rule will not result in dismissal of the petition or deprive the court of the authority to hear the case. *See Family Independence Agency v Coleman (In re TC)*, 251 Mich App 368, 650 NW2d 698 (2002) (violation of 70-day time limit in MCL 712A.19b(1)); *In re Kirkwood*, 187 Mich App 542, 468 NW2d 280 (1991); *In re King*, 186 Mich App 458, 465 NW2d 1 (1990) (time limits for hearing termination petition are not jurisdictional). Although none of these cases specifically addresses a court's failure to hear an initial petition within the time frame established in MCL 712A.17(1) or MCR 3.972(A), because these provisions have no penalty clause, they demonstrate how the court would likely respond to such a circumstance.

When the court continues the trial in a protective proceeding beyond the required time frame for adjudication, the court rule presumes the child will be returned to parental custody. MCR 3.972(A). The court may continue placement of the child outside parental custody only if the presumption is overcome by a finding that returning the child to the parent's custody "will likely result in physical harm or serious emotional damage to the child." *Id.*

If the court orders the child removed from the home of the parent, guardian, or legal custodian, it must hold a review hearing in the case within 182 days, regardless of whether the trial has been completed. *Id.*

If, following trial, a nonrespondent parent is being added as an additional respondent, those allegations must be filed in a supplemental petition. MCR 3.961(C)(2); *see also* MCR 3.903(C)(13). If the supplemental petition contains a request for removal, the court must hold a preliminary hearing to determine the appropriate action to be taken on the petition. MCR 3.961(C)(3).

B. Referees, Judges, and Juries

§24.41 In most Michigan counties, the preliminary stages of child protection proceedings are conducted before a referee. *See* MCL 712A.10; MCR 3.913. Except as provided in MCR 3.912(A), which requires that a judge preside over certain hearings, a referee may preside at any hearing regarding a juvenile. For a referee to preside over a child protection trial, that referee must be licensed to practice law. MCR 3.913(A)(2)(b). However, a referee who is not licensed to practice law may preside over a preliminary inquiry, a preliminary hearing, a progress review, or an emergency removal hearing. *Id.*

A referee may administer oaths and examine witnesses. MCL 712A.10(1)(b). When a referee presides over a hearing that requires the taking of testimony, the referee must make a written report summarizing the testimony and including the referee's recommendations regarding the court's findings and disposition. MCL 712A.10(1)(c). A referee has no authority to issue orders. *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 216–219, 640 NW2d 262 (2001). A referee's recommendations may not be accepted without judicial examination. *Id.*

Any party may, by a timely filed written demand, assert the right to have a judge or a jury hear the case. MCL 712A.17(2); MCR 3.911–.912. The demand must be filed by the later of 14 days after the court gives notice of a right to a jury trial or within 14 days after the attorney or L-GAL files an appearance. MCR 3.911(B), .912(B). Generally, the demand must be filed at least 21 days before trial. *Id.* The right to demand a jury is waived if a demand is not filed timely. *In re Hubel*, 148 Mich App 696, 699, 384 NW2d 849 (1986). The court may excuse a late filing. *Id.*

The jury in a protective proceeding consists of six individuals. MCL 712A.17(2); MCR 3.911. The jury has reached a verdict when five of its members agree. MCR 3.911(C)(2)(b). The purpose of the jury is to find facts, that is, to determine whether the court has jurisdiction pursuant to MCL 712A.2(b). *In re Mathers*, 371 Mich 516, 531–532, 124 NW2d 878 (1963). When a jury determines that the facts presented do not bring the child within the jurisdictional provisions of MCL 712A.2(b), the court must dismiss the case. *Id.;* MCL 712A.18(1). The right to a jury is available only at the adjudicative phase of the proceedings. *Mathers; Hubel; In re Oakes*, 53 Mich App 629, 220 NW2d 188 (1974) (disposition is sole province of court). There is no right to a jury trial when

a supplemental petition is filed. *In re Miller*, 178 Mich App 684, 445 NW2d 168 (1989).

The Committee on Model Civil Jury Instructions has adopted jury instructions for child protection proceedings. *See* M Civ JI 97.01–.52.

C. Evidentiary Issues

§24.42 The Michigan Rules of Evidence apply at the trial phase of a proceeding. MCR 3.972(C). It does not violate a parent's right to due process of law for the court to admit and rely on evidence that was discovered after the initial petition for jurisdiction has been filed but before the adjudication hearing as long as (1) it is relevant to allegations in the petition, (2) the evidence is otherwise admissible, and (3) the parties are provided notice of the petitioner's intent to offer the evidence sufficiently in advance of the trial to avoid unfair surprise. *In re Dearmon/Haverson-Dearmon*, 303 Mich App 684, 847 NW2d 514 (2014). In addition, MCR 3.972(C)(2) permits the court to admit the hearsay statements of a child describing acts of child abuse or neglect perpetrated on the child if at a pretrial hearing the court has found that the statements have adequate indicia of reliability.

Some forms of child maltreatment require the presentation of complex medical or mental health evidence. The legislature has required the use of two protocols to aid professionals in investigating child maltreatment. For example, MCL 722.628(6) requires each county to establish a joint investigation and a forensic interviewing protocol. *See* State of Michigan Governor's Task Force on Children's Justice, *A Model Child Abuse Protocol: Coordinated Investigative Team Approach*; State of Michigan Governor's Task Force on Children's Justice & Department of Health and Human Services, *Forensic Interviewing Protocol (GTF Protocol)*. In addition, the Governor's Task Force on Children's Justice has drafted a protocol for handling cases of Munchausen syndrome by proxy. State of Michigan Governor's Task Force on Children's Justice, *Munchausen by Proxy: A Collaborative Approach to Investigation, Assessment and Treatment*.

Courts have addressed some of the evidentiary problems unique to child maltreatment cases. The Michigan Court of Appeals has approved the use of a "slide-show simulation" of shaken-baby syndrome as a form of demonstrative evidence. *People v Bulmer*, 256 Mich App 33, 662 NW2d 117 (2003). The evidence was properly admitted to "explain what happens to the baby's brain during a shaken baby episode." *Id.* at 34. Because the slide show was offered to illustrate the expert's testimony rather than as a reenactment of what happened to the particular child, it was admissible.

Some forms of child abuse are notoriously difficult to prove. This is perhaps most true of sexual abuse. To prove these cases, litigators often rely on a combination of the testimony or hearsay statements of young children and expert witness testimony offered by mental health professionals.

The model forensic interviewing protocol was developed as a response to concerns about the way professionals interview young children. Its intent is to improve the reliability of children's disclosures about abuse. *See* State of Michigan

Governor's Task Force on Children's Justice and Family Independence Agency, *Forensic Interviewing Protocol (GTF Protocol)* 1. When an interview is properly conducted, the child's hearsay statements regarding child abuse may be admitted through a protective services worker or others. *See, e.g., People v Katt*, 468 Mich 272, 662 NW2d 12 (2003); *In re Brimer*, 191 Mich App 401, 478 NW2d 689 (1991). If a forensic interview with a child is videorecorded, that videorecording must be admitted at a tender-years hearing to determine whether the child's statements contain adequate indicia of reliability to be admitted at trial. MCL 712A.17b(5); *In re Martin*, Nos 330231, 330232, 2016 Mich App LEXIS 1253 (June 23, 2016); *Department of Human Servs v Nierescher (In re Archer)*, 277 Mich App 71, 744 NW2d 1 (2007). While the videorecorded statement must be admitted at the pretrial tender-years hearing, it may not be relied on at trial to form the basis for an adjudication. *Id.* The court must take live testimony from the forensic interviewer during the trial. *Nierescher.*

The tender-years exception in MCR 3.972(C)(2) permits the admission of some hearsay statements; the residual hearsay exception is another potential means by which a child's hearsay statements may be admitted, *see Katt.*

Although the MCR 3.972(C)(2) tender-years exception applies only to statements made by children under age 10 and developmentally delayed minors, the residual hearsay exception in MRE 803(24) has no such age limit. Thus, if a minor's statement meets the test of trustworthiness, it may be admitted pursuant to MRE 803(24) without regard to age. In *Katt,* the court specifically rejected the so-called near-miss theory of admissibility. That is, the fact that MCR 3.972(C)(2) specifically addresses the admission of a child's hearsay statements does not preclude the court from considering the admission of such a statement under the more general residual exception. *Katt,* 468 Mich at 281 n2.

In *People v Meeboer*, 439 Mich 310, 484 NW2d 621 (1992), the court ruled that a child's statement made to a medical professional identifying the perpetrator may be admitted pursuant to the medical diagnosis and treatment exception to the rule against hearsay. MRE 803(4). Before admitting such a statement, the court must be satisfied that "the statement [is] sufficiently reliable to support that exception's rationale." *Meeboer,* 439 Mich at 330. The court set out numerous factors that should be considered in determining whether to admit such a statement. *Id.* at 325. The court also suggested that trial courts should examine the presence or absence of corroborating evidence. *Id.* Although the absence of corroborating evidence does not render the child's statement unreliable, its presence "can support the trustworthiness of the child's statements." *Id.* (Although MCR 3.972(C)(2) has been amended to eliminate the corroboration requirement, evidence that corroborates such a statement remains very important. *See* MCR 3.972(C)(2)(a).)

The presentation of expert witnesses is crucial to adjudicating some child protective proceedings. The courts have established a three-part test for determining whether to admit expert testimony: (1) whether the expert is qualified, (2) whether the expert's testimony will provide the trier of fact with a better understanding of the evidence, and (3) whether the evidence is from a recognized discipline. *People v Wentworth (In re Wentworth)*, 251 Mich App 560, 651 NW2d 773

(2002). In *People v Beckley*, 434 Mich 691, 456 NW2d 391 (1990), the court held that an expert witness may not render an ultimate opinion on whether a child has been sexually abused. The court applied the *Beckley* rule to child protective proceedings in *Brimer,* 191 Mich App at 407–408. Subsequently, in *People v Peterson*, 450 Mich 349, 537 NW2d 857 (1995), the court clarified its holding in *Beckley,* explaining that "[an] expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." *Peterson,* 450 Mich at 373. The court went on to clarify:

> We hold that the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse The prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case. Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse.

Id. Given the court's importation of the criminal rule from *Beckley* into protective proceedings in *Brimer,* one must conclude that *Peterson*'s clarification also applies in the child protection context.

Note that where expert witness testimony is crucial, the court may be required to authorize a parent's request for reasonable expert witness funding. In *In re Yarbrough*, 314 Mich App 111, 885 NW2d 878 (2016), the petitioner's child abuse theory was based entirely on expert testimony that medical scans showed evidence of shaken baby syndrome. The court held that under the framework of *Mathews v Eldridge*, 424 US 319, 335 (1976), the respondents were entitled to expert assistance in challenging the petitioner's theory.

As long ago as the 1970s, the court held that a parent's treatment of one child is probative of that parent's treatment of other children. *In re Dittrick Infant*, 80 Mich App 219, 263 NW2d 37 (1977); *In re LaFlure*, 48 Mich App 377, 210 NW2d 482 (1973). This doctrine, known as "anticipatory neglect," has been extended to nonparent adults. *In re Powers*, 208 Mich App 582, 528 NW2d 799 (1995). It is not, however, automatically determinative. *In re Smebak*, 160 Mich App 122, 408 NW2d 117 (1987); *In re Kantola*, 139 Mich App 23, 361 NW2d 20 (1984). Thus, the court may terminate the rights of a parent to one child while returning another child to parental custody. *See, e.g., id.*

In *Powers,* a man was cohabiting with a woman and was found responsible for having injured her child from another relationship. The man and woman subsequently had a child together. The trial court, relying on anticipatory neglect, found jurisdiction asserting that the father's treatment of the mother's other child was probative of his likely treatment of his own child. The court of appeals affirmed. *Powers,* 208 Mich App at 582. The doctrine of anticipatory neglect has been codified for certain limited factual situations. *See Family Independence Agency*

v Glass (In re AH), 245 Mich App 77, 627 NW2d 33 (2001) (when parent's rights to previous child have been terminated and CPS has deemed parent's subsequent child to be "at risk," legislature has essentially codified doctrine of anticipatory neglect).

Anticipatory neglect or abuse requires a context-specific consideration of the facts of the case. For example, where parents misused prescription drugs in the context of their medical neglect of an infant and refused to participate in services aimed at educating them to address the infant's special needs, the doctrine of anticipatory neglect was viable to support termination of their rights to the infant. However, regarding their older children, who did not have special needs and who had never experienced neglect, anticipatory neglect did not support termination. *In re LaFrance*, 306 Mich App 713, 858 NW2d 143 (2014).

A putative father's conduct before he establishes his paternity of the child may be considered in adjudicating his rights. *Department of Human Servs v Davis (In re Jordan)*, 278 Mich App 1, 747 NW2d 883 (2008).

At the conclusion of the proofs, the child's L-GAL "may" make a recommendation to the court regarding whether grounds to assert jurisdiction have been proved. MCR 3.972(D). This permissive language is at odds with MCL 712A.17d, which requires that the L-GAL actively participate in the proceedings by representing the child's best interests. *See Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 640 NW2d 262 (2001) (child is entitled to effective assistance of counsel); *In re Shaffer*, 213 Mich App 429, 540 NW2d 706 (1995) (child is entitled to zealous advocate). The L-GAL may be required to submit a recommendation in writing as long as confidentiality is protected. RI-318 (Mar 22, 2000).

XI. Dispositional Phase

A. In General

§24.43 After adjudication, if the court asserts jurisdiction, the case moves into an extended dispositional phase. In the dispositional phase of a child protection proceeding, the family court "gains broad powers to enter orders for the welfare of the child and the interests of society." *In re Deng*, 314 Mich App 615, 626, 887 NW2d 445 (2016). Although a fit parent retains the authority to make child rearing decisions regarding his or her child, "by virtue of adjudication proceedings establishing a parent as 'unfit,' the parent relinquishes this right and must yield to the trial court's orders regarding the child's welfare." 314 Mich App at 625.

A juvenile proceeding is continuous, and a subsequently filed petition does not create a new case. *In re Miller*, 178 Mich App 684, 445 NW2d 168 (1989). The dispositional phase of a child protective proceeding consists of an initial dispositional hearing, periodic review hearings, and possibly one or more permanency planning and termination of parental rights hearings. In the dispositional phase, the rules of evidence generally do not apply and the court may rely on any relevant and material evidence to the extent of its probative value. *Id.* Thus, it was not error for the court to rely on reports not formally admitted into evidence. *In re*

King, 186 Mich App 458, 465 NW2d 1 (1990). Similarly, the court may properly consider a report from the Foster Care Review Board (FCRB). *In re Shawboose*, 175 Mich App 637, 438 NW2d 272 (1989). The court may consider a parent's no contest plea to criminal charges involving child abuse in the dispositional phase. *In re Andino*, 163 Mich App 764, 415 NW2d 306 (1987). As part of its dispositional order in a child protective proceeding, the court may order one or both of the child's parents to pay child support. MCR 3.973(F)(5). Any such order for support must comply with MCL 552.605 and MCR 3.211(D). MCR 3.973(F)(5).

In general, when the court has asserted jurisdiction over the child after adjudication, the agency must make reasonable efforts to provide services aimed at reunifying the child with the parent. MCL 712A.19a(2); *In re Frey*, 297 Mich App 242, 824 NW2d 569 (2012). The parent, for his or her part, has a duty to comply with those services. *Id.* at 248. When a parent has a known or suspected intellectual, cognitive, or developmental impairment, the DHHS must take specific actions to provide the parent reasonable accommodations, including services that comply with Title II of the Americans with Disabilities Act, 42 USC 12131 et seq. *In re Hicks*, 315 Mich App 251, 890 NW2d 696 (2016) (trial court erred in terminating parental rights when DHHS failed in its duties to make reasonable accommodations for parent-respondent with cognitive disability). Among other things, the DHHS must

- "offer evaluations to determine the nature and extent of the parent's disability";
- obtain suggestions for tailoring required services to the individual;
- locate agencies that can assist the parent in overcoming obstacles to reunification (if those specialized agencies do not exist in the community, the DHHS must make sure service providers modify "their programs to allow the parent an opportunity to benefit equal to that of a nondisabled parent"; and
- search for relatives or friends who are willing to provide a home for the parent and child if it becomes clear that the parent can only safely care for his or her children in a supportive environment.

Hicks, 315 Mich App at 282. If the DHHS shirks its responsibilities, the court must order compliance. *Id.* In addition, the court may be required to delay ordering a termination of parental rights petition pursuant to MCL 712A.19a(6). *Id.* None of these accommodations are "intended to stymie child protective proceedings to the detriment of the children involved." *Id.* Where an "honest and careful evaluation reveals that no level or type of services could possibly remediate the parent to the point he or she could safely care for the child, termination need not be unnecessarily delayed." *Id.* at 283.

The statute provides several exceptions to the reasonable efforts requirement. *Id.* Further, in one factual situation, the agency may choose whether or not to apply the reasonable efforts requirement. MCL 712A.13a(6). Where a parent is required to register as a sex offender pursuant to the Sex Offenders Registration

Act (MCL 28.721 et seq.), the agency has discretion whether to offer services subject to the court's ability to override the agency's exercise of discretion and to order it to provide services. MCL 712A.13a(6). The phrase "reasonable efforts" is not defined in either the statute or the court rules, however, recent amendments to the Juvenile Code make clear that what constitutes "reasonable efforts" will depend on the facts of the particular case. *See* MCL 712A.14b(1)(c).

B. Initial Dispositional Hearings

1. Procedural Issues

§24.44 The initial dispositional hearing is held "to determine what measures the court will take with respect to a child properly within its jurisdiction." MCR 3.973(A); *see Family Independence Agency v Jones (In re PAP)*, 247 Mich App 148, 640 NW2d 880 (2001).

The court must enter a dispositional order "as provided in the Juvenile Code and these rules." MCR 3.973(F)(1). The statute and rules read together constitute a broad grant of authority to trial courts to enter orders necessary for the well-being of the child. *In re Macomber*, 436 Mich 386, 461 NW2d 671 (1990); *see* MCL 712A.6 ("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."). That broad grant of authority is limited in relation to a parent who has not been adjudicated as unfit. It such a circumstance, the court cannot enter orders affecting that parent's rights merely because it has found the child's other parent unfit. *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 852 NW2d 524 (2014). The court may change custody from one parent to another. *In re Brown*, 171 Mich App 674, 430 NW2d 746 (1988). However, in doing so, it must comply with the provisions of the Child Custody Act. *Department of Human Servs v Johnson (In re AP)*, 283 Mich App 574, 770 NW2d 403 (2009). The court may but is not required to consider the child custody factors established in the Child Custody Act, MCL 722.21 et seq.*Family Independence Agency v Pantaleon (In re EP)*, 234 Mich App 582, 595 NW2d 167 (1999), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000); *Family Independence Agency v Miller (In re Sherman)*, 231 Mich App 92, 585 NW2d 326 (1998), *overruled in part on other grounds by Trejo.*

The court may hold the dispositional hearing immediately on the conclusion of the adjudication or plea. MCR 3.973(B). If the court does not hold the hearing immediately after the jurisdictional hearing, the court must do so within 28 days of the trial if the child is placed outside the parent's home, unless there is good cause for a longer delay. MCR 3.973(C).

In *Department of Human Servs v Cox (In re AMAC)*, 269 Mich App 533, 711 NW2d 426 (2006), there was an adjudicative trial that concluded with the trial court's rendering its written opinion and order terminating respondent's parental rights without a dispositional hearing either immediately following the trial or by proper notice after the trial. Further, the trial court did not address the child's best interests in its opinion, another deviation from the clear mandate that the child's best interests be considered and that such findings and conclusions be stated in

the record or in writing. Because respondent's rights under MCL 712A.19b(5), MCR 3.973, and .977(E), were erroneously terminated, the order terminating her parental rights was vacated and the case remanded for a dispositional hearing.

If, after the assertion of jurisdiction, the court continues the matter for a later dispositional hearing, the court may give notice of that later date either on the record or as required by MCR 3.920. MCR 3.973(B). A parent does not have an absolute right to be present at a dispositional hearing. *See In re Vasquez*, 199 Mich App 44, 501 NW2d 231 (1993) (parent incarcerated out of state). Indeed, the court rules permit incarcerated parents to attend the proceedings via telephone or video conference. MCR 2.004. An incarcerated parent must be offered the opportunity to participate in each hearing involving his or her child. *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 782 NW2d 747 (2010). Failure to offer the parent the opportunity to participate in a hearing by phone may invalidate any court order that results from that hearing. *Id.* at 154. Note that this rule does not apply to prisoners incarcerated outside of Michigan. *Family Independence Agency v Davis (In re BAD)*, 264 Mich App 66, 690 NW2d 287 (2004).

A child may be excused from a dispositional hearing, MCR 3.973(D)(1), although the child has a right to attend any hearing in the process if he or she wishes to do so, MCL 712A.12. Unlike for a review hearing, MCL 712A.18d(4); MCR 3.921(B)(2); a permanency planning hearing (PPH), MCL 712A.19a(4)(h); MCR 3.921(B)(2); and termination of parental rights hearings, MCL 712A.19b(2)(h); MCR 3.921(B)(3), a child is not entitled to notice of the initial dispositional hearing. If proper notice is given, the court may conduct the disposition without the parties being present. MCR 3.973(D)(3).

If a petition alleging additional acts of abuse or neglect is filed regarding a child already under the court's jurisdiction and the petition does not contain a request for termination of parental rights, the petition is handled pursuant to MCR 3.974 (child placed in parent's home) or MCR 3.975 (child placed outside parent's home).

2. Evidence

§24.45 The rules of evidence do not apply at the dispositional hearing. The court may consider any relevant evidence, including the results of any court-ordered assessments or treatment. MCR 3.973(E)(1). Before entering a disposition, the court must consider the treatment plan developed by the agency. *See* MCL 712A.18f. That plan must outline what efforts were made to preserve the family unit, the recommended placement of the child, efforts made by the parents to achieve the child's return to the parental home, and a schedule of services aimed at rehabilitating the parent and meeting the child's needs. *Id.* "The reasonableness of the efforts provided affects the sufficiency of the evidence supporting grounds for termination." *In re Hicks*, 315 Mich App 251, 264, 890 NW2d 696 (2016) (trial court erred in terminating parental rights when DHHS failed in its duties to provide services that met requirements of Section 504 of the Rehabilitation Act and reasonable accommodations requirement of Americans with Disabilities Act for parent-respondent with cognitive disability). However, where an "honest and

careful evaluation reveals that no level or type of services could possibly remediate the parent to the point he or she could safely care for the child, termination need not be unnecessarily delayed." *Id.* at 283.

The case plan must provide for parenting time at least once per week unless parenting time, even if supervised by the agency, would be harmful to the child's well-being. MCL 712A.18f(3)(e). However, the question of whether there will be parenting time, as well as the frequency and the duration of any parenting time granted between adjudication and the filing of a supplemental petition seeking the termination of parental rights, is left to the sound discretion of the trial court. *In re Laster*, 303 Mich App 485, 845 NW2d 540 (2013).

In determining the appropriate disposition, the court must also consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, relative caregiver, or L-GAL. MCL 712A.18f(4). While the DHHS will develop a parent-agency agreement (PAA) with the parent regarding services, the court has the authority to order the parent to engage in those contained in the PAA, as well as additional services. It is the parent's compliance with and benefit from the court-ordered services—not just those in the PAA—from which progress will be measured. *See In re Trejo*, 462 Mich 341, 360–361, 612 NW2d 407 (2000).

If a child has suffered from failure to thrive, Munchausen syndrome by proxy, shaken-baby syndrome, a bone fracture that results from child abuse or neglect, or drug exposure, the agency is required to review the treatment plan with the child's treating physician. MCL 712A.18f(6). If one of these types of harm has befallen the child, the court must provide the physician notice of the dispositional hearing and permit the physician to testify regarding the treatment plan. MCL 712A.18f(7).

3. Dispositional Options

a. Dismiss or Warn and Dismiss

§24.46 If the court finds that the child does not come within the court's jurisdiction, it must enter an order dismissing the petition and returning the child to the custody of his or her parent, guardian, or legal custodian. MCL 712A.18(1); *In re LaFlure*, 48 Mich App 377, 210 NW2d 482 (1973). The Juvenile Code permits the court to warn a neglectful or an abusive parent and dismiss the case. MCL 712A.18(1)(a).

b. Child Placed in Parent's Home

§24.47 The court may place a child in the parent's home under the supervision of the court and the DHHS. MCL 712A.18(1)(b); *see* MCR 3.974. If this option is used, the court must periodically review the case. MCR 3.974(A)(1). The court must conduct such a review not later than 182 days from the date on which the petition was authorized. MCR 3.974(A)(2). If the court asserts jurisdiction pursuant to MCL 712A.2(b), it must conduct a review hearing every 91 days for the first year, MCR 3.974(A)(2), and every 182 days after the first year for as long as the child is subject to the court's jurisdiction. *Id.*

Absent an emergency, the court may not order a child removed from the parental home without a hearing. MCR 3.974(A)(3), (C) (detailing requirements for emergency removals). If it comes to the court's attention at a review hearing that the child should be removed from the home, the court may order placement of the child if the parent is at the hearing and the placement complies with MCR 3.965(C). MCR 3.974(A)(3). If the parent is not at the hearing, the court must treat the situation as an emergency removal. *See* MCR 3.974(C); *Family Independence Agency v Pantaleon (In re EP)*, 234 Mich App 582, 595 NW2d 167 (1999), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000). In *EP,* the trial court placed the child, who had been in foster care, back into the parent's home on an "extended visit." Pursuant to that order, the child resided in the mother's home for four months. The court of appeals found that the child had in fact been returned home, so a preremoval hearing was required. *Id.*

If a child is placed in a parent's home (either because the child was never removed or the child was removed and then returned), the court may order the child removed from the parent and placed in protective custody pending an emergency removal hearing if a petition or an affidavit is filed with the court setting out reasons for removal that meet the requirements of MCR 3.963(B)(1). MCR 3.974(C)(1). Before doing so, the court must make findings that each of the following is true: (1) the child is at a substantial risk of harm in the home or is at imminent risk of harm as a result of the surroundings in which the child is found, (2) the circumstances warrant the issuing of an order pending a hearing (see MCR 3.965 for a child not yet under the court's jurisdiction; see MCR 3.974(C) for a child already under the court's jurisdiction), (3) reasonable efforts consistent with the situation have been made to prevent the removal, (4) protective custody is the only reasonably available remedy that will protect the child from harm, and (5) continued placement in the home is contrary to the child's welfare. MCR 3.974(C)(1) (citing MCR 3.963(B)(1)).

If the court orders a child to be taken into protective custody, it must hold an emergency removal hearing within 24 hours after the child is removed from the parent's custody. MCR 3.974(C)(3). The parties must be provided notice of this emergency hearing. MCR 3.974(C)(2). If a petition for the child has been authorized but the child is not yet under the court's jurisdiction, the hearing must be conducted as set forth in MCR 3.965. MCR 3.974(C)(3)(a). If the child is under the court's jurisdiction but has not been previously removed from the parent, the court must follow the placement provisions in MCR 3.965(C) and make a written determination that the placement criteria in that rule are satisfied. MCR 3.974(C)(3)(b). The parent must be given an opportunity to state why the child should not be removed from the parent or why the child should be returned to the parent. *Id.* The parent must also receive a written statement of the reasons for the removal and, at a hearing under MCR 3.974(D), be advised that he or she has the right "(i) to be represented by an attorney at the hearing; (ii) to contest the continuing placement at the hearing within 14 days; and (iii) to use compulsory process to obtain witnesses for the hearing." MCR 3.974(C)(3)(b). If the court has already conducted a dispositional hearing, the court must hold a dispositional review hearing within 14 days after the child is placed. MCR 3.974(D)(2). If the

court has not yet conducted a dispositional hearing, it must conduct a dispositional hearing within 28 days after the child is placed, except for good cause shown. MCR 3.974(D)(1).

c. Place with a Relative

§24.48 The court may, if it orders a child placed at a preliminary hearing, direct that the child be placed with relatives. MCL 712A.13a(11). The following persons are "related" to the child within the meaning of the Juvenile Code:

> [A]n individual who is not less than 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce.

MCL 712A.18(1)(b). The law prefers that children be placed in the most family-like setting available that will meet the child's needs. MCL 712A.1(3); MCR 3.965(C)(3).

The DHHS must conduct a criminal records check within 7 days of the placement and undertake a complete home study within 30 days of the child's placement. MCL 712A.13a(11). When a child is placed in foster care, the agency responsible for the child's supervision has 30 days to "identify, locate, notify and consult with relatives to determine placement with a fit and appropriate relative" who can adequately provide for the child's needs. MCL 722.954a(2). Having located relatives, the agency must make a decision regarding placement of the child within 90 days. MCL 722.954a(4). The decision must be in writing, and the parties to the case and the interested relatives must be notified. *Id.* If a relative who wishes to provide care for a child is denied the opportunity to do so by the agency, he or she may request that the child's L-GAL review that decision. MCL 722.954a(9) (renumbered from subsection (6) by 2016 PA 190 effective September 19, 2016). If the L-GAL agrees with the relative, the L-GAL must file a motion asking the court to place the child with the relative. *Id.*

Although the law prefers placement with a relative, there is no duty to place a child into a relative's care. *In re Futch*, 144 Mich App 163, 375 NW2d 375 (1984). The actual decision whether to place a particular child with a relative is discretionary and rests with the court, which must consider both the availability of relative caretakers and the child's best interests. *Id.* The fact that relatives are willing to care for a child is not a defense to a petition to terminate parental rights. *Id.; see also In re McIntyre*, 192 Mich App 47, 480 NW2d 293 (1991); *In re Sterling*, 162 Mich App 328, 412 NW2d 284 (1987).

d. Place in Foster Care

§24.49 The court may place a child in foster care. MCL 712A.18(1)(c); *see* MCL 712A.13a(1)(d) (defining *foster care* to mean, among other things, "a foster family home"). When a child is a ward of the court based on abuse or neglect, the foster home must not be supervised by the court. *Id.* For the

general requirements of foster care providers, see the Foster Care and Adoption Services Act, MCL 722.951 et seq.

Developments in the law in the late 1990s and early 2000s have given foster parents increasing influence in child protective proceedings. After the 90-day period described in §24.48 for identifying, locating, and deciding on relative placements, a foster parent gains certain procedural rights that must be observed before a child may be removed. MCL 712A.13b. Once a child has been out of the home for 90 days, the supervising agency must provide the foster parent with 3 days' notice of its intent to move the child. MCL 712A.13b(2)(b). The foster parent may appeal the agency's decision to re-place the child to the FCRB within 3 days of the notice. *Id.* Absent reasonable cause to suspect that the child has been abused or that there is a "substantial risk of harm to the child's emotional well-being," the agency may not re-place the child pending the appeal to the FCRB. MCL 712A.13b(7). The FCRB has 7 days to investigate the child's placement and 3 days after completion of the investigation to report its findings and recommendations to the court or the MCI superintendent (if committed to the MCI). MCL 712A.13b(3). If the FCRB agrees with the agency, the agency may move the child. MCL 712A.13b(4). If the FCRB disagrees with the agency, the agency must maintain the child's placement until the court or the MCI superintendent determines the child's placement. MCL 712A.13b(5).

e. Appoint a Legal Guardian

§24.50 The dispositional provisions of the Juvenile Code permit the court to appoint a legal guardian for the child. MCL 712A.18(1)(h). If the court does so, it may but is not required to dismiss the child protective proceeding. *Id.*

4. Dispositional Orders

§24.51 At the conclusion of the dispositional hearing, the court must enter an order of disposition. MCR 3.973(F)(1). Before doing so, it must examine the case service plan offered by the agency. MCR 3.973(F)(2). Case plans "provide guidance to the agency, parent and court in assessing a parent's progress toward reunification. They typically outline the services that will be provided and the expectations of the parent regarding services and visitations." *In re Trejo*, 462 Mich 341, 346 n3, 612 NW2d 407 (2000). The court may adopt all or any part of the case service plan developed by the agency and may enter additional orders as it deems necessary for the child's well-being. MCR 3.973(F)(2); *see In re Jacobs*, 433 Mich 24, 444 NW2d 789 (1989). The court's authority is broad. *In re Macomber*, 436 Mich 386, 461 NW2d 671 (1990). The question of whether there will be parenting time, as well as the frequency and the duration of any parenting time granted between adjudication and the filing of a supplemental petition seeking the termination of parental rights, is left to the sound discretion of the trial court. *In re Laster*, 303 Mich App 485, 845 NW2d 540 (2013). Unless previously ordered, an order of disposition must require the parent to provide the DHHS or its contract agency with the names of the child's medical providers as well as an order that each of those providers release to the agency the child's medical records. MCR 3.973(F)(4); *see* MCL 722.954c (discussing medical passports).

C. Postdispositional Reviews

1. In General

§24.52 When a child is under the jurisdiction of the court, the court must review the case periodically. MCL 712A.19(3). If the child is in foster care, the first review must take place within 182 days of the child's removal from the parental home. MCL 712A.19; MCR 3.975(C)(1). The court rule requires a review hearing be held every 91 days after the issuance of the initial dispositional order for the first year the child is in foster care. *Id.* If the child remains under the court's jurisdiction beyond one year, the court need review the case only every 182 days for as long as the child remains a temporary ward of the court. *Id.* If the child is placed permanently with a relative or is the subject of a permanent foster family agreement, the court need review the case only every 182 days. *Id.*

The court may use two-way video technology to facilitate review hearings. MCR 3.904.

The court rules distinguish between reviews when the child is placed in the parental home, MCR 3.974, and reviews when the child is placed in "foster care." MCR 3.975.

2. Children Placed at Home

§24.53 If a child was never removed from his or her home or has been returned to a parent's home after having been placed in foster care, the court must review the case no later than 182 days from the date the petition was authorized, MCR 3.974(A)(2), and every 91 days after that first review for the first year that the child is a ward of the court, *id.* After the first year that the child is a ward of the court, the court must hold a review hearing every 182 days until the court's jurisdiction terminates. *Id.* If the child was removed from the home of the parent, guardian, or legal custodian and placed in foster care and then returned to the parent's custody, MCR 3.975 governs the handling of the case rather than MCR 3.974. Except in cases of emergency removal under MCR 3.974(C), the court may not change the child's placement without a hearing. Once a child has been returned home and it comes to the court's attention at a review hearing that the child should be removed from the home, the court may order placement of the child if the parent is at the hearing and the placement complies with MCR 3.965(C). MCR 3.974(A)(3). If the parent is not at the hearing, the court must treat the situation as an emergency removal and proceed under MCR 3.974(C). MCR 3.974(A)(3).

The court may order a child removed from the home and placed pending an emergency removal hearing if a petition or an affidavit is submitted to the court and the court finds that each of the following is true: (1) the child is at a substantial risk of harm in the home or is at imminent risk of harm as a result of the surroundings in which the child is found, (2) the circumstances warrant the issuing of an order pending a hearing (see MCR 3.965 for a child not yet under the court's jurisdiction; see MCR 3.974(C) for a child already under the court's jurisdiction), (3) reasonable efforts consistent with the situation have been made to prevent the removal, (4) protective custody is the only reasonably available remedy that will

protect the child from harm, and (5) continued placement in the home is contrary to the child's welfare. *See* MCR 3.974(C)(1) (citing MCR 3.963(B)(1)); *Family Independence Agency v Pantaleon (In re EP)*, 234 Mich App 582, 595 NW2d 167 (1999), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000) (when child was placed in parental home on "extended visit" for four months, court held that child was placed in home and that hearing was necessary to effect removal). If the court orders the child removed before holding a hearing, the court must hold an emergency removal hearing within 24 hours (excluding Sundays and holidays) after the placement. MCR 3.974(C)(3). If the court has already conducted a dispositional hearing and the child is not returned to the parent, the court must hold a dispositional review hearing within 14 days after the child is placed. MCR 3.974(D)(2). If the court has not yet conducted a dispositional hearing, it must conduct a dispositional hearing within 28 days after the child is placed, except for good cause shown. MCR 3.974(D)(1).

3. Children in Foster Care

§24.54 When a child is placed in out-of-home care, the court must conduct dispositional review hearings "to permit court review of the progress made to comply with any order of disposition and with the case service plan." MCR 3.975(A); *see* MCL 712A.19. The law requires that the court conduct the first review hearing within 182 days of the child's removal from the parental home. MCL 712A.19(3); MCR 3.975(C)(1). The court must conduct subsequent review hearings every 91 days for the first year the child is under the court's jurisdiction. *Id.* After the first year, the court must conduct a review hearing every 182 days from the date of the previous review hearing until the case is dismissed. *Id.* If the child is placed with a relative and that placement is intended to be permanent (i.e., the permanency plan for the child is not to return to parental custody) or the child is placed pursuant to a permanent foster family agreement, the court must hold a review hearing in the case every 182 days for as long as the child is a ward of the court. MCR 3.975(C)(2). Even if a termination of parental rights petition has been filed or another matter is pending (e.g., a petition for guardianship), these mandatory review hearings cannot be canceled or postponed beyond the legally required number of days. MCR 3.975(C).

The agency must submit a report to the court regarding the family members' progress or lack of progress. MCL 712A.18f; MCR 3.975(E). The agency's report must comply with the requirements of MCL 712A.18f. The report must be made available to the parties to the case, and it must be offered in evidence. MCL 712A.19(11); MCR 3.975(E). In addition to the agency's report, the court must consider any other information, written or oral, offered by the parent or the child's caregiver. *Id.*

The criteria for the review is set out in MCR 3.975(F). The court must consider (1) the services provided to the family; (2) whether the parent benefited from the services provided or offered; (3) the extent of parenting time and the reasons if it did not take place or was infrequent; (4) the extent to which the parent complied with the case plan, court orders, and any agreement with the agency; (5) the likely harm to the child if the child is returned to the parent; and (6) if the

child is an Indian child, whether the child's placement remains appropriate and complies with MCR 3.967. MCR 3.975(F)(1). Based on these considerations, the court must determine what progress has been made to alleviate the need for continued foster care placement and may review the concurrent plan if applicable. MCR 3.975(F)(2). The court must also enter an order regarding placement and services to be provided that will serve the needs of the child. MCR 3.975(G). At a dispositional review hearing, the court has authority to order that the child be returned home on 7 days' written notice to all the parties. MCR 3.975(H). However, a party may waive this notice requirement. *Id.* If the court receives a written notice of the intent to return the child to the parental home and no party objects, the court may order the child returned home without holding a hearing. *Id.*

D. Permanency Planning Hearings

§24.55 A PPH is held to determine "the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court." MCL 712A.19a(3). A PPH "is based on the premise that a failure to quickly decide on a long-term care plan for the child could be detrimental to the minor." *In re Hatcher*, 443 Mich 426, 431 n5, 505 NW2d 834 (1993). Generally, if a child is removed from the home of the parent, guardian, or legal custodian, the court must hold a PPH no later than 12 months after the date on which the child was removed. MCR 3.976(B)(2); MCL 712A.19a(1). The court must hold a PPH at this time even if a petition to terminate has been filed and is pending. MCR 3.976(B)(2). The court must, however, hold a PPH within 28 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required. MCR 3.976(B)(1). Reasonable efforts to reunify the child and family must be made in all cases except if any of the following apply:

> (a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638].
>
> (b) The parent has been convicted of 1 or more of the following:
>
> (i) Murder of another child of the parent.
>
> (ii) Voluntary manslaughter of another child of the parent.
>
> (iii) Aiding or abetting in the murder of another child of the parent or voluntary manslaughter of another child of the parent, the attempted murder of the child or another child of the parent, or the conspiracy or solicitation to commit the murder of the child or another child of the parent.
>
> (iv) A felony assault that results in serious bodily injury to the child or another child of the parent.
>
> (c) The parent has had rights to the child's siblings involuntarily terminated.
>
> (d) The parent is required by court order to register under the sex offenders registration act.

MCL 712A.19a(2); *see also* MCR 3.976(B)(1)(b). The court may hold a PPH earlier than required. MCR 3.976(B)(2). The court must hold a PPH every 12 months after the initial PPH if the child remains a court ward. MCR 3.976(B)(3).

Within these time lines, there must be a "judicial determination to finalize the court-approved permanency plan." MCR 3.976(B)(4).

The parties, including children who are age 11 or older, their attorneys, foster parents, relative caregivers, and other persons as the court may determine, must be provided notice of a PPH 14 days before the hearing. MCL 712A.19a(4). If the parents' rights have not been terminated, they must be notified of the PPH. MCR 3.976(C).

At the PPH, the rules of evidence do not apply and the court must consider any written information provided by the parties, the child's caregiver, and "any other evidence … offered at the hearing." MCL 712A.19a(8). If the court determines at the hearing that returning the child to the parent will not place the child at a substantial risk of harm, the court must order the child returned to the parent's custody. MCL 712A.19a(5). If the parent has not substantially complied with the case service plan, the court must presume that return of the child to the parent will present a substantial risk of harm to the child. *Id.; In re Trejo*, 462 Mich 341, 360–363, 612 NW2d 407 (2000).

On the other hand, "the parent's compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody." *Family Independence Agency v Kucharski (In re JK)*, 468 Mich 202, 661 NW2d 216 (2003). *See generally Family Independence Agency v Boursaw (In re Boursaw)*, 239 Mich App 161, 607 NW2d 408 (1999) (when early termination was granted although there was significant progress on treatment plan, termination was reversed; overruled in part on other grounds by *Trejo*). Although substantial compliance is "evidence" of the parent's ability to care for the child properly, it is not conclusive. Thus, if the court finds, despite the parent's substantial compliance with the service plan, that the child would be at a substantial risk of harm if returned to the parent, the court may order the agency to file a petition seeking the termination of parental rights or pursue other permanency options. In addition to considering the parent's conduct, the court must "consider any condition or circumstance of the child that may be evidence that a return to the parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being." MCL 712A.19a(5). *See generally Family Independence Agency v Sayers-Gazella (In re Gazella)*, 264 Mich App 668, 675–676, 692 NW2d 708 (2005) (parent must demonstrate that he or she has benefited from services).

If, at the conclusion of the PPH, the court determines that the child may not be returned home, the court may order the agency to file a petition to terminate parental rights. MCL 712A.19a(6); MCR 3.976(E)(3). If the court does not order a termination of parental rights petition to be filed, it must make a record of its rationale. *Id.* With several exceptions, if the child has been in foster care for 15 of the past 22 months, the court must order the agency to file a petition to terminate parental rights. *Id; see generally Trejo* (determination regarding child's best interests is made on whole record). If the court determines that termination will not serve the child's interests, the court may order the child's continued placement in foster care for a limited time or for the long term. MCL 712A.19a(7); MCR 3.976(E)(4).

Finally, the court may order the child placed in a juvenile guardianship. MCL 712A.19a(7), 722.871 et seq. (Subsidized Guardianship Assistance Act); MCR 3.976(E)(4)(d). The procedure for appointment of a juvenile guardian is governed by MCR 3.979. A guardian so appointed has all the rights and duties as set out in the Estates and Protected Individuals Code (EPIC). MCL 712A.19a(8). Appointing a juvenile guardian does not violate a parent's right to due process of law because appointment of a juvenile guardian is not a de facto termination of parental rights and because such an appointment is not necessarily permanent. *In re TK*, 306 Mich App 698, 859 NW2d 208 (2014). If the court puts in place a juvenile guardianship for a child who is 16 years of age or older, "the court shall retain jurisdiction of the youth until the department determines the youth's eligibility to receive extended guardianship assistance under the young adult voluntary foster care act." MCL 712A.2a(4). That determination must be made within 120 days of the youth's 18th birthday. *Id.* If the youth does receive guardianship assistance, the court must retain its jurisdiction over the youth until he or she no longer receives that assistance. *Id.*

If the court determines that neither return to parental custody nor termination of parental rights is in the child's best interests, it may order an "alternative planned permanent living arrangement" (e.g., placement with a relative that is intended to be permanent, permanent foster family agreement). MCR 3.976(E)(4)(c). Whatever decision the court makes regarding the permanency plan, it must set forth the factual basis for its decision in the court order adopting the permanency plan. MCR 3.976(E).

XII. Termination of Parental Rights

A. In General

§24.56 While a parent's rights regarding a child are extinguished on the termination of parental rights, some parental duties may survive. *See, e.g., Department of Human Servs v Beck (In re Beck)*, 287 Mich App 400, 788 NW2d 697, *aff'd,* 488 Mich 6, 793 NW2d 562 (2010) (trial court did not err when it involuntarily terminated father's parental rights but ordered him to pay child support); *Evink v Evink*, 214 Mich App 172, 542 NW2d 328 (1995) (father voluntarily terminated parental rights after child protective proceeding was filed, and child remained with mother; father was still required to pay child support).

Before the court may enter an order terminating a parent's rights to a child, a petition must be filed with the court that requests that the parent's rights be terminated. MCR 3.977(A)(2); *Department of Human Servs v Holm (In re SLH)*, 277 Mich App 662, 747 NW2d 547, *leave denied,* 482 Mich 1007, 756 NW2d 86 (2008) (where petition contained no request to terminate respondent father's parental rights, it was error for court to enter order terminating his rights). Michigan's Juvenile Code provides 14 separate bases on which a family court may terminate a parent's rights. MCL 712A.19b(3). Before the court may terminate a parent's rights in his or her child, it must find that one or more of those bases exist. *In re Vernia*, 178 Mich App 280, 443 NW2d 404 (1989); *In re Sterling*, 162 Mich App 328, 412 NW2d 284 (1987). The petitioner has the burden of proof for each element necessary to terminate. *In re Trejo*, 462 Mich 341, 612 NW2d

407 (2000). Due process requires that the standard of evidence be at least clear and convincing evidence. *Santosky v Kramer*, 455 US 745 (1982). States are free to set a higher standard. *Id.* at 769–770. Michigan has set its standard of evidence at the clear and convincing level. MCL 712A.19b(3); *Sterling*. Because the statute permits the court to terminate the rights of "a parent," the court may terminate the rights of only one parent, leaving the other parent's rights intact. *In re Marin*, 198 Mich App 560, 499 NW2d 400 (1993). Due process principles are violated when the state deliberately creates circumstances that virtually assure the termination of a parent's rights. *In re B*, 279 Mich App 12, 756 NW2d 234 (2008).

The parents of children to whom the ICWA and the MIFPA apply may be subject to termination of their parental rights on the same bases as other parents, but specific procedural requirements must be followed. 25 USC 1901 et seq.; MCL 712B.1 et seq.; MCR 3.977(G). In addition, to terminate the parental rights of an "Indian child," the petitioner must prove beyond a reasonable doubt that the bases for termination of parental rights in the ICWA and the MIFPA are met. 25 USC 1901 et seq.; MCL 712B.1 et seq. See chapter 25.

The term *respondent,* for purposes of the termination of parental rights, means the child's natural or adoptive mother or the child's legal father. MCR 3.977(B); *see* MCR 3.903(A)(7) (defining *father*). *See generally Family Independence Agency v Heier (In re CAW)*, 469 Mich 192, 665 NW2d 475 (2003) (when child has legal father, that individual is respondent, and termination of his rights is not finding that child was born out of wedlock). A legal custodian lacks standing to oppose a termination petition. *In re Foster*, 226 Mich App 348, 573 NW2d 324 (1997).

When a petition to terminate parental rights is filed, the court *may* suspend parenting time. MCL 712A.19b(4) (emphasis added).

Res judicata does not bar subsequent petitions to terminate parental rights. "[T]his doctrine," the court has reasoned, "cannot settle the question of a child's welfare for all time, nor prevent a court from determining at a subsequent time what is in the child's best interest at that time." *In re Pardee*, 190 Mich App 243, 249, 475 NW2d 870 (1991). Similarly, collateral estoppel does not bar criminal prosecution in a case in which a jury in a child protection proceeding had previously found no jurisdiction over the child. *People v Gates*, 434 Mich 146, 452 NW2d 627, *cert denied,* 497 US 1004 (1990). This is true because a protective proceeding does not determine guilt or innocence and because "the purposes of a child-protective proceeding and a criminal proceeding are so fundamentally different that application in this instance of collateral estoppel would be contrary to sound public policy." *Id.* at 161.

Before the court may terminate the rights of a parent, it must find by a preponderance of the evidence that doing so will serve the child's best interests. *In re Moss*, 301 Mich App 76, 836 NW2d 182 (2013). If the court determines that there is a legal basis to terminate parental rights and that termination would serve the child's best interests, the court must enter an order terminating the parent's rights. *Id.* In considering whether a legal basis exists to terminate parental rights, the court may not compare a foster home to the parent's home. *In re Mathers*, 371 Mich 516, 124 NW2d 878 (1963); *In re Hamlet*, 225 Mich App 505, 571 NW2d

750 (1997), *overruled in part on other grounds by Trejo.* When determining whether there is a legal basis to terminate a parent's rights, the court must measure the parent's capacities against statutory standards. *Id.* However, the court may weigh the advantages of a foster home in comparison to a parent's home when considering the child's best interests. *Department of Human Servs v Foster (In re Foster)*, 285 Mich App 630, 776 NW2d 415 (2009); *see, e.g., In re Johnson*, 305 Mich App 328, 852 NW2d 224 (2014) (termination in child's best interests where mother sentenced to six years' imprisonment for bank robbery and child developed strong attachment to foster mother). The court may terminate a parent's rights rather than place the child with a relative. *Sterling; In re Futch*, 144 Mich App 163, 375 NW2d 375 (1984). In addition, while the DHHS must meet the requirements of the Americans with Disabilities Act of 1990 (ADA) when providing services to parents, the ADA is not a defense to a termination of parental rights proceeding. *Family Independence Agency v Terry (In re Terry)*, 240 Mich App 14, 610 NW2d 563 (2000).

Before this chapter discusses each separate statutory basis for the termination of parental rights, the three basic forms that a petition may take, standing (discussed within the discussion of the three basic types of petitions), and notice requirements must be addressed. *See* MCL 712A.19b; MCR 3.977.

B. Three Forms of Petitions

1. In General

§24.57 There are three basic forms for termination of parental rights petitions: (1) a petition to terminate parental rights at the initial dispositional hearing; (2) a supplemental petition that seeks termination based on different circumstances; and (3) a supplemental petition to terminate parental rights when the parent, after having had services and the opportunity to rectify the conditions that led the court to assert jurisdiction, continues to be incapable of providing for the child or unwilling to do so. Each form of petition has unique procedural requirements.

2. Petitions for Termination at the Initial Dispositional Hearing

a. In General

§24.58 "If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights … at the initial dispositional hearing." MCL 712A.19b(4); *see* MCR 3.977(E). The court of appeals has held that when a petitioner seeks the termination of parental rights in an initial petition and demonstrates by a preponderance of the evidence that the court has a basis to assert its jurisdiction under MCL 712A.2(b) and there is clear and convincing evidence of a basis to terminate parental rights pursuant to MCL 712A.19b(3) and a preponderance of the evidence that termination of parental rights is in the child's best interests, the trial court may enter an order terminating parental rights. *In re Moss*, 301 Mich App 76, 836 NW2d 182 (2013). In such a case, the petitioner is not required to provide reunification services in an effort to reunify the family. *Id.* (citing *Department of Human Servs v Compton (In re HRC)*, 286 Mich App 444, 781 NW2d 105 (2009).

b. Standing to File a Petition

§24.59 Generally, any person who has information that a child may be maltreated may file a petition asking the court to take jurisdiction. *See* MCL 712A.11(1). The court rule defines the *petitioner* as "the person or agency who requests the court to take action" regarding a child. MCR 3.903(A)(22); *People v Gates*, 434 Mich 146, 452 NW2d 627, *cert denied,* 497 US 1004 (1990) (child protective "proceedings may be initiated by anyone who has information that a child is in need of the court's protection"). In *In re Huisman*, 230 Mich App 372, 584 NW2d 349 (1998), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000), the court of appeals held that a parent who has sole physical and legal custody of a child has standing to seek the termination of the parental rights of the noncustodial parent pursuant to the Juvenile Code. *See also In re Medina*, 317 Mich App 219, ___ NW2d ___ (2016) (custodial parent has standing pursuant to MCL 712A.19b(4) to petition to terminate rights of other parent). This, the court reasoned, is true because MCL 712A.19b(1) provides standing to a child's "custodian." That provision of the statute provides in part, "Except as provided in subsection (4), if a child remains in foster care in the temporary custody of the court …, upon petition of the … custodian …, the court shall hold a hearing to determine if the parental rights to the child should be terminated." *Id.* Applying this section, the court found that the father had standing. While the court reached the correct conclusion on the standing issue, it appears to have done so for the wrong reasons.

MCL 712A.19b(1) applies "[e]xcept as provided in subsection (4)." MCL 712A.19b(4), in turn, permits the court to enter an order terminating parental rights at the initial dispositional hearing. Because any person may file a petition, it follows that any person may seek termination at the initial dispositional hearing by requesting it in the petition provided that the allegations contained in the petition would make out a case for *aggravated circumstances* as defined in MCL 622.638 and 712A.19a(1). Moreover, as the language of subsection 19b(1) makes clear, it addresses standing "if a child remains in foster care." MCL 712A.19b(1). Because the child in *Huisman* was never in foster care but, as the court pointed out, was in the care and custody of the father, subsection 19b(1)'s limitations on standing relating to children in foster care did not apply to the case. Although CPS was initially involved in *Huisman,* it closed its case after the mother pleaded guilty to a criminal charge relating to her abuse of the child. *Huisman,* 230 Mich App at 375. After CPS's involvement ended, the father sought to terminate the mother's rights. *Id.* Thus, the child was not in foster care but in the care and custody of the father and, by its terms, the limited standing provision of MCL 712A.19b(1) did not apply. *See Medina* (child need not be in foster care before custodial parent could petition to terminate parental rights). Moreover, the respondent mother pleaded guilty in a criminal proceeding to attempting to kill her son by poisoning him. Thus, the case involved "aggravated circumstances" as defined in MCL 712A.19a(2) and 722.638.

c. Initial Petitions to Terminate by the Department of Health and Human Services

§24.60 *Nonmandated petitions.* Michigan's statutory law appears to be in conflict about the circumstances under which a petition may seek termination of parental rights at the initial dispositional hearing. On the one hand, as discussed in §24.59, the Juvenile Code permits any petition filed in a child protective proceeding to seek termination of parental rights at the initial dispositional hearing, including one by the DHHS, as long as the petition alleges the parent committed acts that constitute "aggravated circumstances" against the child. MCL 712A.19a(2), .19b(4); *see, e.g., Family Independence Agency v Glass (In re AH)*, 245 Mich App 77, 627 NW2d 33 (2001) (affirming termination at initial dispositional hearing in face of due process and equal protection challenges). On the other hand, MCL 722.638(3) seems to explicitly permit the DHHS to seek termination of parental rights "even though the facts of the child's case do not require departmental action under [MCL 722.638(1), which defines "aggravated circumstances]." If the agency is considering exercising this option in a situation in which the law does not require the agency to seek termination at the initial dispositional hearing, it "shall hold a conference among the appropriate agency personnel to agree upon the course of action." MCL 722.638(3). The statute is silent regarding to whom "the appropriate agency personnel" is meant to refer. DHHS policy, however, requires that the case conference include the CPS worker, the foster care worker, and "other staff as needed." Michigan Children's Protective Services Manual 715-3, "Family Court: Petitions, Hearings and Court Orders," at 8.

The child's L-GAL must be invited to this meeting but is not required to attend. MCL 722.638(3). The statute is not clear about the nature of the L-GAL's input in the decision, but it does state, "If an agreement is not reached at this conference, the department director or the director's designee shall resolve the disagreement after consulting the attorneys representing both the department and the child." *Id.* The DHHS's policy designates the local office director. CFP 715-3, at 3–4.

Mandatory petitions. In certain cases, the DHHS is statutorily obligated to petition the court for jurisdiction and to seek termination of parental rights at the initial disposition. MCL 722.638(1)–(2). In *AH,* a mother whose rights were terminated because she had previously voluntarily released her rights following the initiation of a child protective proceeding challenged the statute as an unconstitutional violation of due process and equal protection. The court rejected these arguments, finding that the statute was narrowly tailored to meet the state's compelling interest in protecting the welfare of the child. Thus, the court rejected the equal protection argument. Because the DHHS still had to prove that some act or omission on the parent's part presented a risk of harm after the petition was filed, due process was not violated. *Id.* However, when the agency filed a petition pursuant to MCL 722.638 and the court granted termination pursuant to MCL 712A.19b(3)(*l*) (prior termination) without any consideration of efforts to rehabilitate, the parent's constitutional right to due process of law was violated. The statutory scheme created an unrebuttable presumption of parental unfitness. *In re Gach*, No 328714, 2016 Mich App LEXIS 783 (Apr 19, 2016).

d. Procedural Requirements

§24.61 The burden of proof by clear and convincing evidence rests with the petitioner. *In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000); *In re Miller*, 433 Mich 331, 445 NW2d 161 (1989). The procedural requirements for adjudicating an initial petition to terminate parental rights are set out in MCR 3.977(E). The court must find the following:

- A petition has been filed that requests termination at the initial dispositional hearing.
- There is a preponderance of the evidence that the child comes within the jurisdictional provisions of MCL 712A.2(b). This finding may be based on either a plea or a finding by the trier of fact (judge or jury).
- There is clear and convincing legally admissible evidence (which may be introduced at either the trial or the dispositional hearing) that one or more of the allegations in the petition are true and establish a basis for termination of parental rights pursuant to MCL 712A.19b(3) (excluding MCL 712A.19b(3)(c)) and that termination of parental rights is in the child's best interests. MCL 712A.19b(5).

If the court makes these three findings, it may enter an order terminating parental rights (unless the case involves an Indian child—see chapter 25).

In *Department of Human Servs v Cox (In re AMAC)*, 269 Mich App 533, 711 NW2d 426 (2006), there was an adjudicative hearing on a petition with a request for termination of parental rights that concluded with the trial court's rendering its written opinion and order terminating respondent's parental rights without a dispositional hearing either immediately following the trial or by proper notice after the trial. Further, the trial court did not address the child's best interests in its opinion, another deviation from the clear mandate that the child's best interests be considered and that such findings and conclusions be stated in the record or in writing. Because respondent's rights under MCL 712A.19b(5), MCR 3.973, and .977(E) were erroneously denied, the order terminating her parental rights was vacated and the case remanded for a dispositional hearing. The court may terminate a parent's rights even if the child has never been in foster care. *In re Marin*, 198 Mich App 560, 499 NW2d 400 (1993). That is, the court need not undertake a period of temporary wardship of the child nor ensure that efforts are made to reunify the maltreated child with his or her parent, guardian, or legal custodian.

3. Supplemental Petitions to Terminate—New and Different Circumstances

§24.62 With some regularity, a child is placed in foster care due to one form of maltreatment and it is subsequently discovered that the child has suffered additional forms of maltreatment. *See, e.g., Family Independence Agency v Gilliam (In re Gilliam)*, 241 Mich App 133, 613 NW2d 748 (2000) (jurisdiction regarding father because he did not have suitable home for children; subsequently discovered that he had substance abuse problem); *In re Snyder*, 223 Mich App 85, 566 NW2d

18 (1997) (wardship due to neglect and parental substance abuse; sexual abuse subsequently disclosed). For this reason, MCL 712A.19(1) requires that if the DHHS "becomes aware of additional abuse or neglect of a child who is under the jurisdiction of the court and if that abuse or neglect is substantiated as provided in the child protection law, the [department] shall file a supplemental petition with the court." Thus, a foster care worker who has reasonable suspicion that a child has suffered from more or different forms of abuse or neglect than originally known must report that additional abuse or neglect pursuant to the CPL. MCL 722.623(1). If the report is "substantiated" by the DHHS, *see* MCL 722.622(dd) (renumbered from MCL 722.622(cc), effective April 6, 2017, by 2016 PA 491) (defining *substantiated*), it must file a supplemental petition, which may but need not request the termination of parental rights.

When a supplemental petition seeks the termination of parental rights based on a "new or different" act of child maltreatment, that "new or different" act must be proved by legally admissible evidence. MCR 3.977(F); *Gilliam,* 241 Mich App at 137; *Snyder*; *see* MCR 3.973(H). The court explained the rationale for this distinction in *Snyder.* When the basis for termination is related to the basis for jurisdiction, the court may consider any relevant and material evidence because the supplemental proofs "are presented on a background" of legally admissible evidence. No such background exists for the new allegation. *Snyder,* 223 Mich App at 90.

The question of whether a parent alleged to have committed a "new or different" form of maltreatment is entitled to a jury determination has been at issue since the *Snyder* and *Gilliam* decisions. Although no case has addressed this issue post-*Snyder,* it was addressed pre-*Snyder.* In *In re Miller*, 178 Mich App 684, 445 NW2d 168 (1989), the court held that a jury is only available at the adjudicative stage of a child protective proceeding. "Juvenile proceedings are continuous in nature," the court reasoned, and "[o]nce a case enters the dispositional phase, any subsequently filed petition which alleges new instances of abuse or neglect of the minor children does not create an entirely new case which requires the … court to redetermine jurisdiction and thus afford the respondent the right to a jury trial." *Id.* at 686; *see also In re Hubel*, 148 Mich App 696, 384 NW2d 849 (1986).

4. Supplemental Petitions to Terminate—Failure to Rehabilitate

a. Standing

§24.63 A proper party may file a supplemental petition seeking the termination of parental rights based on the parent's failure to rehabilitate. MCR 3.977(H). When a child has remained in foster care after a review or PPH, the statute provides standing to seek action on a petition to terminate parental rights to a narrowly circumscribed set of individuals:

> [U]pon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or petition of the child, guardian, custodian, concerned person, agency, or children's ombudsman …, the court shall hold a hearing to determine if the parental rights to a child should be terminated.

MCL 712A.19b(1); *see In re Jagers*, 224 Mich App 359, 568 NW2d 837 (1997) (prosecutor has standing to file termination petition); *In re Hill*, 206 Mich App 689, 522 NW2d 914 (1994) (when Department of Human Services (now DHHS) files petition and is represented by someone other than prosecutor, prosecutor lacks independent standing; prosecutor has no standing to amend or supplement another party's petition); *In re King*, 186 Mich App 458, 465 NW2d 1 (1990) (prosecutor has standing under court rule to file petition to terminate).

A "concerned person" may file a supplemental petition to terminate parental rights. MCL 712A.19b(1). A *concerned person* is

> a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination … and who has contacted the [DHHS], the prosecuting attorney, the child's attorney [L-GAL], and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition.

MCL 712A.19b(6). In addition, the office of children's ombudsman has standing to file a supplemental petition when the child remains in foster care. MCL 712A.19b(1).

b. Procedural Requirements

§24.64 A supplemental petition to terminate parental rights may be filed at any time following a review or PPH. MCR 3.977(H)(1). An individual with standing need not await the outcome of a PPH before filing. *Id.* When a supplemental petition is filed, the court has 42 days to hold a hearing on the petition and may continue the hearing for up to 21 days. MCR 3.977(H)(1)(b). Moreover, the court must issue an opinion and order "regarding a petition for termination of parental rights within 70 days after the commencement of the initial hearing on the petition." MCL 712A.19b(1). The court's failure to issue such an order within this time frame will not result in dismissal of the petition. *Id.; see Family Independence Agency v Coleman (In re TC)*, 251 Mich App 368, 650 NW2d 698 (2002). The court rules provide that the court must file its decision regarding a petition to terminate parental rights "within 28 days after the taking of final proofs, but no later than 70 days after the commencement of the hearing to terminate parental rights." MCR 3.977(I).

When hearing a supplemental petition requesting the termination of parental rights that is not based on a change of circumstances, the rules of evidence do not apply and the court may rely on any relevant and material evidence. MCR 3.977(H)(2). The applicable court rule states that the rule regarding privileges applies "except to the extent such privileges are abrogated by MCL 722.631." MCR 3.977(H)(2). MCL 722.631 broadly abrogates privileges, leaving only the attorney-client privilege fully intact and the privilege applicable to clergy members partially intact. A statement to a member of the clergy is privileged only to the extent that it takes place "in a confession or similarly confidential communication." *Id.* Thus, if a member of the clergy receives information about a case outside of a "confession or similarly confidential communication," that communication is not privileged. *See In re Brock*, 442 Mich 101, 119, 499 NW2d 752 (1993) (privi-

leges broadly eliminated); *Department of Soc Servs v Stricklin*, 148 Mich App 659, 384 NW2d 833 (1986) (MCL 722.631 abrogates spousal communication privilege).

C. Notice Requirements for Termination Petitions

§24.65 The Juvenile Code delineates the timing of and persons entitled to notice of a petition to terminate parental rights. MCL 712A.19b(2). Notice must be in writing and provided at least 14 days before the termination hearing. *Id.* The persons entitled to notice are (1) the agency (which must notify the child if the child is age 11 or older); (2) the child's foster parent or custodian; (3) the child's parents; (4) if the child has a guardian, the child's guardian; (5) the child's Indian tribe's elected leader; (6) the child's L-GAL and each party's attorney, including the child's, if one has been appointed pursuant to MCL 712A.17d(2); (7) if the child is age 11 or older, the child; and (8) the prosecutor. MCL 712A.19b(2). For further notice requirements when an Indian child is involved, see chapter 25.

Each person entitled to notice of a termination proceeding must be provided that notice pursuant to MCR 3.920 and .921(B)(3). MCR 3.977(C). Each legal parent is a "respondent" in a termination proceeding. MCR 3.977(B). Each must therefore be served a summons and a copy of the termination of parental rights petition. Service of a summons on the respondent parent's attorney is not sufficient notice to the parent. *Family Independence Agency v Harris (In re Atkins)*, 237 Mich App 249, 602 NW2d 594 (1999). However, appearance at a hearing and participation by a party waives defects in notice unless "objections regarding the specific defect" are made a part of the record. MCR 3.920(G).

D. Authority to Terminate When Parent Has Complied with but Not Benefited from Services

§24.66 Pursuant to MCL 712A.19a(5) and (6), if a parent has not "substantially complied" with the required case service plan by the time of the PPH, the law presumes that the permanency planning goal will change from reunification to termination of parental rights and the court may order the DHHS to file a termination of parental rights petition. MCL 712A.19a(6). The law does not establish a time frame for the DHHS to comply with the court's order that it file a termination of parental rights petition. Subject to several specific exceptions, where a child has remained in foster care for 15 of the most recent 22 months, the court must direct that the DHHS file a petition seeking termination of parental rights. MCL 712A.19a(6)(a)–(c). However, when the parent has an intellectual, cognitive, or developmental impairment and there is a delay in providing services necessary to meet the requirements of Section 504 of the Rehabilitation Act and the reasonable accommodations requirements of the Americans With Disabilities Act or evidence showing a parent could safely care for his or her children with an extension of services, the court is not required to order the filing of a termination petition merely because the child has been in foster care 15 out of the last 22 months. *In re Hicks*, 315 Mich App 251, 890 NW2d 696 (2016). The "requirements are not intended to stymie child protective proceedings to the detriment of

the children involved." *Id.* at 282. Where an "honest and careful evaluation reveals that no level or type of services could possibly remediate the parent to the point he or she could safely care for the child, termination need not be unnecessarily delayed. *Id.*

When the parent has failed to comply with the case service plan, the noncompliance may form the basis for termination of the parent's parental rights. *In re Trejo*, 462 Mich 341, 360–363, 612 NW2d 407 (2000). As the court of appeals wrote in *In re Frey*, 297 Mich App 242, 248, 824 NW2d 569 (2012), "[w]hile the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." When the parent has completed the prescribed case service plan, the parent's compliance evidences his or her ability to provide proper care for the child. *Family Independence Agency v Kucharski (In re JK)*, 468 Mich 202, 214, 661 NW2d 216 (2003). But mere compliance with the requirements of the treatment plan does not result automatically in the return of the child. If the parent, although having complied with the case service plan, has not derived sufficient benefit from those services to be deemed rehabilitated, the court may terminate parental rights. *Family Independence Agency v Sayers-Gazella (In re Gazella)*, 264 Mich App 668, 675–677, 692 NW2d 708 (2005). That is, mere physical compliance with the parent-agency treatment plan is insufficient to prevent termination. *Id.*

E. Bases for Terminating Parental Rights

1. Desertion

§24.67 The court may terminate if a parent deserts his or her child. MCL 712A.19b(3)(a). Desertion is defined at 28 days if the parent's identity is unknown and 91 days if known. *Id.* When a father had not seen his child in over two years, the court properly found abandonment. *In re Mayfield*, 198 Mich App 226, 497 NW2d 578 (1993). Similarly, when a parent had "little or no contact" with her children for more than a year, there was sufficient basis to terminate parental rights pursuant to MCL 712A.19b(3)(a)(ii). *In re Hall*, 188 Mich App 217, 469 NW2d 56 (1991).

2. Parent Harmed Child or Sibling

§24.68 The court may terminate parental rights if a parent's act or omission or a nonparent adult's act causes a child harm and the court determines it is likely the child will suffer further harm if returned to parental custody. MCL 712A.19b(3)(b). Thus, in a case in which the prosecutor filed an original petition to terminate parental rights under MCL 712A.19b(3)(b)(i) and (ii), based on a parent's attempted murder of a child and subsequent criminal prosecution, the trial court erred in failing to authorize the petition because, although the parent was incarcerated, the child's mental well-being remained at risk. *In re SR*, 229 Mich App 310, 581 NW2d 291 (1998). When a father sexually abused his children and was incarcerated for eight years based on his guilty plea, termination under MCL 712A.19b(3)(b)(i) was proper. *In re Vasquez*, 199 Mich App 44, 501 NW2d 231 (1993). Termination under MCL 712A.19b(3)(b)(ii), (iii), and (j) was

similarly proper when a mother disregarded her children's claims that they were being sexually abused and continued to send the children to stay with the abuser. *In re Brown*, 305 Mich App 623, 853 NW2d 459 (2014); *see also In re Gonzales/Martinez*, 310 Mich App 426, 871 NW2d 868 (2015) (mother did not believe children's revelations of sexual abuse and did nothing to stop abuse after hearing children's reports). In contrast, when a mother took steps to protect her children from injury by separating them from the perpetrator of domestic violence, MCL 712A.19b(3)(b)(ii) did not provide a proper basis for termination. *Family Independence Agency v Sours (In re Sours)*, 459 Mich 624, 593 NW2d 520 (1999).

In *In re LaFrance*, 306 Mich App 713, 858 NW2d 143 (2014), the court held that MCL 712A.19b(3)(b)(ii) must be read in context with MCL 712A.19b(3)(b)(i) and (iii). Section (b)(ii) is not intended, when read in context with the other two provisions, to address a "non-intentional omission" by the parent; rather, (b)(ii) requires an intentional act by a parent or nonparent adult that is harmful to the child that a parent does not prevent. The court rejected the notion that (b)(ii) is intended to address a broader swath of behavior than (b)(i) and (iii). Thus, (b)(ii) is not intended to apply "to a negligent failure to respond to an accidental injury or naturally occurring medical condition not caused by an 'act' of a parent or other adult." 306 Mich App at 725.

In *In re Ellis*, 294 Mich App 30, 817 NW2d 111 (2011), the court was confronted with evidence of child abuse and an absence of evidence regarding which parent perpetrated the abuse. The parents were the sole caretakers of their two-month-old child who suffered numerous nonaccidental injuries and the injuries were highly specific to child abuse and indicative of very high impact on more than one occasion. The court held that termination of parental rights was permissible pursuant to MCL 712A.19b(3)(b) and (k) where the evidence showed that the parent must have either caused or failed to prevent the injuries. In *In re Powers*, 208 Mich App 582, 528 NW2d 799 (1995), the court addressed the ability of the court to terminate a parent's rights based on his physical abuse of his live-in girlfriend's child. The court held that, because he was not a "parent" of the mother's child, his rights in his own child could not be terminated on the basis of MCL 712A.19b(3)(b) (his rights were properly terminated based on anticipatory neglect).

3. Expiration of 182 Days

§24.69 The Juvenile Code provides for termination when

> [t]he parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> (ii) Other conditions exist that cause the child to come within the court's jurisdiction.

MCL 712A.19b(3)(c). Note that this provision is measured from the date on which the court issues the initial order of disposition. The conditions on which termination is sought under MCL 712A.19b(3)(c)(i) must be those on which jurisdiction was initially taken. *See Family Independence Agency v Gilliam (In re Gilliam)*, 241 Mich App 133, 613 NW2d 748 (2000); *In re Snyder*, 223 Mich App 85, 566 NW2d 18 (1997). If new acts of abuse, neglect, or parental incapacity are alleged pursuant to MCL 712A.19b(3)(c)(ii), those new acts must be proved by clear and convincing legally admissible evidence. *Id.*

For example, when a parent was incarcerated for an extended period of time and had proposed a placement of the children with an uncle who was determined not to be in a position to take the children, it was not error to terminate parental rights. *In re McIntyre*, 192 Mich App 47, 480 NW2d 293 (1991). Conversely, where a father agreed that his child should be placed with his sister and his sister was willing and able to care for the child, the mere fact that he was incarcerated did not provide a basis for the court to terminate his parental rights under MCL 712A.19b(3)(c)(i). *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 782 NW2d 747 (2010). Where the state presented expert testimony that it would likely take three to five years beyond the statutory period for a parent to overcome her problems and that the children had highly specialized needs due to severe neglect, there was no error in terminating parental rights. *In re Dahms*, 187 Mich App 644, 468 NW2d 315 (1991).

If the parent has corrected the conditions that led the court to assert jurisdiction over the child, subsection (c) does not provide a basis to terminate parental rights. *See, e.g., Family Independence Agency v Sours (In re Sours)*, 459 Mich 624, 593 NW2d 520 (1999). If parents are not given adequate services to address the conditions that led to the child's wardship, termination on this ground is error. *In re Newman*, 189 Mich App 61, 472 NW2d 38 (1991). In addition, disregarding evidence presented by professionals who worked with the mother over an extended period of time and instead relying on the conflicting testimony of a single person who was a "minimally informed source" regarding the parent-child bond was error. *Family Independence Agency v Kucharski (In re JK)*, 468 Mich 202, 661 NW2d 216 (2003). If the bond between the child and the parent is an issue at termination, the trial court errs if it fails to take into consideration the fact that parenting time is automatically suspended when a termination petition is filed. *Id.* Since the time *JK* was decided, MCL 712A.19b(4) has been amended so that parenting time is no longer automatically suspended on the filing of a termination petition. Therefore, if parenting time is suspended when the termination petition is filed, presumably this will be done for cause as provided in the record of the case.

4. Guardian or Limited Guardian

§24.70 The Juvenile Code provides for the termination of parental rights when the child has had either a guardian or a limited guardian and certain other circumstances also exist. MCL 712A.19b(3)(d)–(f). In such a circumstance, the guardian is typically the petitioner. *See* MCL 712A.19(1) (specifically providing guardians standing to petition for termination of parental rights). The bases

for termination cited above track the bases for the court's assertion of jurisdiction. MCL 712A.2(b)(4)–(6). No reported case has addressed the termination of parental rights under these provisions.

Pursuant to MCL 712A.19b(3)(d), the court may terminate the rights of a parent who has placed the child in a limited guardianship and then failed "without good cause" to comply with the limited guardianship placement plan put in place to assist the parent in regaining custody of the child "to the extent that the noncompliance has resulted in a disruption of the parent-child relationship." *Id.* The court was called on to determine what, under this provision, constitutes good cause. *Russell v Miller (In re Utrera)*, 281 Mich App 1, 761 NW2d 253 (2008). The court, consistent with prior rulings, held that *good cause* is defined as "'a legally sufficient or substantial reason.'" *Id.* at 11 (quoting *FG v Washtenaw County Circuit Court (In re FG)*, 264 Mich App 413, 419, 691 NW2d 465 (2004)). Thus, unless there is a "legally sufficient or substantial reason" for the parent's noncompliance with the limited guardianship placement plan, the court may terminate parental rights if it finds that there has been a disruption in the relationship between the child and the parent. If, however, the parent's asserted good cause for noncompliance with the plan (e.g., mental illness) is the same condition that necessitates the guardianship, it cannot constitute good cause for noncompliance. *Utrera,* 281 Mich App at 23.

5. Failure to Provide Proper Care or Custody

§24.71 The court may terminate parental rights when

> [t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

MCL 712A.19b(3)(g). As the text of this provision makes clear, termination is permitted without regard to the parent's intent. *See generally In re Jacobs*, 433 Mich 24, 444 NW2d 789 (1989); *In re Miller*, 182 Mich App 70, 451 NW2d 576 (1990) (legislature has eliminated any question about culpability for neglect). Thus, termination under MCL 712A.19b(3)(g) is proper when a parent's emotional and cognitive difficulties render the parent permanently unable to effectively parent. *In re IEM*, 233 Mich App 438, 592 NW2d 751 (1999). Although "it would be impermissible for a parent's parental rights to be terminated solely because he or she was the victim of domestic violence," termination may be appropriate where domestic violence cooccurs with child physical abuse, sexual abuse, or substance abuse. *In re Plump*, 294 Mich App 270, 273, 817 NW2d 119 (2011). When a parent had been incarcerated for much of his children's lives and had poor parenting skills, termination was proper. *In re Hamlet*, 225 Mich App 505, 571 NW2d 750 (1997), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000). However, mere incarceration is insufficient to provide a basis to terminate under MCL 712A.19b(3)(g). *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 782 NW2d 747 (2010) (where father was incarcerated and as result Department of Human Services (now DHHS) failed to assess his parenting abilities or provide services, termination of his parental rights

was improper). When a parent's inability to recover from substance abuse resulted in child neglect, a basis for termination existed. *Department of Soc Servs v Conley (In re Conley)*, 216 Mich App 41, 549 NW2d 353 (1996). For other examples of the application of MCL 712A.19b(3)(g), see *In re Gonzales/Martinez*, 310 Mich App 426, 871 NW2d 868 (2015) (failure to comply with parent-agency agreement; positive drug test; failure to address mental health issues; unstable housing); *In re Brown*, 305 Mich App 623, 853 NW2d 459 (2014) (substance abuse and history of inadequate, transient housing); *Anderson v Schafer (In re BZ)*, 264 Mich App 286, 690 NW2d 505 (2004) (statutory grounds for termination met by evidence that respondent did not interact with two sons, did not remain in contact with social worker, did not complete steps in family plan, did not maintain secure residence, and did not attend parenting sessions); *In re Huisman*, 230 Mich App 372, 584 NW2d 349 (1998) (mother in prison based on abuse of child; overruled in part on other grounds by *Trejo*); *In re Jackson*, 199 Mich App 22, 501 NW2d 182 (1993) (mental illness; leaving children alone); *In re Systma*, 197 Mich App 453, 495 NW2d 804 (1992) (little contact with child; long criminal history; substance abuse); and *In re King*, 186 Mich App 458, 465 NW2d 1 (1990) (repeated evictions). However, when the parent had "fulfilled every requirement of the parent-agency agreement" and that "compliance negated any statutory basis for termination," the court erred in terminating parental rights under MCL 712A.19b(3)(g). *Family Independence Agency v Kucharski (In re JK)*, 468 Mich 202, 214, 661 NW2d 216 (2003).

6. Parental Incarceration

§24.72 The court may terminate the parental rights of a parent where

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

MCL 712A.19b(3)(h). Under this provision, the court must only consider future incarceration of the parent and not whether past incarceration together with future incarceration will meet the two-year time requirement. *In re Perry*, 193 Mich App 648, 484 NW2d 768 (1992); *In re Neal*, 163 Mich App 522, 414 NW2d 916 (1987). When a parent was sentenced to seven to twenty years, he "would not likely be able to provide his children with a suitable home for at least two years." *In re Ovalle*, 140 Mich App 79, 84, 363 NW2d 731 (1985). The Michigan Supreme Court has ruled that "mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 782 NW2d 747 (2010) (where incarcerated parent was offered no services and where he agreed to his child being placed with his sister who was able to provide a proper home for child, termination was not proper). A parent can provide "proper care and custody" for his or her child while incarcerated by agreeing to the child's placement with a fit and willing relative who in fact provides care for the child. *Id.*

Further, the fact that a parent is incarcerated does not relieve the state of its duty to facilitate reunification. *In re Smith*, 291 Mich App 621, 805 NW2d 234 (2011).

When the father was incarcerated for 18 months and agreed to placement of his child with a grandmother, it was an error to terminate his parental rights pursuant to MCL 712A.19b(3)(c)(g), (i), and (j). *In re Pops*, 315 Mich App 590, 890 NW2d 902 (2016).

7. Termination Based on a Prior Termination

§24.73 The statute has three separate provisions for the termination of a parent's rights when the parent has previously lost a child to termination. MCL 712A.19b(3)(i), (*l*), (m). Michigan's appellate courts have upheld the court's authority to take protective action regarding children, including the termination of a parent's rights based on a prior termination in the face of equal protection and due process challenges. *Family Independence Agency v Glass (In re AH)*, 245 Mich App 77, 627 NW2d 33 (2001) (note that while facts of this case involved prior termination and mother challenged mandatory petition provisions of MCL 722.638, court actually terminated based on MCL 712A.19b(3)(c)(i) and (g)). The court has also applied MCL 712A.19b(3)(i) to terminate the parental rights of a parent in his own child when he had previously abused his unmarried live-in girlfriend's child, had been unsuccessful in rehabilitating himself after services were offered, and the mother's rights in that child were terminated. *In re Powers*, 208 Mich App 582, 528 NW2d 799 (1995).

Although a parent may neglect a child by failing to protect the child from another abusive adult, before terminating parental rights under MCL 712A.19b(3)(i), "the clear language of the statute requires the court to determine the success of prior rehabilitation efforts as of the date of the termination hearing." *In re Gach*, No 328714, 2016 Mich App LEXIS 783, at *11 (Apr 19, 2016). MCL 712A.19b(3)(*l*), which permits termination of parental rights based only on a previous termination of parental rights, is unconstitutional when read in conjunction with other statutory provisions (e.g., MCL 722.638(1)(b)(i)) because it creates a presumption of unfitness and provides no way for a parent to rebut that presumption. *Gach,* 2016 Mich App LEXIS 783, at *11.

8. Likelihood of Future Harm

§24.74 When there is clear and convincing evidence of possible future harm to the child if returned to parental custody, the law provides a basis for termination. MCL 712A.19b(3)(j); *In re Gonzales/Martinez*, 310 Mich App 426, 871 NW2d 868 (2015) (respondent had difficulty controlling her aggression, respondent had slapped child who accused her boyfriend of sexual abuse, children's caretakers do not feel respondent is safe, and child fears harm if returned to respondent); *In re Brown*, 305 Mich App 623, 853 NW2d 459 (2014) (where mother failed to protect her children from nonparent adult's sexual abuse, permitting ongoing contact after abuse had been disclosed, there was risk of future harm sufficient to support termination of her parental rights). However, if the prediction of future harm is "essentially conjecture," the court is without a basis to terminate a parent's rights. *Family Independence Agency v Boursaw (In re Boursaw)*, 239

Mich App 161, 607 NW2d 408 (1999), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000) (citing *Family Independence Agency v Sours (In re Sours)*, 459 Mich 624, 593 NW2d 520 (1999)). Similarly, even where the parent is incarcerated or has a history of incarceration, the petitioner must present some concrete evidence of future harm to the child that results from the parent's actions. *Department of Human Servs v Mason (In re Mason)*, 486 Mich 142, 782 NW2d 747 (2010) (where petitioner, Department of Human Services (now DHHS), failed to present any evidence that respondent father had ever hurt child, termination on this ground was improper).

9. Serious Abuse or Neglect

§24.75 The Juvenile Code permits termination when a child or his or her sibling has suffered from one of several specific forms of serious abuse or neglect such as criminal sexual conduct involving penetration, battering, or life-threatening injuries. MCL 712A.19b(3)(k). Termination is also proper in the absence of evidence regarding which parent caused the injuries but where both parents were the sole caretakers of the two-month-old child who suffered the serious injuries highly specific to child abuse. *In re Ellis*, 294 Mich App 30, 817 NW2d 111 (2011) .

When the evidence demonstrated by clear and convincing evidence that the respondent father sexually abused his daughter by digitally penetrating her vagina, it was irrelevant that he had not been criminally charged with criminal sexual conduct. *In re Schadler*, 315 Mich App 406, 890 NW2d 676 (2016). Because there were grounds to terminate parental rights to that child, there were grounds to terminate parental rights to that child's sibling. *Id.*

10. Conviction of Specified Crimes

§24.76 The law provides for the termination of rights when a parent has been convicted of certain specifically delineated criminal offenses if continuing the parent-child relationship would likely harm the child. These crimes include murder, criminal sexual conduct, or repeated violent crimes. MCL 712A.19b(3)(n). The conviction does not need to result from a crime against the parent's child or any other child. The court need only find that there is a conviction coupled with a finding that a continued relationship between parent and child would be harmful. No published appellate decision addresses termination under this subsection.

In *In re Andino*, 163 Mich App 764, 415 NW2d 306 (1987), the court held that a parent's no contest plea to criminal sexual conduct charges involving his children could be admitted in the dispositional phase of a child protective proceeding. It is not clear whether a no contest plea would constitute a "conviction" for purposes of this provision.

F. Best Interests Phase

§24.77 If the family court determines that there is a basis to terminate parental rights under MCL 712A.19b(3), the court must then consider what

course of action will serve the best interests of the child. MCL 712A.19b(5). If the court determines that termination of parental rights will serve the child's best interests, it "shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." *Id.; see* MCR 3.977. The statue does not provide a standard of evidence applicable to the best interests phase of a termination of parental rights proceedings. *In re Moss*, 301 Mich App 76, 836 NW2d 182 (2013). Thus, the child's best interests may be proven by a preponderance of the evidence. *Id.*

The child's best interests should be determined from the entire record of the case. *In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000); *In re White*, 303 Mich App 701, 846 NW2d 61 (2014). Further, the court "should consider a wide variety of factors" weighing on the child's best interests, including the child's bond to the parent, the parent's ability to parent the child, the child's need for permanency, stability and finality, the child's well-being while in care, and the possibility of adoption, among other factors. 303 Mich App at 713. Regarding the parent, the court may consider the history of domestic violence, his or her compliance with the parent-agency treatment plan, and the parent's history of visitation with the child. *Id.* In addition to these factors, the court may consider the statutory best interests factors in section 3 of the Child Custody Act, MCL 722.23, if doing so is helpful in analyzing the child's best interests. *Family Independence Agency v Miller (In re Sherman)*, 231 Mich App 92, 585 NW2d 326 (1998). It is not required to do so, however. *Id.*

When multiple children are the subjects of a termination of parental rights petition, the court must consider each child's best interests separately. *White; In re Olive*, 297 Mich App 35, 823 NW2d 144 (2012). While the court cannot consider the advantages of a foster home in determining whether a legal basis exists to terminate parental rights, *In re Mathers*, 371 Mich 516, 124 NW2d 878 (1963), the court may consider the comparative advantages of a foster home for the child during the best interests phase of a termination decision, *Department of Human Servs v Foster (In re Foster)*, 285 Mich App 630, 776 NW2d 415 (2009); *see also In re Johnson*, 305 Mich App 328, 852 NW2d 224 (2014) (termination in child's best interests where mother sentenced to six years' imprisonment for bank robbery and child developed strong attachment to foster mother).

Where a child is placed with a relative, the court must consider that placement as an explicit factor in determining whether termination of parental rights will serve the child's best interests. *Olive; In re Mason*, 486 Mich 142, 164, 782 NW2d 747 (2010). Generally, a child's "placement with relatives weighs against termination." *Olive,* 297 Mich App at 43. However, when a child is placed with a nonoffending parent, that does not constitute relative placement because a parent is not related within the definition of a relative in MCL 712A.13a(1)(j). *In re Schadler*, 315 Mich App 406, 890 NW2d 676 (2016). Where guardianship had been considered by a custodial relative but had been rejected because those relatives did not feel safe around and did not want contact with the respondent, a trial court finding that termination was in the best interests of the children was not clearly erroneous. *In re Gonzales/Martinez*, 310 Mich App 426, 871 NW2d 868 (2015).

The trial court may not conduct an unrecorded in camera interview of the minor child for purposes of determining the child's best interests. Doing so results in a violation of the parents' due process rights. *Department of Human Servs v Compton (In re HRC)*, 286 Mich App 444, 781 NW2d 105 (2009)

G. Posttermination Reviews

§24.78 If the court terminates parental rights, it must hold a posttermination review hearing every 91 days for the first year after the order terminating parental rights. MCR 3.978(A); MCL 712A.19c. If the child remains in care beyond one year after the order terminating parental rights, the court must hold a posttermination review hearing at least every 182 days. *Id.* If the child is placed in another planned permanent living arrangement, is the subject of a permanent foster family agreement, or is placed in the home of a relative and that placement is intended to be permanent, the court must hold a posttermination review hearing every 182 days for as long as the child remains a ward of the court. MCL 712A.19(4); MCR 3.978(A). A posttermination review hearing may be held earlier than required by the statute or court rule. MCL 712A.19c. The purpose of a posttermination review is for the court to review the child's placement and progress toward adoption or other permanency goal, MCR 3.978(A), and the appropriateness of the permanency goal and whether reasonable efforts to achieve the permanency goal have been made, MCL 712A.19c. At the conclusion of the hearing, the court "may enter such orders as it considers necessary in the best interests of the child." MCR 3.978(C).

The court may choose to appoint a juvenile guardian as established in MCL 712A.19c and MCR 3.979. MCL 712A.19c is limited to posttermination proceedings and is distinct from MCL 712A.19a, which sets forth the process for appointing a guardian before parental rights are terminated. *In re COH*, 495 Mich 184, 848 NW2d 107 (2014) (court of appeals erroneously applied relative placement preference under MCL 722.954a to proposed guardianship under MCL 712A.19c(2)). A court may appoint a guardian for the child under MCL 712A.19c(2) if it is in the child's best interests. *COH.* Because the statute does not require a particular analysis, a court has discretion on how to make a best interests determination and may use best interests factors from the Child Custody Act or the Adoption Code or any other relevant factors. *Id.* See generally the Subsidized Guardianship Assistance Act, MCL 722.871.

XIII. Reviews, Rehearing, and Appeals

A. Reviews of Referee Recommendations

§24.79 Referees are authorized to preside over many of the hearings in child protective proceedings. *See* MCR 3.911–.912. However, they may make only recommendations that must be reviewed and approved by a judge before becoming an order of the court. *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 640 NW2d 262 (2001). The court rules establish the procedural requirements for the review of referee recommendations. MCR 3.991. Once a recommendation has been issued, a party has 7 days to file a written request for a judge to review it. MCR 3.991(B). The judge need not wait the 7 days and may

review the recommendation at any time. MCR 3.991(A)(3). Once the judge has reviewed the recommendation and signed the order, the parties lose the opportunity to request a review and must seek a rehearing under MCR 3.992. MCR 3.991(A)(4). The operation of this rule is particularly important at the preliminary stage of the proceeding. For example, if the referee recommends that the child be removed from the parent's custody, this is not an order of the court until the judge reviews the recommendation and enters an order. Consequently, many courts have sped up the review process, eliminating in some situations effective review of referee recommendations.

A request for review must be in writing and be served on the parties. MCR 3.991(B). A written response to a request for review may be filed. MCR 3.991(C). However, the judge need not schedule a hearing on a request for review. MCR 3.991(D); *Family Independence Agency v Harris (In re Atkins)*, 237 Mich App 249, 602 NW2d 594 (1999). Whether or not the court holds a hearing on the request, the judge must consider the request within 21 days unless good cause is shown requiring a longer period. MCR 3.991(D). In making a decision, the judge must adopt the referee's recommendation unless either (1) the judge would have reached a different result or (2) the referee committed legal error that is likely to have affected the outcome or is not otherwise harmless. MCR 3.991(E). The judge has broad discretion in handling a review and may adopt the recommendation as written, modify it as the judge sees fit, or reject the recommendation entirely. MCR 3.911(F). For example, when the referee properly admitted a child's hearsay statement, the judge properly concluded on review that there was no error of law. *In re Brimer*, 191 Mich App 401, 478 NW2d 689 (1991).

B. Rehearing

§24.80 A party may seek a rehearing in a case involving termination of parental rights by filing a written motion within 14 days after the court issues its order. MCR 3.992(A). For most other types of cases, the motion may be filed within 21 days after the order. *Id.* The court has discretion to permit an untimely request if there is good cause for doing so. *Id.* The motion must state the basis on which rehearing is requested. *Id.* To warrant consideration, the motion must present information not previously presented or information that was presented but not considered by the court. *Id.* Each party must receive notice of a rehearing pursuant to MCR 3.920. MCR 3.992(B). A party may file a response within 7 days of the motion; the response must be in writing and served on all parties. MCR 3.992(C). The court need not hold a hearing on the motion; if it does, the rules relating to a dispositional hearing apply. MCR 3.992(E). The judge may affirm, modify, or vacate the prior decision. MCR 3.992(D). The court may also stay the application of an order pending rehearing. MCR 3.992(F). For a discussion of the distinction between a judge's review of a recommendation and a rehearing, see *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 219–220, 640 NW2d 262 (2001).

C. Appeals

§24.81 A party may appeal the following orders to the court of appeals as of right: (1) a dispositional order placing a child under the supervision of the court or removing the child from his or her home, (2) an order terminating parental rights, (3) an order required by law to be appealed to the court of appeals, and (4) any final order. MCR 3.993(A). An order issued after a preliminary hearing that removes a child from his or her home is not appealable as of right. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 861 NW2d 303 (2014). Only orders of disposition are appealable as of right. *Id.* Any other order may be appealed by leave granted by the court of appeals. MCR 3.993(B). This includes an order removing a child from the parental home after a preliminary hearing. *McCarrick/Lamoreaux* (citing MCR 7.205(F)). The rules in MCR 7.101 et seq. apply to child protective proceeding appeals. MCR 3.993(C)(1). Although the court of appeals may grant a late request to appeal, no appeal may be granted if it is requested more than 63 days after entry of the order of termination or 63 days after an order denying reconsideration of an order terminating parental rights. MCR 3.993(C)(2). *But see* MCR 7.205(G)(5) (which seems to permit court to grant leave for up to 6 months under certain narrow circumstances). A party may seek leave to appeal to the Michigan Supreme Court within 28 days after a decision in the court of appeals. MCR 7.305(C)(2).

If a party objects to the court decision asserting temporary jurisdiction over a child, that party may not wait to appeal until after a supplemental petition seeking termination of parental rights has been granted to appeal. *In re Hatcher*, 443 Mich 426, 505 NW2d 834 (1993). To do so constitutes a collateral attack. *Id.* It is not, however, a collateral attack to appeal the court's assertion of jurisdiction under MCL 712A.2(b) after the court has ordered the termination of parental rights in response to an initial petition that requests termination. *Department of Human Servs v Holm (In re SLH)*, 277 Mich App 662, 747 NW2d 547, *leave denied,* 482 Mich 1007, 756 NW2d 86 (2008). Nor does it constitute a collateral attack for a parent to assert a violation of *Department of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 852 NW2d 524 (2014) (abolishing the one-parent doctrine), for the first time on appeal after a supplemental termination petition because it constitutes a direct challenge to the court's exercise of dispositional authority. *In re Kanjia*, 308 Mich App 660, 866 NW2d 862 (2014). The rule announced in *Sanders* is to be given retroactive application to all cases that were on direct appeal at the time that case was decided. *Kanjia.* When a parent is denied an adjudication hearing and does not appeal until after a supplemental proceeding to terminate his or her rights, it is not a collateral attack on the court's assertion of jurisdiction but a proper attack on the court's exercise of dispositional authority. *In re Collier*, 314 Mich App 558, 887 NW2d 431 (2016).

Collateral estoppel as articulated in *Hatcher* arises only when there is a written order from which to appeal. *In re Bechard*, 211 Mich App 155, 535 NW2d 220 (1995). When a child has been returned to the parent's custody and is subsequently removed by court order, the order of removal may be appealed as of right rather than by leave of the court. *Family Independence Agency v Pantaleon (In re*

EP), 234 Mich App 582, 595 NW2d 167 (1999), *overruled in part on other grounds by In re Trejo*, 462 Mich 341, 612 NW2d 407 (2000).

A parent whose rights have been terminated has a right to appeal that decision. *Family Independence Agency v Kucharski (In re JK)*, 468 Mich 202, 661 NW2d 216 (2003). Thus, while an appeal is pending in a termination of parental rights case, the trial court has no authority to proceed with the child's adoption. *Id.*

In a termination case, the appellate court reviews for clear error (1) the finding that a ground for termination has been proven by clear and convincing evidence and (2) where appropriate, the determination regarding the child's best interests. *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 63, 874 NW2d 205 (2015). Although appellate courts review a trial court's factual findings following a termination for clear error, appellate courts review "'de novo whether the trial court properly selected, interpreted, and applied a statute.'" *In re Gonzales/Martinez*, 310 Mich App 426, 871 NW2d 868 (2015) (quoting *IME v DBS*, 306 Mich App 426, 433, 857 NW2d 667 (2014)).