

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Judges Owens, Wilder, & Cavanaugh

In the Matter Of J.L. GORDON, Minor

-----/

MICHIGAN DEPARTMENT OF HUMAN SERVICES,
Petitioner-Appellee

SUPREME CT.. NO. 143673
COA NO. 301592
L. CT. NO. 2008-746988-NA

v.

COURTNEY HINKLE,
-----/ Respondent-Appellant

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143673 SUPPLEMENTAL BRIEF IN SUPPORT OF
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

FILED

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APPEAL OF JUDGMENT AND RELIEF REQUESTED

Appellant relies on the Appeal of Judgment and Relief Requested statement in her original Application For Leave To Appeal.

STATEMENT OF JURISDICTION

Courtney Hinkle appealed of right, pursuant to **MCR 3.993(A)(2)**, an order terminating her parental rights to the Michigan Court of Appeals. She requested appellate counsel within fourteen days of the entry of the order terminating her parental rights to her son Jeremiah Gordon, Thus, her appeal to the Michigan Court of Appeals was timely. The decision of the Michigan Court of Appeals is dated August 11, 2011, less than twenty-eight days from the filing of this Application of Leave To Appeal.

SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED

1. DOES THE TRIAL COURT HAVE A DUTY TO ENSURE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE INDIAN CHILD WELFARE ACT (ICWA) WHEN THE RESPONDENT PARENT STATES AT A PRELIMINARY HEARING THAT HER PARENTS ¹ARE TRIBAL MEMBERS EVEN IF RESPONDENT IS NOT A MEMBER OF A SPECIFIC TRIBE?

Appellant answers YES and further answers that the trial court should not have proceeded to any hearing on an Order To Take Into Custody or a preliminary hearing until at least ten days after the Saginaw Chippewa Indian Tribe had been given notice pursuant to 25 USC 1912(a).

The answer of Appellee Department of Human Services (DHS) answer is UNKNOWN, but DHS in this case violated its policies of investigating Indian heritage upon receiving a referral and once Indian affiliation is claimed, complying with ICWA.

Appellee Lawyer-Guardian ad Litem's answer is UNKNOWN as the Lawyer-Guardian ad Litem had not participated in the appellate process.

The trial court's answer is presumably YES as it ordered at the preliminary hearing that DHS was to investigate the alleged Indian heritage and that DHS serve the Saginaw Chippewa Tribe, but the trial court allowed DHS to violate ICWA by removing the child prior to a preliminary hearing and absent exigent circumstances in violation of the Juvenile Court Rules, MCR 3.963 and MCR 3.967.

The Michigan Court of Appeals apparently answers NO because it found that there was ample evidence that notice had been given when the trial court's legal and social files contain no record of notice.

2. IF THE NOTICE PROVISIONS OF INDIAN CHILD WELFARE ACT (ICWA) APPLY TO A RESPONDENT PARENT, WHO IS NOT A TRIBAL MEMBER BUT WHOSE PARENTS ARE TRIBAL MEMBERS, DOES THE DEPARTMENT OF HUMAN SERVICES HAVE A DUTY ALONG WITH THE TRIAL COURT TO ENSURE THAT THE RECORD OF THE TRIAL COURT IS COMPLETE AS TO DHS'S COMPLIANCE WITH THE NOTIFICATION PROVISIONS OF ICWA?

Appellant answers YES.

¹ At the preliminary hearing, mother stated that her family had members; in a subsequent hearing, the trial court learned that mother had an adoptive mother who was a sister to Appellant's biological mother. Both are tribal members.

Appellee/DHS presumably answers NO because the trial court ordered it to provide written proof of notice to the trial court's file and the DHS failed to comply with the directives of the trial court. DHS has continually told the trial court and the Court of Appeals that ICWA had been served even though ICWA is the name of the statute, not the name of the tribe with whom the Appellant and her child have an affiliation.

Appellee/Lawyer-Guardian ad Litem's answer is UNKNOWN.

The trial court's answer is presumably YES despite its lack of a record of notice, and MCR 3.965(B)(2) mandates that the trial court inquire if the child is Indian at a preliminary hearing procedures at the preliminary hearing if the child is Indian and that the trial court notify the tribe if the child was taken into custody pursuant to MCR 3.963(A) or the petition requests removal from parental custody.

The Michigan Court of Appeals apparently answers NO because it found that there was ample evidence that notice had been given when the trial court's legal and social files contain no record of notice.

3. IS A RESPONDENT PARENT IN A CHILD PROTECTIVE PROCEEDING LEGALLY ABLE TO WAIVE A MINOR CHILD'S STATUS AS AN "INDIAN CHILD?"

Appellant answers NO.

The answer of Appellee/DHS is presumably YES based on the Prosecutor's Brief, but DHS's policies recognize that the federally-recognized tribes in Michigan have rights.

The answer of the Lawyer-Guardian ad Litem is UNKNOWN.

The trial court's answer is presumably NO given that the trial court did not find Respondent's statements as a "waiver."

The Michigan Court of Appeals answers YES.

4. DOES THE CHILD WHO APPEARS TO HAVE INDIAN HERITAGE IN A CHILD PROTECTIVE PROCEEDING HAVE A RIGHT SEPARATE FROM HIS PARENT TO PURSUE TRIBAL ENROLLMENT AS AN ADULT EVEN IF ADOPTED AND NEVER ENROLLED IN A TRIBE AS A MINOR THAT CAN BE DEFEATED BY HIS PARENT DURING THE COURSE OF A CHILD PROTECTIVE PROCEEDING?

Appellant answers NO.

The answer of DHS is UNKNOWN.

The answer of the Lawyer-Guardian ad Litem is UNKNOWN.

The trial court's answer is UNKNOWN.

5. HAS THE RIGHT OF AN INDIAN TRIBE EVEN PRIOR TO THE PASSAGE OF THE INDIAN CHILD WELFARE ACT EVER HAD BEEN SUBJECT TO WAIVER BY A PARENT OR ANY INDIVIDUAL ACTING ON BEHALF OF AN INDIAN CHILD?

Appellant answers NO.

Appellee/Lawyer-Guardian ad Litem's answer is UNKNOWN.

Appellee/DHS's answer is UNKNOWN.

The trial court's answer is UNKNOWN.

SUPPLEMENTAL STATEMENT OF FACTS

Appellant relies on her complete Statement Of Facts as filed in her original application, but feels compelled to highlight the key facts as to the actions of the Department of Human Services and the trial court as to the compliance, or better said, lack of compliance, with the requirements of the Indian Child Welfare Law.

The first hearing in this matter was not the preliminary hearing, but a telephone hearing conducted by the Intake Referee Scott Hamilton and the Children's Protective Services investigator and petitioner Nina Bailey. {Tr. 5-21-08, p. }. Not one party, including the minor, was represented in that hearing. Further, no petition had been filed at the time of the hearing in violation of MCR 3.961. The child had originally lived in northern Michigan where he had been in a guardianship with a great aunt,² who was an alleged tribal member of the Saginaw Chippewa Tribe, it was later revealed. By the time of the referral, that guardianship had been terminated. When asked by the Referee if the child had American Indian heritage, the CPS worker replied, "No," but did not go into any details about whether she had investigated the child's background. ***No testimony was provided by Ms. Bailey if she had researched the American Indian heritage question, nor did the trial court request information as to if she had even investigated that issue.*** {Supra. p. 7}.

The second hearing was ironically labeled the "preliminary hearing." {Tr. 5-22-08}. Rather than ask immediately if the child had American Indian heritage, the trial court did not ask until near the end of the hearing. {Tr. 5-22-08, entitled "Preliminary

² There was no indication on the record that the family court in Shiawassee County had previously had jurisdiction over Jeremiah with the implication that jurisdiction was based on parental neglect, contrary to the impression the Prosecutor tried to give on Page 2 of her Brief to the Court of Appeals as the case in that had county had been a guardianship.

Hearing}. Notably, notice had to be given to a specific tribe that the child or parent claimed affiliation *prior to removal*.

The intake referee, Scott Hamilton, addressed preliminary matters and proceeded to hear testimony on probable cause as to the allegations. Subsequently, the attorneys proceeded to argue whether the trial court should authorize the petition. The trial court noted that there were credibility issues regarding some of the allegations. {Supra, pp. 5-10 }. The Court then at the end of the hearing asked about American Indian heritage; **the mother replied that her family is part of the Saginaw Chippew Indian Tribe in Mt. Pleasant and that her family were members.** {*Supra*, pp. 27-28}. **The Referee then ordered DHS to do an investigation and notify the tribe.** {*Supra*, p. 28}. No inquiry was made as to “active efforts” versus reasonable efforts to prevent removal by the trial court. {Entire transcript, 5-22-08}.

On **July 21, 2008**, the date of trial on the assumption of jurisdiction, the trial court inquired if DHS had received any response regarding the potential American Indian heritage of the minor. Ms. Bailey, the petitioner from DHS, stated that she had **proof that her letter had arrived, but no results as to tribal membership.** {*Supra*, p. 4}. **No proof to this attorney’s knowledge after examining the trial court’s files was ever presented to the trial court on that date or ever that the Saginaw Band of the Chippewa tribe had been served.**³ No record exists in the trial court in either the legal or social file that DHS ever did an investigation regarding the child’s American Indian heritage.

³ During oral arguments in the Court of Appeals, Judge Wilder asked the Prosecutor where there was proof of notice to the tribe; the answer was that DHS said they had notified the tribe. No documentation was ever provided to my knowledge in the trial court’s file.

On September 22, 2008, Judge Martha Anderson proceeded to an initial disposition by beginning with a discussion of the case plan and visitation requests.

{Tr. 9-22-08, pp. 4-8}. **The Court then asked if there were American Indian heritage, to which Ms. Hinkle replied that there was on her mother's side. Her aunts and uncles were tribal members.** A woman then spoke up and stated that she was Ms. Hinkle's biological mother and that she was still waiting on her membership.⁴ {Supra p. 9}. The Court inquired if notice had been sent to *ICWA*⁵ the prosecutor responded that notice had been sent, but no response had been received. Again no documentation was shown to the Court. Having ordered the mother Courtney Hinkle to comply with specific services in the case plan, **the Court asked the DHS foster care worker Lisa Campbell to obtain a copy of the notice sent to ICWA for the court file.** {Supra, pp. 10-11}. *No one seemed to be aware that ICWA was not an entity or a tribe but the name of a federal statute.* No one affirmatively stated that notice had been sent to the Saginaw Chippewa Tribe; no one corrected the trial court judge that ICWA was a statute, not an entity to be served with notice {Tr. 9-22-08}.

The next time that the issue of notice to the tribe surfaced was at the first review hearing, held on January 5, 2009. As to compliance with ICWA, DHS claimed that *the paperwork had been mailed back to ICWA; more information was sent about the mother's family history; mother filled out the paperwork. The agency was awaiting a response from ICWA. {Tr. 1-5-2009, p. 4}. **No record is in the court file of the**

⁴ Respondent Courtney Hinkle's biological mother is now a tribal member.

⁵ The trial court did not seem to understand that the notice had to be mailed to the tribe, if known, and that ICWA was the name of the federal statute and not an agency.

paperwork being sent. Again, no one corrected the statement that one cannot notify a federal statute. {Tr. 1-5-2009}.

At the next review, which the court held on April 2, 2009, the caseworker from Catholic Social Services first reported on the positive progress of Respondent Courtney Hinkle. **The issue of American Indian heritage surfaced, but was brought up by an unidentified speaker in the transcript as to tribal financial *benefits*.** Judge Anderson stated she was not interested in money. The mother's statement during this hearing was inappropriately used by the Prosecutor to argue for waiver of the ICWA issue when the fact remained that there was no proof that the Saginaw Chippewa Tribe had ever been properly served, or given any type of notice. Judge Anderson instructed Ms. Smith to contact ICWA and to find out why there had been no response from ICWA {Supra, pp. 6-11}. The worker, obviously lying, claimed that she "had sent papers to ICWA." {Supra, p. 10}. Exhibit 3, portion of transcript of hearing on 4-2-09, pp. 5-11}.

The issue of American Indian heritage was never resolved, and the trial court proceeded to termination using a non-Indian standard of clear and convincing evidence rather than the more stringent standard of "beyond a reasonable doubt." Ironically, the Michigan Court of Appeals found that "there was ample evidence that the tribe had actual notice of the proceeding," *In re Gordon, Minor*, COA 301592.

SUPPLEMENTAL ARGUMENT

Standard of Review

Issues involving the application and interpretation of the Indian Child Welfare Act, 25 USC 1901 et seq. are reviewed de novo as questions of law. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).

I. THE TRIAL COURT HAS A DUTY TO ENSURE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE INDIAN CHILD WELFARE ACT FROM THE INCEPTION OF THE CASE.

The State of Michigan published *The Indian Child Welfare Act of 1778: A Court Resource Guide* as part of a project apparently begun 2008, the year that the Gordon case commenced. The current edition, with a forward by Justice Kavanaugh, is dated March 2011. {Exhibit 1, portions of said guide}. In the preface, three reasons were cited for the publication of the Guide thirty years after the implementation of Indian Child Welfare Act (ICWA) 1978, 25 U.S.C. §§ 1901-1963:

First, SCAO's Child Welfare Services division (CWS) recently began receiving more questions about our state's compliance with this federal law. Second, CWS began participating in the Tribal State Partnership, a forum for the Michigan Department of Human Services (DHS) and the twelve federally-recognized tribes in Michigan. Third, the resulting discussions with local DHS personnel and tribal representatives made clear the need for a serious examination of how our state courts have applied (or ignored) the ICWA. Those events caused the Supreme Court to create this special committee and ask it to craft a court resource guide designed to provide practical ICWA advice to our state courts {Underlining added}.

Given that one of the reasons for the publication of a resource guide to state courts is to ensure compliance with ICWA because of a perceived poor track record by Michigan courts that have skirted or misapplied that statute, the trial court in this case must be held accountable to the minimum notice standards required in the Act as found at 25 U.S.C. 1912(a):

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian *and* the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe

cannot be determined, such notice shall be given to the Secretary [of the Interior in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. (emphasis added).

At the time that this case commenced in 2008, MCR 5.980(A)(2) also required notice to the child's parent and Indian tribe. That court rule has been replaced by MCR 3.002 and MCR 3.967, which governs removal of Indian children. {Ex. 2, copy of MCR 3.980; MCR 3.002 & MCR 3.935, MCR 3.963; MCR 3.965(B)⁶; MCR 3.967; MCR 5.402(E)}.

To argue that the a trial court at the inception of a child protective proceeding can allow a petition to proceed without proof that the petitioner has followed the notice provisions of the Indian Child Welfare Act is to argue for the defenestration of the guidelines published by this Honorable Court. However tempting it is for an intake referee, for example, to proceed at a preliminary hearing on the assumption that the Indian Child Welfare Act does not apply to the family who is the subject to governmental intervention and potential break-up, the more prudent course is, upon finding that the mere possibility exists that a parent and/or child has American Indian heritage, is for the trial court *to err* on the side of ICWA compliance. The most prudent course is, moreover, to *ensure* ICWA compliance. The trial court did neither when this case began.

Keeping in mind that the first hearing in this case was *not* the preliminary hearing but a hearing, conducted without notice to the mother, without the presence of an attorney for the mother, and without the appointment or presence of a Lawyer-Guardian ad Litem

⁶ The intake referee conducted the OTTIC hearing based on MCR 3.963(B), the procedure used for a non-Indian child; the correct rule for an alleged Indian child for court-ordered removal is now MCR 3.967(B) which requires notice to parties. MCR 3.980 governed at the time of Jeremiah Gordon's removal.

for Jeremiah, on an Order To Take Into Custody (O.T.T.I.C.) pursuant to MCR 3.963(B), Respondent argues that DHS and the trial court robbed her of physical custody of her son, not only without due process of law,⁷ but certainly without even a nod toward the application of ICWA.

Put into the vernacular, DHS and the trial court did the legal equivalent of a smash and grab at a convenience store as to depriving her of parental custody. This is how Wikipedia describes a smash and grab attack:

A smash and grab raid or smash and grab attack (or simply a smash and grab) is a particular form of burglary. The distinctive characteristic of a smash and grab, that distinguishes it from other forms of burglary, is its elements of speed and surprise. A smash and grab involves smashing a barrier, usually a display window in a shop or a showcase, grabbing valuables, and then making a quick getaway, without concern for setting off alarms or creating noise.

The greatest cost of smash and grab raids can often be in replacing the windows, which can sometimes far exceed the cost of the goods that are stolen.

www.wikipedia.org/ accessed 12-09-2011

To Courtney Hinkle, DHS and the trial court smashed the rules governing children with Indian heritage with the grabbing of her child. The damage to her at the beginning of the case was the temporary loss of her child- the loss of a fundamental liberty interest in the care and custody of her son Jeremiah. *Santosky v. Kramer*, 455 US 745 (1982). Ultimately, she suffered the permanent loss of her son. As Justice Corrigan noted in *In re Rood*, a parent losing a child to the state suffers a far more egregious loss than one who loses property. *In re Rood*, 433 Mich 73, 111; 763 NW2d 587 (2009). The damage to the judicial system and the taxpayers was comparable to the costs of replacing

⁷ The trial court record does not reflect that the mother got notice of the OTTIC hearing, and pursuant to ICWA she had to receive actual notice prior to removal.

windows in a smash and grab burglary- costs of litigation through appeals, the payment of ongoing foster care, costs of the use of appellate courts' resources, and, if remanded, the costs of paying for service to the tribes and reviews of the case pending either reunification or another permanency plan. Similar to the facts of this case, the trial court in *In re Alexander, Minors*, COA No. 278530, 2007 WL 4463756, 2; 2007 Mich App LEXIS 2848 (Mich Ct App, 2007), learned during the course of a child protective proceeding that the respondent parent had an affiliation with the Chippewa Tribe in Standish, Michigan. The record was devoid of any notification to that tribe. On remand, the trial court record shows that *twenty-six* tribes were notified with seventeen Indian tribes responding.⁸

The delay caused by the failure of the trial courts in cases- in which Indian heritage of a parent and/or child surfaces- to ensure that petitioning DHS serves the tribe *at the time the agency filed the original petition* is preventable, and thus the costs to the judicial system are preventable. In this case, for instance, had DHS given proper notice to the Saginaw Chippewa Indian Tribe at the appropriate time- *prior to DHS's even requesting Jeremiah's removal from his mother*, Appellant would probably not be before this Honorable Court. Even if a child alleged to be Indian in a child protective proceeding turns out not to be a member of a tribe or eligible for tribal membership, DHS's timely service and the trial court's vigilance as to compliance with those notice requirements can save thousands of dollars in expenses to the court and the litigants and achieve permanency for the child faster than allowing DHS and the trial court to neglect ICWA while proceeding with prosecuting parents for child neglect.

⁸ This attorney was the attorney for Appellant father in *In re Alexander, Minors*, supra.

Thus, it is the cost of “replacing windows” or put another way, the collateral costs to the judicial system that argue for ensuring that the trial courts in child protective proceedings from the very beginning of the case insist on compliance with ICWA. The Juvenile Code, MCL 712A.1 et seq, must be construed in the best interests of the child *and the state*. MCL 712A.1(3).

712A.1 Definitions; proceedings not considered criminal proceedings; construction of chapter.

(3) This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents.

The Juvenile Court Rules must be applied with the philosophy of the Juvenile Code:

Rule 3.902 Construction

(A) In General. The rules are to be construed to secure fairness, flexibility, and simplicity. The court shall proceed in a manner that safeguards the rights and proper interests of the parties. Limitations on corrections of error are governed by MCR 2.613.

(B) Philosophy. The rules must be interpreted and applied in keeping with the philosophy expressed in the Juvenile Code. The court shall ensure that each minor coming within the jurisdiction of the court shall:

(1) receive the care, guidance, and control, preferably in the minor's own home, that is conducive to the minor's welfare and the best interests of the public; and

(2) when removed from parental control, be placed in care as nearly as possible equivalent to the care that the minor's parents should have given the minor.

Liberal construction of the Juvenile Code and application of the Juvenile Court Rules in favor of the state *and* the child demand that the trial court persistently pester DHS workers in every child protective case to comply with the Indian Child Welfare Act at the first inkling that a child may have Indian heritage.

It is cheaper for the taxpayers in the long run to do the case correctly at the beginning; it is better for the child who is sought to be protected for the trial court do the case the correct way in the first place. The child stands to benefit from the achieving of a permanent placement, at his or original home if possible, without undue delays caused by appeals, remands, and notice on the tribe not given prior to DHS's original filing of a petition as required pursuant to 25 USC 1912(a), but after an appellate court's ordering remand to the trial court for notice and thus given long after the original removal from parental custody, and often after the termination of parental rights. The stance of the Oakland County Prosecutor in this case on behalf of DHS is thus alarming in that it the Prosecutor's zest to punish the mother by fighting to uphold a termination on a non-ICWA standard, the child is being hurt by being denied permanency. The failure of DHS to serve notice on the Saginaw Chippewa Tribe conflated with the trial court's negligence to ensure ICWA compliance as to notice has cost needless delays. More importantly, the very agency, DHS, that is supposed to be protecting the child has helped to deprive him of not only his Indian heritage, but also of any benefits, such as college scholarships, based on his Indian background. Currently, DHS has left Jeremiah to drift through foster care pending this appeal. Even if the mother were not to prevail on the merits with the order terminating her rights reversed, any adoption for Jeremiah has been delayed. Adoptions are subject to ICWA regulations and can be delayed for months because of noncompliance. MCR 3.002(c) and (d). MCR 3.800; Bench Book, Child Protective Proceedings, Chapter 20.

In the instant case, Referee Hamilton to his credit at the hearing on the Order To Take Into Custody asked the Children's Protective Services's worker if the Jeremiah Gordon had American Indian heritage. When that worker quickly responded, "No," his inquiry ceased when it should have continued.⁹ to verify the petitioner's compliance with ICWA. Rather than accepting the government's mere "No" as an answer, Referee Hamilton should have grilled CPS worker Nina Bailey about what efforts she had made to determine that the child was not American Indian as she so blithely answered. Pursuant to DHS's policies, those efforts needed to have been made quickly after the date of the referral to Children's Protective Services. Nina Bailey received a referral, did little investigation of the situation, and requested removal quickly. Her actions violated DHS's policies, which in turn resulted in DHS's failure to comply with ICWA- a failure to which the trial court mistakenly at the first hearing gave a pass. To continue with the smash and grab analogy, the trial court should have been the cop on the beat as one of the first responders to the burglary. Instead, the trial court failed to respond to the burglar alarm. Clues to compliance with ICWA were mandated by the trial court; the trial court flunked the forensic examination of the scene.

DHS publishes a policy manual for Children's Protective Services, cited as the PSM, and another regarding Native American Affairs, cited as the NAA,. Both policy manuals impose duties on the Children's Protective Services worker regarding investigating American Indian heritage of the family subject to a referral for neglect or abuse. Both manuals mandate that the worker follow ICWA if it appears that there is a tribal "affiliation" prior to even filing anything in the family court. Tribal membership of either

⁹ Appellant also maintains that the OTTIC hearing should not have taken place without the existence of a petition and without notice to her even in the absence of any Indian heritage issues. See Argument II.

the child or the parent does not have to be proven for ICWA's notice requirements to be mandated:

A complaint of suspected child abuse or neglect involving an American Indian child who resides off the reservation requires that the worker take affirmative steps to determine at this initial stage whether an American Indian child is involved. PSM 716-1, p.1.

CASE INVOLVING AN AMERICAN INDIAN CHILD

Special practices and procedures must be followed when an American Indian child is the subject of a CA/N investigation. Identification of a case involving an American Indian child at the earliest point of contact is of utmost importance.

See NAA 100 - NAA 615 for policy, procedures and definitions governing the department's handling of CA/N investigations involving children and families of American Indian heritage. These items must be consulted whenever there is reason to believe a child may be of American Indian heritage.

American Indian Heritage Inquiry

In every investigation of alleged child abuse or neglect, the family must be asked whether the child is known to have American Indian heritage. This inquiry must be documented in the case record and appropriate action taken. (See PSM 713-1, CPS Investigation-General Instructions And Checklist and NAA 200, Identification Of An Indian {PSM 716-1, p.1 bold in original})

Case Identification

Where there is reason to believe a child may be Indian, the worker must follow the Indian Child Welfare Act (ICWA) requirements regarding that child, *pending verification* of the child's Indian status. NAA 210 p. 1. {bold in original; underlining & italics added}.

Documentation

Workers must document in social work contacts all inquiries and contacts made to determine if or not a child is an Indian child. Document all contact with the child, child's parent(s), Indian custodian and tribal representative. Document the need for emergency intervention and specific intervention taken to maintain the safety of the child. NAA 255, p.1 {bold in original; underlining added}.

IDENTIFICATION OF AN INDIAN CHILD

If the child or the child's parent has *affiliation* with an American Indian tribe, the worker may gather tribal documentation from the child or parent or any other person

with knowledge of the child's or parent's tribal affiliation in a culturally competent manner. NAA 200, p.3. {bold in original; italics added}.

Identification Timeline

The worker must make thorough efforts to identify any child who is subject to ICWA within **three** business days of assignment of a children's protective services (CPS) complaint for investigation or any case opening for children's services. NAA 200,p. 2 {bold in original}.

Had Ms. Bailey done her job pursuant to the DHS policy manuals as to making a thorough efforts within *three days* of receiving the referral on Jeremiah Gordon, she may have learned that the child's biological maternal grandmother had tribal membership pending, and that the Respondent mother's adoptive mother¹⁰ was a tribal member. Further, Jeremiah had been in a guardianship with a great-aunt who had tribal membership.

The CPS worker could have then have communicated that information to the intake referee; his decision to recommend or deny removal from the mother's custody would have certainly been more informed. Had Referee Hamilton asked a few probing questions about Ms. Bailey's effort to investigate American Indian heritage, the state's efforts to smash and grab Jeremiah from his mother may have been and should have been foiled during the burglary. At that hearing on the OTTIC, once aware of the numerous threads of information regarding the child's potential or possible tribal membership, the Intake Referee could then have proceeded to ask if notice had been given to the Saginaw Chippewa Tribe and would have been compelled to delay the proceeding had notice not been given. 25 USC 1912(a); MCR 3.967.

¹⁰ Respondent mother's adoptive mother is the a maternal aunt, ie. sister to Respondent's biological mother. MCR 3.002(10) renders Courtney Hinkle an "adult" Indian child as she was adopted by a tribal member.

Moreover, the trial court would have to been forced to apply the standards in MCR 3.980(B) and (C) for removal from parental custody rather than MCR 3.963(B).

By failing to ask probing questions of the petitioning DHS worker, the Intake Referee did not ensure that DHS complied with its policy guidelines, which to DHS's credit mandate that if it is suspected that a child may have American Indian heritage, then the child must be treated as an Indian child until proof is provided to the contrary, to wit:

A complaint of suspected child abuse or neglect involving an American Indian child who resides off the reservation requires that the worker take affirmative steps to determine at this initial stage whether an American Indian child is involved. PSM 716-1, p.1

Throughout this case, the contrary was never proven. The lack of notice to the Saginaw Chippewa Tribe at the time of the earliest hearings was never rectified. No DHS worker from either Children's Protective Services or the foster care division ever affirmatively stated that the Saginaw Chippewa Tribe had been served with any notice, let alone by registered mail with return receipt requested as mandated by 25 USC 1912(a); no one even mentioned a telephone call to the tribe. Actual notice is not in the record.

The lack of an affirmative statement from any DHS worker any time that Jeremiah's Indian heritage surfaced in this case that DHS had notified being sent to the Saginaw Chippewa Tribe rather than notice being sent "to ICWA" was suspicious. That suspicion lingered throughout the case as no record was ever produced including a return receipt for registered mail that notice was ever sent to the Saginaw Chippewa Tribe. A significant principle in examining the trial court's duties as to notice must always be the guiding principle in ICWA interpretation: only the tribe can determine eligibility for membership. *In re Shawboose*, 175 Mich App 637, 639; 438 NW2d 272 (1989). As the

trial court, including a referee at an early hearing cannot definitively find whether or not a child fits the definition of "Indian child" under ICWA, the trial court in this case should have proceeded to assume that Jeremiah Gordon fit the definition of an Indian child. Until the trial court obtains verification from either the child's tribe or the Department of the Interior that the child is not an Indian child, the trial court must be vigilant to verify service, and one hopes service done properly pursuant to ICWA. Moreover, until notice has been sent, the trial court should not proceed hearing the case. 25 USC 1916; MCR 3.967. None of the safeguards present in ICWA and the Juvenile Court Rules that exist to ensure compliance with ICWA worked in this case. The burglar alarm rang, the state agency grabbed by the child, and the trial court permitted the kidnapping by legal process. Then the state prosecuted the mother.

Not only did the Oakland County Family Court fail to stop the proceeding, it removed Jeremiah from his mother's custody without even following the court rules for a non-Indian child. {See Argument II}.

Moreover, the trial court's dismissive attitude toward ICWA at intake contributed to another ICWA violation, not by DHS, by the trial court itself. MCR 3.965(B)(9), the rule governing preliminary hearings in child protective proceedings, compelled the trial court to provide notice itself to the tribe:

(B) Procedure

(9) The court must inquire if the child or either parent is a member of any American tribe or band. If the child is a member, or a parent is a tribal member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe or band, and follow the procedures set forth in MCR 3.980.

This rule has been amended in 2010 to MCR 6.965(B)(2) which states:

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, **notify the tribe**, and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967.
{emphasis added}.

So, when the Court of Appeals found that the existence of "ample evidence" of actual notice to the tribe when neither DHS nor the trial court had sent any notice despite a federal statute, DHS policy, and the Juvenile Court Rules compelling that the Saginaw Chippewa Tribe be served, the disrespect shown by the Michigan Court of Appeals not only to the respondent mother, but to the Juvenile Court Rules, and most importantly, the Indian Child Welfare Act, was alarming. The burglar alarm was still ringing; the Court of Appeals failed to respond appropriately at the scene of the crime.

II. THE DEPARTMENT OF HUMAN SERVICES AND THE TRIAL COURT HAD A DUTY TO ENSURE THAT THE TRIAL COURT HAD A COMPLETE RECORD FROM THE INCEPTION OF COURT INVOLVEMENT THAT OAKLAND COUNTY DHS, AS THE PETITIONER IN A CHILD PROTECTIVE PROCEEDING SEEKING REMOVAL OF JEREMIAH GORDON FROM HIS MOTHER, HAD COMPLIED WITH THE INDIAN CHILD WELFARE ACT GIVEN THAT BOTH MOTHER AND CHILD HAD SIGNIFICANT CONNECTIONS TO THE SAGINAW CHIPPEWA TRIBE AND THAT ONLY THE TRIBE CAN DETERMINE TRIBAL MEMBERSHIP.

A. THE DUTIES OF DHS AS TO RECORDING COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT BEGIN UPON ITS RECEIVING A CHILD ABUSE/NEGLECT REFERRAL, NOT WHEN, HAS HAPPENED IN THIS CASE, A PARENT MENTIONS TRIBAL AFFILIATION AT A PRELIMINARY HEARING, BUT BEGIN VERY EARLY INTO THE INVESTIGATION OF A REFERRAL REGARDING CHILD ABUSE AND/OR CHILD NEGLECT.

The duties of the Department of Human Services regarding compliance with the Indian Child Welfare Act start not when the petition is *filed*, but when it *receives* a

referral regarding abuse and/or neglect¹¹ of a child. A worker from Children's Protective Services will not know if he or she has to send notice to a tribe until that worker has complied with the provisions in the DHS policy manuals, in particular the PSM and the NAA, supra, as to investigating the family's ethnic background and possible tribal affiliation. Compliance with DHS's policy manuals has been encouraged by this Court in *In re Rood, supra*, at 121, to ensure due process. Sending notice to a tribe is a task that DHS needs to complete prior to requesting removal and/or filing a petition absent removal without a court order by a police officer based on endangerment to the child's "health, safety, or welfare" MCR 3.963(A); 3.967(A) and (B).

In every child protective case, regardless of the child's heritage, DHS has a duty not only to protect the child but also afford a parent "minimal due due process." Statutory requirements, court rules and agency policies provide an important point of departure for this inquiry. *Rood, supra*, at 122. When a case has the extra element of a referral involving a family that claims Indian heritage, DHS also has a duty to the alleged tribe, or if the tribe is unknown, to the Secretary of the Interior that the tribe received due process. 25 USC 1902; 25 USC 1912.

When Judge Wilder asked the Prosecutor where in the trial court's record there was documentation of ICWA compliance by DHS, the answer was that DHS said it had complied. Saying that you did a certain act, and being able to prove it are two different matters. Had a representative of the Saginaw Chippewa Tribe appeared at a hearing and told the trial court that it had actual notice, perhaps the lack of a return receipt by registered mail, and the lack of documentation in both DHS's records and the trial

¹¹ Child abuse or neglect referral are designated as "CA/N" in DHS publications.

court's files would not have been so critical in this case. That scenario, nor anything close to it, did not happen, despite the fact even by the time of a review hearing, DHS had still not provided any documentation that the Saginaw Chippewa Tribe had been served at any time, let alone prior to removal as mandated by 25 USC 1912(a).

The first duty of DHS upon the earliest stages into the investigation of a referral is to ask persons involved, such as the referral source and the child's parent(s) and extended family members is if there is any American Indian heritage. The investigation does not cease just because a family member may not have a tribal card. The investigation must be documented in the case record:

CASE INVOLVING AN AMERICAN INDIAN CHILD

Special practices and procedures must be followed when an American Indian child is the subject of a CA/N investigation. Identification of a case involving an American Indian child at the earliest point of contact is of utmost importance.

In every investigation of alleged child abuse or neglect, the family must be asked whether the child is known to have American Indian heritage. This inquiry must be documented in the case record and appropriate action taken. (See PSM 713-1, CPS Investigation-General Instructions And Checklist and NAA 200, Identification Of An Indian Child for more information on determining American Indian heritage.) {bold in original; underlining added}

And, in the Children's Protective Services's checklist for completing an child abuse/neglect investigation, the following appears:

Determine American Indian heritage; see NAA 200, Identification of an Indian Child for how to determine American Indian heritage and the process that must be followed if a child/family has American Indian heritage. CPS should also ask the parent(s) or any other person responsible for the health and welfare of the child if they or the child has ever lived on an American Indian reservation. If so, determine which reservation(s). {PSM 713-1, p. 3}. {Underlining added}.

Notably, the checklist does not endow a CPS worker or anyone from DHS to determine

tribal *membership*, but only to inquire about American Indian *heritage*. Hence even one of the many new CPS workers hired pursuant to the federal lawsuit, *Dwayne v. Granholm*, No. 2:06-cv-13548, Federal District Ct. (E. D.Mich) 2007, could have known by running down the checklist that as investigator there were a duty to investigate Indian heritage and to document the results of that investigation into the court record.

In the instant case, Oakland County DHS blatantly violated its duties according to the trial court transcript of the OTTIC hearing. When Referee Hamilton asked Ms. Bailey about whether there was American Indian heritage, she merely said, "No." Had she followed DHS's policies, she would have had to have a written record in DHS's case file, which presumably would have included the following facts: 1) Jeremiah Gordon had been in a guardianship with a tribal member who lived in northern Michigan where tribal membership is more common than in Oakland County; 2) Jeremiah's mother was the biological child of a person whose tribal membership was pending; 3) Jeremiah's mother had been adopted by a maternal aunt who was a tribal member.

Significant ties actually existed in this case to trigger notice to the Saginaw Chippewa Tribe had DHS followed its procedures by investigating American Indian heritage and documenting that investigation into *its records*. Had Ms. Bailey complied with DHS's mandated policy, she would then had been obligated to send notice of state intervention regarding Jeremiah Gordon to the child's mother *and* to the Saginaw Chippewa Tribe **prior** to requesting removal from the trial court, to wit:

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation
In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their

right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary : Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. {Underlining added}.

As DHS could not determine tribal eligibility, it should have sent notice to both the parent Courtney Hinkle and the Saginaw Tribe when it determined that there was American Indian *heritage*, **prior to requesting an Order To Take Into Custody requesting removal of Jeremiah from his mother and a foster care placement.** **DHS was prohibited from proceeding to remove Jeremiah before the expiration of ten days after both his mother and the tribe had received notice. Further, because registered mail was mandated, the documentation of sending the registered mail as well as the return receipt should have been placed into DHS's CPS file.** DHS breached its duty as to notice to both mother and the tribe. Had the CPS worker complied with DHS policies and the Indian Child Welfare Act, she would have possessed proof of notice sent to both the parent and the tribe by registered mail with return receipt requested with the receipt placed into DHS' s case file.

B. BY FAILING TO INSIST UPON AN ACCURATE RECORD REGARDING DHS'S ICWA COMPLIANCE, OR LACK OF COMPLIANCE, THE TRIAL COURT BREACHED ITS DUTY TO ENSURE COMPLIANCE WITH NOT ONLY ICWA BUT THE JUVENILE CODE AND JUVENILE COURT RULES.

No trial court in the State of Michigan should be excused from ensuring compliance with the Indian Child Welfare Act. To uphold the decision of Court of Appeals in this matter would send a powerful message that the trial court can get as sloppy as DHS. When the Court of Appeals ruled in this case that the tribe received notice, the Court of

Appeals wrote fiction. No documented notice to the tribe constitutes no notice. Without the trial court having a record of notice being sent by DHS, then an appellate court should assume no compliance rather than fabricate a vehicle for doing an end-run around DHS's incompetence. As the entire child welfare system is under federal court jurisdiction and being monitored by the Public Catalyst Group from New Jersey with considerable expense to the state, the State of Michigan should be spared additional expenses through increased delays for permanency because the trial courts are causing remands and other delays because of ICWA problems. *Dwayne v. Granholm*/ now known as *Dwayne v. Snyder*, No. 2:06-cv-13548, US District Ct. E.D. Mich (2007).

No grey area exists as to whether the trial court in this case had to ensure that a record was kept as to notice in compliance with ICWA. The Juvenile Court Rule MCR 3.903(A) defines "records" and "register of actions," to wit:

(25) "Records" means the pleadings, motions, authorized petition, notices, memorandums, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders.

(26) "Register of actions" means the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards. See MCR 8.119(D)(1)(c).

MCR 8.119(D) is specific as to what the Juvenile Court must keep as to records:

(D) Records Kept by the Clerk. The clerk of the court of every trial court shall keep records in the form and style the court prescribes and in accordance with Michigan Supreme Court records standards and local court plans. A court may adopt a computerized, microfilm, or word-processing system for maintaining records that substantially complies with this subrule.

(1) Indexes and Case Files. The clerk shall keep and maintain records of each case consisting of a numerical index, an alphabetical index, a register of actions, and a case file in such form and style as may be prescribed by the Supreme Court. Each case shall be assigned a case number on receipt of a complaint, petition, or other initiating document. The case number shall comply with MCR 2.113(C)(1)(c) or MCR 5.113(A)(1)(b)(ii) as applicable. In addition to the case number, a separate petition number shall be assigned to each petition filed under the Juvenile Code as required under MCR 5.113(A)(1)(b)(ii). The case number (and petition number if applicable) shall be

recorded on the register of actions, file folder, numerical index, and alphabetical index. The records shall include the following characteristics:

(c) Register of Actions. The clerk shall keep a case history of each case, known as a register of actions. The register of actions shall contain both pre- and post-judgment information. When a case is commenced, a register of actions form shall be created. The case identification information in the alphabetical index shall be entered on the register of actions. In addition, the following shall be noted chronologically on the register of actions as it pertains to the case:

- (i) the offense (if one);
- (ii) the judge assigned to the case;
- (iii) the fees paid;
- (iv) the date and title of each filed document;
- (v) the date process was issued and returned, as well as the date of service;
- (vi) the date of each event and type and result of action;
- (vii) the date of scheduled trials, hearings, and all other appearances or reviews, including a notation indicating whether the proceedings were heard on the record and the name and certification number of the court reporter or recorder present;
- (viii) the orders, judgments, and verdicts;
- (ix) the judge at adjudication and disposition;
- (x) the date of adjudication and disposition; and
- (xi) the manner of adjudication and disposition.

Each notation shall be brief, but shall show the nature of each paper filed, each order or judgment of the court, and the returns showing execution. Each notation shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(d) Case file. The clerk of the court shall maintain a file folder for each action, bearing the case number assigned to it, in which the clerk shall keep all pleadings, process, written opinions and findings, orders, and judgments filed in the action. Additionally, the clerk shall keep in the file all other documents prescribed by court rule, statute, or as ordered by the court. If other records of a case file are maintained separately from the file folder, the clerk shall keep them as prescribed by case file management standards.

(2) Calendars. The clerk may maintain calendars of actions. A calendar is a schedule of cases ready for court action that identifies times and places of activity.

(3) Abolished Records.

(a) Journals. Except for recording marriages, journals shall not be maintained.

(b) Dockets. A register of actions replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered on the register of actions. {Underlining added}.

(4) Other Records. The clerk shall keep in such form as may be prescribed by the court, other papers, documents, materials, and things filed with or handled by the court including but not limited to wills for safekeeping, exhibits and other discovery materials, requests for search warrants, marriage records, and administrative activities.

In the definitional rule, MCR 3.903, the Juvenile Court Rules provide a vehicle for interfacing the definitions in child protective proceedings with the Indian Child Welfare Act.

(F) Indian Child Welfare Act.

If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq.*, is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the definitions in MCR 3.002 shall control.

When the trial court ordered removal of Jeremiah from his mother on an Order To Take Into Custody, it failed to ensure that DHS even followed the procedures delineated in the Juvenile Court Rules, MCR 3.901 *et. seq.*, for *any* child in which removal is sought whether or not Indian. Had the trial court even followed the Juvenile Court Rules, the ICWA violation would arguably have been caught prior to removal. Any child protective proceeding “absent exigent circumstances”¹² must begin with a petition being filed. MCR 3.961.¹³ This case in the Oakland County Family Court began *not* with a *petition* being filed, but with a *telephone call* being made to the court; the call resulted in removal of Jeremiah from parental custody. Had DHS began this case with its filing of a

¹² Exigent circumstances would be removal by a police officer without a court order. MCR 3.963:

Protective Custody of Child

(A) Taking Custody Without Court Order. An officer may without court order remove a child from the child's surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to conclude that the health, safety, or welfare of the child is endangered. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical harm to the child. DHS has no authority to remove a child from parental custody absent a court order. {Underlining added}.

¹³ For a child with no question of tribal membership, MCR 3.967, there are additional rules for emergency removal.

petition as the Juvenile Court Rules mandate, DHS would have had to at least made a record if Indian heritage had been investigated because the court rule initiating child protective proceedings compels making such a record in the body of the petition itself.

The SCAO petition form for child protective proceedings mandates that the trial court compel the petitioner to provide in *writing* documentation of any Indian heritage to verify that petitioner DHS¹⁴ has inquired into Indian heritage, first of all, and secondly, has provided the requisite notice under ICWA. {Exhibit 4, Copy of petition form}.

MCR 3.961, entitled "Initiating Child Protective Proceedings," mandates that the petitioner not only begin a case *begin* a court case with the filing of a petition, but also mandates that the petitioner inquire into Indian heritage *prior* to filing a petition:

Rule 3.961 Initiating Child Protective Proceedings

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition.

(B) Content of Petition. A petition must contain the following information, if known:

(1) The child's name, address, and date of birth.

(2) The names and addresses of:

(a) the child's mother and father,

(b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father,

(c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found, and

(d) any court with prior continuing jurisdiction.

(3) The essential facts that constitute an offense against the child under the Juvenile Code.

(4) A citation to the section of the Juvenile Code relied on for jurisdiction.

(5) The child's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe.

(6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. **If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:**

¹⁴ For petitions filed under the Juvenile Code regarding a child in a limited guardianship or full guardianship of a minor, the issue of Indian heritage should have already been addressed because of mandated compliance with MCR 5.204.

(a) the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and

(b) documentation, including attempts, to identify the child's tribe.

(7) The information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending. {Bold in original caption & bold added in text}.

Thus, the proper way to begin a child protective proceeding, absent removal from parental custody by a police officer without a court order, is with the *filing of a petition* by the petitioner, who is usually DHS.¹⁵ No where do the Juvenile Court Rules allow removal with a telephone hearing absent exigent circumstances. MCR 3.963(A). As the contents of a petition must state in the affirmative whether or not the child is a member or eligible for membership in an Indian tribe, a *duty exists for the trial court to ensure a record is made of potential tribal eligibility for the child who is the subject of the petition* whether or not his parent at intake is a member of an American Indian tribe. A properly-filed petition using the form promulgated by the State Court Administrative Office (SCAO), attached as part of Exhibit 4, requires under Item #2 mandates that the petitioner has already inquired into American Indian heritage of the parties prior to signing and filing the petition. Put another way: lack of tribal membership of a parent accused of child neglect or abuse does not excuse a trial court from mandating that DHS produce *a record of compliance with ICWA's notice requirements* when indications exists that the child has American Indian *heritage*. The record of the trial court as to Indian heritage, absent exigent circumstances, should start, therefore, *with the documentation provided on the face sheet of the petition*.

¹⁵ Some child protective proceedings are filed by a guardian, a limited guardian, a Guardian ad Litem or Lawyer-Guardian ad Litem, in a proceeding under EPI, but in those instances a child has already been removed from parental custody through the guardianship, which suspends parental rights..

It is important to remember when analyzing the duties of the trial court as to maintaining a record congruent with ICWA requirements that the trial court cannot determine tribal eligibility. "The question of whether a person is a member of a tribe is for the tribe itself to answer." *In re NEGP*, 245 Mich App 126, 133;626 NW2d 921 (2001). citing *In re IEM* 233 Mich App 238, 447-448;592 NW2d 751 (1999). or even rule that a child is definitively not an Indian child absent proper notice to the named tribe or the Secretary of the Interior. As the *Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings* (hereinafter "BIA Guidelines") reminds trial courts that as to determining whether ICWA applies, tribal verification of a child's status is best, and the Department of the Interior's pronouncements are given great weight. *BIA Guidelines, supra* at 7.

Without notice to either the specific tribe, or if a specific tribe is unknown to the Secretary of the Interior, the trial court cannot just rule that a child is not Indian as the Court of Appeals just allowed in this case. As proper notice under ICWA requires registered mail with a return receipt, proof in the form of document from the U.S. Post Office is contemplated. DHS policy requires documentation to be placed into the court file. PSM, NAA, *supra*. The BIA Guidelines contain this tidbit of cultural education to the trial courts as to the fact that tribal membership does not begin and end with the production of an Indian tribal card:

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.

United States v. Brocheau, 597 F. 2nd 1260, 1263 (9th Cir. 1979)
cited in *BIA Guidelines, supra* at 8.

To return to the smash and grab analogy, the petition is the trial court's "inventory" check list that can prevent DHS from committing the "crime" of smash and grab. At the time of filing a petition, the child often does not possess a tribal card. Therefore, the requirement that Indian heritage be addressed on the face sheet of the petition is analogous to preventive policing in the community. By filing out a petition and signing it, the DHS is verifying to the trial court whether or not the Indian heritage of the family has been initially *addressed*, not necessarily proven. DHS has a check list for its CPS workers that should be followed prior to asking for court intervention. That checklist mandates documentation in DHS's file. PSM 713-1, p.2, *CPS General Instructions and Checklist* for field Investigation.¹⁶ When DHS seeks court intervention, the trial court also has a check list which should begin for almost every case in the form of a petition. If the trial court discovers that the child may have Indian heritage and that notice has not been given, the trial must stop the proceedings, absent immediate danger to the child, and allow the tribe at least ten days to respond to the notice, a time period extendable up to twenty additional days upon request. 25 USC 1912 (A); MCR 3.967 (A).

Moreover, because the trial court has no authority to determine tribal membership, once it discovers a strong possibility that ICWA may apply, the best practice would be for the trial court to assume, until proven otherwise, that the child is Indian and use the proper rule for removal of Indian children, MC 3.967, which states:

Rule 3.967 Removal Hearing for Indian Child

¹⁶ Determine American Indian heritage; see NAA 200, Identification of an Indian Child, for how to determine American Indian heritage and the process that must be followed if a child/family has American Indian heritage. PSM 713-1, p. 2 .

(A) Child in Protective Custody. If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974, a removal hearing must be completed within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to 25 USC 1912(a) or the court adjourns the hearing pursuant to MCR 3.923(G). Absent extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than 45 days.

(B) Child Not in Protective Custody. If an Indian child has not been taken into protective custody and the petition requests removal of that child, a removal hearing must be conducted before the court may enter an order removing the Indian child from the parent or Indian custodian.

(C) Notice of the removal hearing must be sent to the parties prescribed in MCR 3.921 in compliance with MCR 3.920(C)(1).

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(E) A removal hearing may be combined with any other hearing.

(F) The Indian child, if removed from home, must be placed in descending order of preference with:

- (1) a member of the child's extended family,
- (2) a foster home licensed, approved, or specified by the child's tribe,
- (3) an Indian foster family licensed or approved by a non-Indian licensing authority,

(4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed in subrule (F), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b).

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. {Underlining added}.

If a petition proceeds, whether or not the the trial court removes the child, the trial court has additional duties pursuant to ICWA. If the child is removed or if a petition is

authorized and the tribe has not intervened, the *trial court* has a duty to serve the tribe with notice of the proceeding. MCR 3.965(B)(2):

(B) Procedure.

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, **notify the tribe**, and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, **follow the procedures set forth in MCR 3.967**. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one expert witness is present to provide testimony. {emphasis added}.

Subsequent to the preliminary hearing, the trial court has additional duties of service to the Indian tribe absent verification that the child was not Indian. MCR 3.921 delineates that the trial court has an ongoing duty to provide notice:

(1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(h) in accordance with the notice provisions of MCR 3.905, if the child is an Indian child:

(i) the child's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(ii) the child's parents or Indian custodian, and if unknown, the Secretary of the Interior, and

Without DHS providing the initial record of Indian heritage inquiry and subsequent notice, the trial court will continually breach its ongoing duties toward giving notice.

Absent the trial court ensuring that a written record is created and placed into its file of service to the specific tribe or Department of the Interior if the tribe is unknown, the trial court risks compounding the DHS' original error of failing to serve the tribe. Specific

types of proceedings, such as dispositional reviews, permanency planning hearings, and hearings on juvenile guardianships *all require the trial court to provide notice.* ¹⁷

Without a record of compliance by DHS with the notice requirement, the trial court did not even have authority to proceed as to any type of proceeding against Courtney Hinkle regarding her son Jeremiah. To find that the trial court did not have a duty to ensure that a record is to render the trial court unable to justify its actions as to proceeding on a petition, or stopping the proceeding to allow the appropriate time limits under ICWA at § 1912. Such a finding is to misapply ICWA and to help perpetuate the very practices that Justice Kavanaugh stated had led to this Court's publishing *The Indian Child Welfare Act of 1778: A Court Resource Guide*. Without a record of notice compliance, the trial court was at risk for further noncompliance as to the application of ICWA using the proper burden for removal from parental custody, ie. the standard of "clear and convincing" pursuant to MCR 3.967(C)(1), rather than rather than "contrary to the welfare," pursuant to MCR 3.965(C)(2), and active efforts as opposed to reasonable

¹⁷ MCR 3.921: (2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hearing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:

(j) if the child is an Indian child, the child's tribe,
l) if the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior, and; see also 712A.19(5)(g) for review hearings and MCL 712A.19a(4)(f) for permanency planning hearings.

(3) Termination of Parental Rights. Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in subrule (B)(2), except that if the child is an Indian child, notice shall be given in accordance with MCR 3.920(C)(1). See also 712A.19b(2)(f).

(C) Juvenile Guardianships. In a juvenile guardianship, the following persons shall be entitled to notice:

(8) if the child is a member of a federally recognized Indian tribe, the child's tribe, Indian custodian, or if the tribe is unknown, the Secretary of the Interior;

efforts. *In re JL*, 483 Mich 300, 318-319; 770 NW2d 853 (2009). To find that trial court's had no duty to obtain and maintain an adequate record of notice to an Indian tribe in the manner proscribed in ICWA to dismantle the statutory scheme to protect Indian children. Stating one served "ICWA" as DHS did in this case does not equate to proper service, and the finding of the trial court in the instant case that "ICWA" was served, was absurd at best, and has caused unconscionable delays. The finding by the Michigan Court of Appeals that the tribe had "actual notice" when it had no notice because nothing was contained in the trial court's record, in itself shows the importance of finding that the trial court had a duty to ensure its files reflected the need for a complete record.

III. NO PARENT IN ANY STATE COURT CHILD PROTECTIVE PROCEEDING OR TRIBAL CHILD PROTECTIVE PROCEEDING HAS THE LEGAL AUTHORITY TO WAIVE HIS OR HER CHILD'S STATUS AS AN "INDIAN CHILD," AND RESPONDENT APPELLANT COURTNEY HINKLE NEVER EVEN ATTEMPTED TO WAIVE HER SON'S INDIAN STATUS IN THIS CASE.

A. THE INDIAN CHILD WELFARE ACT STATED PURPOSE IS TO PROTECT THE RIGHTS OF INDIAN CHILDREN, INDIAN FAMILIES AND INDIAN TRIBES, AND THE ACT ENDOWS THE INDIAN CHILD WITH RIGHTS SEPARATE FROM HIS PARENT(S) TO PURSUE TRIBAL ENROLLMENT UPON REACHING THE AGE OF MAJORITY EVEN IF ADOPTED AND ENDOWS THE INDIAN TRIBE WITH RIGHTS SEPARATE FROM THAT OF AN INDIVIDUAL PARENT OR CHILD.

From the title of alone, the intent of ICWA is clear that the act is to benefit children.

The Indian Child Welfare Act was based upon the findings that the United States government is a trustee of Indian tribes.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such

children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

No section of ICWA has a "waiver" provision to allow a parent to waive any rights that an "Indian child" may have. 25 USC 1901 et seq. On the contrary, a person who comes into foster care and ultimately becomes an adoptee has rights to pursue tribal enrollment even after reaching the age of majority. The Indian "child" in a child protective proceeding, even upon reaching the age of majority, has rights separate and distinct from his or parent, whether an adoptive parent or a biological parent.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. {emphasis added}.

Further, not only the Indian "child" has rights separate and distinct from both the birthparent- rights that extend beyond the termination of jurisdiction of a child protective and/or adoptive proceeding, but the Indian tribe maintains separate and distinct rights from that of a birth parent as evidenced in the decision of the Michigan Court of Appeals in *In re Hanson*. 188 Mich App 392: 470 NW2d 669 (1991). In that case, the Indian "child," Elaine Hanson, was a person of mixed racial identity but with alleged Indian heritage, who had been adopted and was allegedly not an enrolled tribal member. Upon reaching the age of majority, adoptee Elaine Hanson sought to re-open obtain information from her adoptive file with the argument that the information was necessary to establish her tribal eligibility. The Wayne County Probate Court, holding that the

Indian Child Welfare Act did not apply, denied the petition to the adoptee/plaintiff.

Reversing the trial court, the Michigan Court of Appeals held that “the express policy of the ICWA as set forth in 25 USC 1902,” which was to protect both the best interest of Indian children and “to promote the stability and security of Indian tribes and families,” required reversal as the adult adoptee had “demonstrated good cause as a matter of law for the release of any information regarding her biological mother which could assist in establishing her tribal affiliation.” *Hanson, supra* at 397.

In the *Hanson, supra*, the biological mother had during the appellate period been found and had consented to the release of information from the trial court’s adoption file. Significantly, the Court of Appeals, acknowledging that the case presented issues of first impression, broadened its ruling beyond the immediate situation of the appellant to address the situations in which the adult adoptee had not procured the consent to the disbursement of the information in the closed adoption files. In those situations, the Michigan Court of Appeals recognized the *independent status of the Indian tribe*—a status separate from that of the biological parent and the Indian child adopted. Relying on the *BIA Guidelines* which adopted the standard of 25 USC 1951(b), the Court of Appeals found that “the probate court should release the identifying information to the appropriate tribe, not the adoptee.” *Hanson, supra* at 397-399.

Not one point in the record did Courtney Hinkle on behalf of her son, Jeremiah Gordon, waive notice to the Saginaw Chippewa Tribe of the proceedings. Enacted to rectify past wrongs against Indian families, Indian children, and Indian tribes, ICWA is a remedial statute that must be liberally construed “in favor of the persons intended to be benefitted.” *Empson-Laviolette v Crago*, 280 Mich App 620, 629; 760 NW2d 793 (2008).

Even if Courtney Hinkle had even attempted to waive the duty of DHS and the trial court to comply with ICWA, the statute has to be construed in the favor of the persons benefitted. Jeremiah Gordon was one of those persons, and the tribe was another. Further, the application of ICWA at any rate would have benefitted Courtney Hinkle because of the higher burden of proofs for removal, assuming jurisdiction, and finding statutory grounds for termination. MCR 3.967; 25 USC 1912 (d),(e), and (f). The fact that her attorney did not make a record at every hearing did not constitute a waiver. The first hearing, Ms. Hinkle did not receive notice, and did not have an attorney. The second hearing, entitled the preliminary hearing, she informed the trial court of her heritage and that her family had tribal members. {Tr. 5-22-08, pp. 27-28}. At that point, the trial court helped DHS to violate ICWA. The waiver argument has no basis in law or even the facts of this case.

B. FEDERAL CASE LAW PRIOR TO THE ENACTMENT OF THE INDIAN CHILD WELFARE ACT HAS RECOGNIZED THAT THE RIGHTS OF THE TRIBE CANNOT BE WAIVED BY ANY INDIVIDUAL ACTING ON BEHALF OF AN ALLEGED INDIAN CHILD, NOR CAN THE RIGHTS OF AN INDIAN TRIBE BE DENIED BY THE CHILD'S STATUS AS A WARD OF THE STATE OF MICHIGAN.

Michigan jurisprudence has recognized the separate right of a child's Indian tribe as to decisions about child custody even prior to the enactment of the Indian Child Welfare Act. In the 1973 case of *Wisconsin Potowatomies of the Hannaville Indian Community v. Houston*, 393 F. Supp 719 (W.D. Mich) 1973, the tribe sued the director of the Michigan Department of Social Services regarding the custody of three children of an Indian father and on-Indian mother. The children on original petition became temporary court wards of a county probate court, but were ultimately committed to

Michigan Children's Institute,¹⁸ a division of DHS, formerly DSS. The adoptive plan was for placement in Florida with maternal (non-Indian) relatives. Despite the findings that the probate court had lawfully exercised its jurisdiction when the children had come into foster care following a death of a parent during a time when the children were physically not on the tribe's reservation, and although a relative had sought relief in the probate court by filing for custody and had thus submitted himself to the personal jurisdiction of the probate court, the federal district court held that the actions of an individual person could not defeat the rights of the Indian tribe. *Wisconsin Potowatomies, Etc. v. Houston*, supra at 733. This pre-ICWA case addresses "waiver" of Indian rights albeit in the context of a relative to the children waiving rights of an Indian tribe. The federal court held that an individual's action on behalf of Indian children could not vitiate the rights of the child(ren)'s tribe, to wit:

Indeed, had no one from the tribe made any attempts to locate and care for the Wandahsega children between the time they became orphaned and the time this lawsuit was filed, this court might be inclined to find, not a conferring of jurisdiction upon the state court, but perhaps *a waiver of the right to assert tribal jurisdiction*.

But such is not the case. Efforts were made by the parties to whom tribal custom would dictate custody to find and care for the Wandahsega children. *The fact that the attempts were made by an individual seeking to assert his personal interest in the children does not mean that the tribe had failed to assert its jurisdiction*. Indeed, the tradition of the Potowatomies reveals that it is their custom to act informally, through blood relatives, in affairs of the family. Had Jake McCulloch been successful in finding the children, returning them to the reservation, and commenced caring for them, it well may be that the tribal authorities may have considered that no dispute existed over which to assert jurisdiction and render a decision. Whereas, in white society, orphaned children may always present a question for procedural government intervention, that may not be the case among Indian tribes. It is not for this court or the state court to say that the Hannahville Community must have a formal procedure to determine

¹⁸ The Michigan Children's Institute is governed by the Social Welfare Act, MCL 400.201 et seq. The MCI Superintendent is empowered to consent to the adoption of its wards. MCL 400.209.

guardianship. It is sufficient that the tribe has shown that, according to its standards, it did not abandon interest in the children or jurisdiction over them. *Relinquishment of Indian rights is not to be lightly inferred. Doubts as to the intent of a law, or a treaty, are to be resolved in favor of the Indians, and are to be construed as the Indians understood their meaning.* See *Waldron v. U. S.*, 143 F. 413 (8 Cir. 1905). If this be so, doubts as to existence of a custom or the intent to abandon a custom must likewise be resolved in favor of the Indians. {Italics added} *Wisconsin Potowatomies, Etc. supra* at 733-734.

Thus, despite the illegal seizure of Jeremiah Gordon and all the actions of the trial court subsequently through the termination of mother's parental rights, nothing that the mother could have done in this case constituted a waiver of the rights of her child. Jeremiah Gordon's rights to claim his Indian heritage survive even his commitment to Michigan Children's Institute even if the mother had, which she emphatically did not, "waive" his Indian status. Even if *he were to be adopted, his rights to pursue his Indian tribal membership survive. In re Hanson, supra.*

The tribe contains the insurance policy to the store that was robbed, and Jeremiah Gordon's rights to pursue a claim to his heritage and tribal membership persist. Moreover, in this case, the record is devoid of even an attempt by the respondent mother to waive any Indian heritage rights to her son. The fact that she was honest with the trial court that she had been denied monetary benefits (most likely casino profits from Soaring Eagle casino) is a foolish foundation upon which the Prosecutor built a "waiver argument," an argument swallowed by the Michigan Court of Appeals to side step the issue of "conditional affirmance" as in *In re Morris, COA Case Number: 299471, SCt Case Number: 142759 (pending).*

C. FEDERAL AND STATE CASE LAW INTERPRETING THE INDIAN CHILD WELFARE ACT AND INDIAN STATUS HAS CONSISTENTLY RECOGNIZED THAT IN CHILD PROTECTIVE PROCEEDINGS AND ADOPTIONS NOT ONLY

INDIAN CHILDREN BUT INDIAN TRIBES HAVE RIGHTS SEPARATE AND DISTINCT FROM THAT OF BIOLOGICAL PARENTS.

In *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (1989), a biological Indian mother of twin babies arranged for an adoption by a couple through a state court proceeding. Although the state trial court had been apparently aware of that the Indian Child Welfare Act, the Act was not mentioned in the final decree of adoption. Two months after the final decree of adoption, the Choctaw Indian tribe moved to vacate the adoption. The trial court denied the motion; the Supreme Court of Missouri affirmed the trial court. The trial court had noted that the mother of the twins had gone to some effort to defeat tribal jurisdiction by ensuring that the twins had been born outside of the reservation and by promptly arranging for the adoption of the twins in a state court. The United States Supreme Court reversed. The Court found that the *Choctaw tribe* had a right to invoke the provisions of ICWA, and that it was the tribe's right to decide custody. The Supreme Court, mindful of the fact that the twins, at the time of its decision were now three years old and had spent their entire lives in their adoptive home and acknowledging that heartache that could ensue by their removal, nonetheless held that the *right of the tribe* to decide the ultimate custody of the twins trumped the both the wishes of the biological parents and the adoptive parents. *Choctaw, supra* at 49,54

Choctaw v. Holyfield, the only United States Supreme Court case interpreting ICWA, contains grave lessons for this Court in application of the Indian Child Welfare Act to the waiver argument devised in this case. In construing ICWA on the issue of domicile, the United States Supreme Court found that procedures in ICWA were to benefit the children as individuals *and* the tribes despite the actions and intent of parents, whether

or not charged in child protective proceedings, or voluntarily wishing to sever their parental rights:

Nor can the result be any different simply because the twins were "surrendered" by their mother. Tribal jurisdiction under 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. See 25 U.S.C. 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"), 1902 ("promote the stability and security of Indian tribes").²³ The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, e. g., 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen *as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves*. *Choctaw, supra*, at 49, {Emphasis added}

The United States Congress passed ICWA after lengthy hearings about the tragedy of the numerous break-up of Indian families and the placement into foster care and adoption of children with Indian heritage by non-Indians.¹⁹ Congress enacted the ICWA for the dual purpose of "protect[ing] the best interests of Indian children and [promoting] the stability and security of Indian tribes." Lewerenz and McCoy, *The End of "Existing Indian family" Jurisprudence: Holyfield at 20, In the Matter of A.J.S And The Last Gasps of a Dying Doctrine*; Williams Law Review, Vol. 36:2, 684, 691; also *Choctaw, supra*, at 50-52, *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996).

¹⁹ A 1976 study by the Association on American Indian Affairs found that 25 to 35% of all Indian children were being placed in out-of-home care. Eighty-five percent of those children were being placed in non-Indian homes or institutions. Unger, Steven, ed., *The Destruction of American Indian Families*, New York: Association on American Indian Affairs, 1977, p.1.

Choctaw v. Holyfield stands as the ultimate authority that the actions of an individual acting on behalf of his or her biological child does not have the legal capacity to defeat the rights given to the tribe by the Indian Child Welfare Act. Through its children, the tribe seeks to continue its culture and its existence. The tribe is the insurance policy on the store from which DHS in this case committed a smash and grab. Even if the mother were robbed of custody, temporarily or permanently, her actions could not ever defeat the rights to which Indian tribes have been afforded in federal and state law even prior to the enactment of ICWA. The passage of the Indian Child Welfare Act in 1978 was after hearings in which the continuity of tribal cultures and tribal continuity was threatened by the break-up of Indian families often at the hands of state agencies. When DHS violated ICWA in this case by failing to even investigate Indian heritage prior to seeking an ex parte order to remove, the trial court should have triggered the store's burglar alarm and allowed it to ring until at a minimum until the Saginaw Chippewa Tribe had received notice by registered mail. Even if the respondent mother Courtney Hinkle had wanted to turn off the burglar alarm, she lacked the legal key to do so. Waiver by a parent of a child's potential membership or affiliation in an Indian tribe during a child protective proceeding is an argument based on legal quicksand to which this Honorable Court should allow to sink into legal oblivion.

CONCLUSION AND RELIEF REQUESTED

Only a tribe can determine whether a person including a child is a member or eligible for membership. *Santa Clara Pueblo v. Martinez*, 436 US 49, n32; 98 S Ct 1670 (1978). What triggers DHS's initial compliance duties with ICWA as to notice being sent is indication, not proof, of Indian heritage of the parent and/or the child. By the time she

was requesting an Order To Take Into Custody, Ms. Bailey should have had written proof placed in the CPS file-proof that needed to be shared with the trial court at intake-that both Courtney Hinkle and the Saginaw Chippewa Tribe had been served by registered mail with notice of pending state intervention. 25 USC 1912.

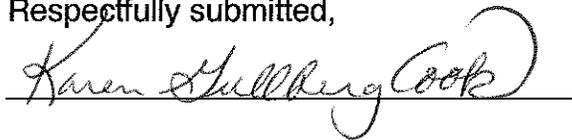
If child protective proceedings were equitable proceedings rather than statutory proceedings, the situation in this case would be one where Appellant could argue that the petitioner had "dirty hands" when it sought relief. The OTTIC request was the set-up for the attempt to rob the mother of her child; the trial court allowed it to succeed and gave it its blessing, when it should have pulled the burglar alarm and stopped the proceedings. Just as when a crime is committed, the police are mandated to write a report, the trial court was mandated to keep a record, and mandated itself to send notice of every hearing beyond the preliminary hearing to the tribe unless the child's status had been verified as non-Indian. Service to the tribe was not done as to the original petition, the disposition, the dispositional reviews, the permanency planning hearing, and on the supplemental petition to terminate parental rights. Without the maintenance of an appropriate record as to notice compliant with the requirements of ICWA at the inception of the case, error after error followed.

To the Michigan Court of Appeals, none of the violations of the Juvenile Court Rules, the Juvenile Code, and the Indian Child Welfare Act, seemed to matter because it found that the tribe had received actual notice without a scintilla of proof that the tribe had any notice, and even more troublesome, because the mother had somehow indicated to the trial court that she had waived her son's rights and ultimately those of the Saginaw

Chippewa Tribe to notice. The holding was absurd, tragic, and disrespectful to the Indian community all at once.

Appellant requests that this Honorable Court grant her Application for Leave To Appeal and ultimately reverse the decision of the trial court and the Michigan Court of Appeals and restore physical custody of Jeremiah Gordon to her.

Respectfully submitted,

A handwritten signature in cursive script that reads "Karen Gullberg Cook". The signature is written over a horizontal line.

Karen Gullberg Cook P26141
Attorney for Appellant Courtney Hinkle

Date: December 10, 2011

**EXHIBIT 1 The Indian Child Welfare Act of 1778: A Court Resource
Guide 2011, excerpts**

2011

Indian Child Welfare Act of 1978:
A Court Resource Guide

ICWA Special Committee

State Court Administrative Office

March, 2011

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INTRODUCTION

This court resource guide was written by a special committee formed by the Michigan Supreme Court to help Michigan judges learn about the federal Indian Child Welfare Act of 1978, the need for states to comply with the Act, and discuss its implementation in Michigan.

Some committee members asked, “Why now?” Why did the Court and the State Court Administrative Office (SCAO) wait more than 30 years to take a close look at the Indian Child Welfare Act (ICWA)? The answer has several components. First, SCAO’s Child Welfare Services division (CWS) recently began receiving more questions about our state’s compliance with this federal law. Second, CWS began participating in the Tribal State Partnership, a forum for the Michigan Department of Human Services (DHS) and the twelve federally-recognized tribes in Michigan. Third, the resulting discussions with local DHS personnel and tribal representatives made clear the need for a serious examination of how our state courts have applied (or ignored) the ICWA. Those events caused the Supreme Court to create this special committee and ask it to craft a court resource guide designed to provide practical ICWA advice to our state courts. Funding for the committee’s work was provided by SCAO’s Court Improvement Program and the State Bar of Michigan’s Interest on Lawyers Trust Accounts Program. See Administrative Order 1997-9.

Congress passed the ICWA in 1978 as a response to then-prevalent culturally insensitive state government child welfare practices that negatively impacted “Indian children” (a term defined in the ICWA), their families, and their tribes. Indian children who grow up in non-Indian homes lose touch with their cultural and spiritual roots. The ICWA aims to ensure that Indian children are removed from their parents only after carefully crafted efforts have been made to maintain the Indian family. This guide will help state courts to understand the ICWA concepts and how they interact with Michigan’s laws governing child welfare, guardianships, and adoptions. **The goal of the committee and this guide is to make the ICWA’s requirements the “best interest” considerations for Indian children, families, and tribes.**

While drafting this guide the committee as a whole met on four occasions between September 2008 and May 2009. The final product reflects the consensus agreements of the entire committee. In the future, CWS staff will review and update the guide periodically to ensure that it reflects evolving case law and court rule changes.

A subcommittee of the larger committee evaluated Michigan’s court rules and recommended that the Supreme Court rescind MCR 3.980 (then Michigan’s only court rule that referred to the ICWA), and insert ICWA-specific provisions throughout all the court rules that address child abuse and neglect proceedings, guardianships, and adoptions – all of which are proceedings to which the ICWA applies to some degree. Those recommended changes were adopted by the Court in January 2010, and became effective May 1, 2010. The new rules were included in the 2010 version of this Guide. While the full text of those rules do not appear in this 2011 edition, they can be reviewed

in full at SCAO's web site. The new or amended court rules are clearly marked in each corresponding section or subsection of this edition. However, SCAO recommends that the reader not rely solely on these references; a more thorough review of the revised rules themselves is highly recommended.

Questions or concerns about this guide may be directed to CWS staff, whose contact information appears in the Conclusion section.

ICWA Fundamentals

This guide (“Resource Guide”) will help Michigan judges interpret and apply the Indian Child Welfare Act of 1978 (ICWA), 25 USC 1901 – 1963, the related federal regulations, 25 CFR 23.1 – 23.83, and the less formal but more specific guidance provided by the US Department of the Interior, Bureau of Indian Affairs (BIA) in its *Guidelines for State Courts; Indian Child Custody Proceedings* (“BIA Guidelines”).

Unless the context requires a more formal citation, this guide will cite individual sections of the ICWA by their US Code section numbers (e.g., “ICWA §1901” or simply “§1901”). The same informal citation format will be used to cite specific sections of the BIA Guidelines. With those exceptions, this guide will follow the Michigan Uniform System of Citation.

This preliminary section titled “ICWA Fundamentals” discusses several universal terms and concepts that apply to all ICWA proceedings. Judges must know the types of proceedings to which the ICWA applies, the proper parties to an ICWA case, those parties’ respective burdens of proof, and the benefits of collaborating with the Department of Human Services (DHS) and the child’s tribe in ICWA cases. That knowledge will allow courts to apply the ICWA correctly and uniformly throughout Michigan.

I. Why Does This Guide Refer to “Indian” Children and “Tribes” Instead of “Native American” Children and “Bands”? MCR 3.002(4) and (9)

The ICWA itself uses the terms “Indian” and “Tribe”, starting with the Act’s official title. For consistency, this guide uses the Act’s terminology; Michigan state courts should do the same.

II. ICWA Definitions of “Child Custody Proceedings” and “Foster Care” MCR 3.002(1)

ICWA §1903 states that the Act applies to any “child custody proceeding” involving an Indian child. It is important to note that the ICWA definition of “child custody proceeding” has a much broader scope than that in Michigan law. §1903(1) states that “child custody proceeding” shall mean and include – (i) “foster care placement” ... (ii) “termination of parental rights” ... (iii) “preadoptive placement”

The ICWA defines “foster care placement” as:

...any action removing an Indian child from his parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. §1903(1)(i).

This ICWA concept of foster care is broader than a typical Michigan child welfare case.

Comparing those two special ICWA definitions to Michigan's statutes, we can see that the ICWA applies to the following child custody proceedings:

- 1) Foster care placements (MCL 712A.1 – 32)
- 2) Guardianships (MCL 700.1101 – 8102)
- 3) Terminations of parental rights (MCL 712A.1 – 32)
- 4) Adoptions and preadoptive placements (MCL 722.95 - 906; 710.21 – 70).

The ICWA has only two exceptions to its broad definition of "child custody proceeding." First, a child custody proceeding does not include "a placement based upon an act which, if committed by an adult, would be a crime." If a juvenile commits an act that would be a crime if committed by an adult and the placement is based upon that act, then the placement is not a "child custody proceeding" and the ICWA does not apply. All other placements of juveniles, including status offenses, are "child custody proceedings" and continue to fall under the provisions of ICWA.

Second, the statutory definition of a "child custody proceeding" does not include an award of custody to one of the parties in divorce proceedings. Thus, child custody and parenting time disputes between parents are not "child custody proceedings" and do not implicate the ICWA.

III. Delinquency Proceedings (MCR 3.903[F], 3.905, 3.931, 3.935)

The BIA Guidelines state, "Although most juvenile delinquency proceedings are not covered by the Act (ICWA), the Act does apply to status offenses" BIA Guidelines §B.3 and Commentary – Determination That Placement Is Covered by the Act. Whether the ICWA applies in a delinquency proceeding depends on two factors: (1) the type of offense or crime and (2) whether the placement was based upon an act that would be a crime if committed by an adult. If the Indian child is charged with a status offense, then the ICWA applies. For all other juvenile offenses when placement was based on an act that would be a crime if committed by an adult, the ICWA does not apply.

Important caveat: If the investigation of a criminal delinquency case reveals that the Indian child suffered abuse and neglect, then the ICWA will apply to any abuse and neglect petition arising out of the delinquency case. BIA Guidelines §B.3 and Commentary – Determination That Placement Is Covered by the Act.

Status Offenses

MCL 712A.2(a)(2)-(4) includes the following status offenses:

- (a)(2): The juvenile has deserted his or her home without sufficient cause, and the court finds on the record that the juvenile has been placed or refused alternative placement or the juvenile and the juvenile's parent, guardian, or custodian, have exhausted or refused family counseling.

placement would be based on an act that would be a crime if committed by an adult (i.e., not a status offense)

Non-Status Offenses

If an Indian child is returned home after committing an act to which the ICWA does *not* apply, the DHS Child Protective Services division (CPS) may intervene if a lack of proper supervision may have contributed to the child's delinquent behavior. CPS may then file a new petition to provide in-home services or to remove the child from the home and place him in a foster care setting. Note that the ICWA *would* apply to the proceedings under the new CPS petition even though it did *not* apply to the original juvenile proceeding that caused CPS to become involved. See the BIA Guidelines §B.3 and Commentary.

IV. Involuntary Proceedings (Multiple child protective proceeding court rules incorporate the concept of "involuntary" proceedings)

ICWA §1903(1)(i) defines "foster care placement" to include "*any* action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution ... where the parent or Indian custodian cannot have the child returned upon demand." This would include both emergency removals under ICWA §1922 and other involuntary removal procedures authorized by Michigan law. In Michigan, that almost always will involve DHS, whose removal of a child from a parent is an involuntary proceeding *from the parent's perspective*. The ICWA definition of an [involuntary] "foster care placement" also includes guardianship petitions.¹

If the removal is involuntary (i.e., pursuant to an abuse and neglect petition), the ICWA will apply and the following requirements must be met:²

- The tribe must be notified, along with the parents, Indian custodian, etc. MCR 3.905(C), 3.920(C), 3.921;
- "Active efforts" must be made to maintain the Indian family MCR 3.961;
- A "qualified expert witness" must testify to the necessity of the removal MCR 3.967;
- The placement preferences in the ICWA must be honored unless the child's tribe adopts a resolution that alters those preferences.

Involuntary Placement in Foster Care MCR 3.967

ICWA §1912(e) states that:

¹ Juvenile guardianships pursuant to MCL 712A.19a and 19c, "full" guardianships pursuant to MCL 700.5204 are covered by the ICWA.

² "Active efforts" and "qualified expert witness" have special ICWA definitions. Those definitions and the other requirements listed in the text above are discussed in more detail throughout this guide.

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by *clear and convincing evidence, including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Furthermore, ICWA §1912(d) states that any party who petitions a state court to remove an Indian child from the home must show that “ACTIVE EFFORTS” were made to prevent the need for the child’s removal. These efforts must take into account the tribe’s social and cultural conditions and way of life, and they should make use of tribal and extended family resources.

To meet the ICWA’s “clear and convincing evidence” threshold, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the child. The evidence must show the relationship between the conditions and the damage that is likely to result. See BIA Guidelines D.3 and Commentary – Standards of Review.

Generalized evidence of community or family poverty, crowded or inadequate housing, or nonconforming social behavior does not constitute “clear and convincing evidence” of home conditions that will cause serious emotional or physical damage. The evidence for removal must focus on specific conditions and the likelihood that they will cause serious damage to the child. See BIA Guidelines §D.3 and Commentary – Standards of Review.

Involuntary Termination of Parental Rights (MCR 3.977[G])

To terminate the parental rights to an Indian child, ICWA §1912(f) requires evidence *beyond a reasonable doubt* – including testimony from “QUALIFIED EXPERT WITNESSES” – that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Before seeking a termination of parental rights, the petitioner must have made the same types of “active efforts” described above and discussed in more detail in section IX below.

The court may not terminate parental rights simply because:

- 1) someone else could do a better job of raising the child; or
- 2) termination is in the child’s best interest; or
- 3) the parents or custodians are “unfit parents.”

The petitioner must prove that serious emotional or physical damage to the child will occur if the child stays with her parents or Indian custodian. See BIA Guidelines and Commentary §D.3 – Standards of Evidence and Commentary.

Notice of Involuntary Proceedings (MCR 3.905[C], 3.921[C])

According to the BIA Guidelines §B.5 – Notice Requirements, notice of an involuntary proceeding must clearly state all of the following information:

- 1) The name of the Indian child.
- 2) The child's tribal affiliation.
- 3) A copy of the petition, complaint, or other document initiating the proceedings.
- 4) The petitioner's name, along with the name and address of the petitioner's attorney.
- 5) A statement that the parents, Indian custodian, and tribe all have a right to intervene in the proceedings.
- 6) A statement that the court will appoint counsel for the parents or custodian if they cannot afford one.
- 7) A statement that the parents or Indian custodian may have additional time to prepare for the proceedings, if needed.
- 8) The court's location, mailing address, and telephone number.
- 9) A statement that the parents, custodian, and tribe all have a right to petition the court to transfer the case to the tribal court.
- 10) The potential legal consequences of a current adjudication for the future custodial rights of the parents or custodian.
- 11) A statement that the child custody proceedings may be confidential and that the tribe must not share information about the proceedings with anyone who is not entitled to know it.

V. Voluntary Proceedings

Certain parts of the ICWA apply to voluntary proceedings such as parental consents to foster care, termination of parental rights, adoptive placement, and guardianships. See ICWA §1913. If the ICWA applies to one of these proceedings, the following procedural issues must be addressed:

- Notice. Under §1911(c), Indian custodians and tribes have the right to intervene at any time during the proceedings. Without notice of the proceedings, they could not invoke that right. See *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30 (1989.) MCR 3.802(A)(3); MCR 3.807(B)(2); MCR 5.109, MCR 5.402(E)(3)
- Consent. A valid consent document must be executed (see below for details and statutory authority).
- Placement. The placement preferences in the ICWA must be followed unless amended by the tribe. (See PLACEMENT OF INDIAN CHILDREN Section below.)

A parent's request for anonymity has priority over the ICWA notice and placement-preference provisions.

Identifying an Indian Child or Indian Tribe; Notification Requirements

MCR 3.802(A), MCR 3.905, MCR 3.920, MCR 3.921,
MCR 5.109, MCR 5.402(E)(3)

To ensure compliance with the ICWA, state courts must determine: (1) whether the child appearing before the court is an “Indian child” (2) if so, to which tribe the child belongs and (3) if the child is eligible for membership in multiple tribes, which tribe the ICWA designates as “the Indian child’s tribe.”

I. Is the Child an “Indian Child” for Purposes of the ICWA?

ICWA §1903(4) defines an “Indian child” as someone who is (1) under the age of 18 and unmarried, and *either* (a) a member of a federally recognized Indian tribe, *or* (b) the biological child of a member of an Indian tribe *and* eligible for membership in any federally-recognized Indian tribe.¹³

The best way to identify an “Indian child” and determine the tribal affiliation is to contact the tribe and inquire. *The tribe’s determination of membership or eligibility for membership is conclusive.*

Ask the DHS Caseworker About a Child’s ICWA Status

MCR 3.935(B)(5) and MCR 3.965(B)(2) requires courts to “inquire if the child or either parent is a member of any American Indian tribe or band.” If so, the court “must determine the identity of the child’s tribe.”

If a court has assigned a DHS caseworker to the case, that caseworker will have access to this information. Caseworkers must determine at the outset whether a child is an “Indian child” for purposes of the ICWA. DHS POLICY instructs caseworkers to work with tribes to meet this requirement. SCAO recommends that courts verify specific steps taken by the DHS caseworker to determine the child’s American Indian status. This will significantly reduce the risk of discovering the child’s Indian heritage at an advanced stage in the proceedings, thereby causing significant delays and wasting court time.

If No DHS Caseworker has Been Assigned to the Case

Not all state court child welfare matters will involve DHS caseworkers. For example, filing a petition for a limited or full guardianship will not automatically cause DHS to become involved. See MCR 5.404(A).

¹³ The court in *In re Fried*, 266 Mich App 535 (2005), held that the ICWA does not apply if the Indian child’s tribe is not federally recognized.

In those cases, the petitioning party must designate the child as an Indian child,¹⁴ pursuant to MCR 5.404(A).

According to the BIA Guidelines, § B.1 Determination That Child Is an Indian, a state court has reason to believe a child may be an Indian child if:

- 1) A party to the case, an Indian tribe, an Indian organization, or a public or private agency tells the court that the child is an Indian child.
- 2) Any public or state-licensed agency involved in child protection services or family support has information suggesting that the child is an Indian child.
- 3) The child gives the court reason to believe he or she is an Indian child.
- 4) The court knows that the residence or domicile of the child, the child's biological parents, or the child's custodian is a predominantly Indian community.
- 5) An officer of the court involved in the proceedings has knowledge that the child is an Indian child.

These are the most common circumstances that should give a court reason to believe that the child may be an Indian child, thereby invoking the ICWA. But the list is not exhaustive. Courts must watch for other indications that the ICWA will apply to a child's case.

If in doubt, a court may appoint a lawyer guardian ad litem for the child to help investigate the child's Indian heritage or order DHS or a court employee to investigate the child's tribal affiliation after a temporary guardianship is ordered. See the Guardianship section below for more details.

II. What is the "Indian Child's Tribe" for Purposes of the ICWA? (MCR 3.002[6])

ICWA §1903(5) defines an "Indian child's *tribe*" as the tribe (or tribes) that the child is a member of or eligible to join. If the child already belongs to more than one tribe or is eligible for membership in more than one tribe, then the ICWA recognizes the tribe with which the child has the more significant contact.

The ICWA applies to all federally-recognized tribes in the United States. The federal Bureau of Indian Affairs recognizes 565 American Indian and Alaska Native tribes.¹⁵ Twelve of those federally-recognized tribes reside in Michigan.

- 1) Bay Mills Indian Community
- 2) Grand Traverse Band of Ottawa and Chippewa Indians
- 3) Hannahville-Potawatomi Indian Community
- 4) Keweenaw Bay Indian Community

¹⁴ Guardianship petitioners can designate a child as an "Indian child" by checking Item 5 on *SCAO FORM 651* (Petition for Appointment of Guardian of Minor) or by checking the second box on Item 3 on the *SCAO FORM 650* (Petition for Appointment of Limited Guardian of Minor).

¹⁵ Source: U.S. BUREAU OF INDIAN AFFAIRS

EXHIBIT 2 Court Rules Regarding Indians



Michigan Supreme Court

State Court Administrative Office

Child Welfare Services

Michigan Hall of Justice

P.O. Box 30048

Lansing, Michigan 48909

Phone (517) 373-8036

Kelly Howard
Director

MEMORANDUM

DATE: February 11, 2010

TO: Chief Circuit Judges

cc: Presiding Family Division Judges
Circuit Court Administrators
Family Division Administrators

FROM: Kelly Howard, Director, SCAO Child Welfare Services Division

RE: MCR amendments incorporating the Indian Child Welfare Act (ICWA), 25 USC 1901-1963

The federal Indian Child Welfare Act became law in 1978. Because no federal regulations have been available to guide them, states have varied in their interpretations and use of the ICWA, which has led to inconsistent application around the country, and from court to court within Michigan. While the ICWA's intent is clear on some issues, it is frustratingly opaque on others. The Bureau of Indian Affairs issued its "Guidelines for State Courts" in 1979, but the guidelines are not as authoritative as formally promulgated federal regulations.

With these realities in mind, SCAO's Court Improvement Program created a state-tribal ICWA Committee to analyze the ICWA and offer interpretive recommendations to Michigan courts. The committee recently published a bench guide entitled the ICWA Court Resource Guide.

While drafting that bench guide, the committee also asked SCAO to help conduct a thorough review of all Michigan court rules that apply in ICWA cases. A subcommittee created to conduct that review subsequently recommended extensive rule amendments designed to incorporate the ICWA's provisions into the Michigan Court Rules. Whenever possible, the subcommittee based its recommendations on the exact language of the ICWA. If the ICWA did not provide explicit rules, the subcommittee also relied on the BIA's "Guidelines for State Courts."

The court rules subcommittee formally presented its recommendations to the Michigan Supreme Court in October 2009. The Court designated the matter as ADM File No. 2008-43, and published the proposed rules for comment. Following the public comment period, the justices

unanimously adopted the recommended MCR amendments on January 27, 2010, and ordered that they take effect May 1, 2010. These rule changes provide guidance to the trial courts about the nuances of the ICWA, especially with regard to how the courts' handling of cases that involve an "Indian child" and an "Indian child's tribe" must differ from other child protection, guardianship, and adoption cases.

The new and amended court rules can be found on SCAO's website at:

<http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#approved>

The rule changes include:

- Deletion of MCR 3.980, Michigan's only previous court rule addressing the ICWA, and its replacement with multiple new and amended court rules. Most of the amendments appear in Subchapter 3.900, Proceedings Involving Juveniles. Others affect Subchapters 3.800 (Adoption) and 5.400 (Guardianship, Conservatorship and Protective Order Proceedings).
- Additional definitions of special-meaning terms such as "Indian child," "Indian child's tribe," "reservation," and "child custody proceeding." [Note: In ICWA proceedings, "child custody proceeding" has a definition unique to ICWA.] All the definitions come directly from the ICWA; the definitions will help courts discern to whom the ICWA applies and who must be considered a party to an ICWA case under the federal law. For example, the definition of "child custody proceeding" includes "foster care placement." And the latter term includes guardianships, not just our traditional concept of foster care placements that are based on abuse and neglect. This federal requirement is clearly noted in the amended court rules.
- Required notice of proceedings to be provided to Indian tribes when the ICWA mandates it. The ICWA allows tribes to intervene at any time during an ICWA proceeding; therefore, state courts must provide notice of their hearings so the affected tribe(s) will have an opportunity to assert that right.
- Clarification that an Indian tribe has exclusive jurisdiction over any ICWA-defined "child custody proceeding" involving a child whose residence or domicile is on a reservation. If a tribe has exclusive jurisdiction, the amended court rules now explicitly state that a Michigan trial court must dismiss the case, thereby allowing the tribe to assert its jurisdiction.

The amendments reflect substantial revisions of the rules relating to child protective proceedings, adoption, and guardianships, and this short summary outlines only a few of the most important changes. SCAO recommends that you thoroughly review the amendments as you prepare to implement the new rules on May 1, 2010. Child Welfare Services in SCAO will conduct statewide training on the ICWA Court Resource Guide beginning this summer, and the new court rules will be incorporated in those training sessions.

February 11, 2010

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If judges or court staff have questions about these court rules, please contact Angel Sorrells at sorrellsa@courts.mi.gov or Amy Byrd at byrda@courts.mi.gov.

CHAPTER 3. SPECIAL PROCEEDINGS AND ACTIONS

MICHIGAN COURT RULES OF 1985

Subchapter 3.000 General Provisions

Rule 3.002 Indian Children

For purposes of applying the Indian Child Welfare Act, 25 USC 1901 *et seq.*, to proceedings under the Juvenile Code, the Adoption Code, and the Estates and Protected Individuals Code, the following definitions taken from 25 USC 1903 and 25 USC 1911(a) shall apply.

(1) "Child custody proceeding" shall mean and include

(a) "foster-care placement," which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated,

(b) "termination of parental rights," which shall mean any action resulting in the termination of the parent-child relationship,

(c) "preadoptive placement," which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and

(d) "adoptive placement," which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act that, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "Exclusive jurisdiction" shall mean that an Indian tribe has jurisdiction exclusive as to any state over any child custody proceeding as defined above involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law.

Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 USC 1911[a]. *CHAPTER 3 SPECIAL PROCEEDINGS AND ACTIONS Chapter Last Updated 9/29/2011*

(3) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 years and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(4) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 USC 1606.

(5) "Indian child" means any unmarried person who is under age 18 and is either

(a) a member of an Indian tribe, or

(b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(6) "Indian child's tribe" means

(a) the Indian tribe of which an Indian child is a member or eligible for membership, or

(b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

(7) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(8) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(9) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 43 USC 1602(c).

(10) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father whose paternity has not been acknowledged or established. *CHAPTER 3 SPECIAL PROCEEDINGS AND ACTIONS Chapter*

(11) "Reservation" means Indian country as defined in section 18 USC 1151 and any lands not covered under such section, for which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

(12) "Secretary" means the Secretary of the Interior.

(13) "Tribal court" means a court with jurisdiction over child custody proceedings and that is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative

Rule 3.963 Protective Custody of Child

(A) Taking Custody Without Court Order. An officer may without court order remove a child from the child's surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to conclude that the health, safety, or welfare of the child is endangered. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical harm to the child.

(B) Court-Ordered Custody.

(1) The court may issue a written order authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, upon presentment of proofs as required by the court, the judge or referee has reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical harm to the child. At the time it issues the order or as provided in MCR 3.965(D), the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required. The court may also include in such an order authorization to enter specified premises to remove the child.

(2) The written order must indicate that the judge or referee has determined that continuation in the home is contrary to the welfare of the child and must state the basis for that determination.

(3) The court shall inquire whether a member of the child's immediate or extended family is available to take custody of the child pending preliminary hearing, whether there has been a central registry clearance, and whether a criminal history check has been initiated.

(C) Arranging for Court Appearance. An officer or other person who takes a child into protective custody must:

(1) immediately attempt to notify the child's parent, guardian, or legal custodian of the protective custody;

(2) inform the parent, guardian, or legal custodian of the date, time, and place of the preliminary hearing scheduled by the court;

(3) immediately bring the child to the court for preliminary hearing, or immediately contact the court for instructions regarding placement pending preliminary hearing;

(4) if the court is not open, contact the person designated under MCR 3.934(B)(2) for permission to place the child pending preliminary hearing;

(5) ensure that the petition is prepared and submitted to the court;

(6) prepare a custody statement similar to the statement required for detention of a juvenile as provided in MCR 3.934(A)(4) and submit it to the court.

Rule 3.965 Preliminary Hearing

(A) Time for Preliminary Hearing.

(1) Child in Protective Custody. The preliminary hearing must commence no later than 24 hours after the child has been taken into protective custody, excluding Sundays and holidays, as defined by MCR 8.110(D)(2), unless adjourned for good cause shown, or the child must be released.

(2) Severely Physically Injured or Sexually Abused Child. When the Family Independence Agency submits a petition in cases in which the child has been severely physically injured, as that term is defined in MCL 722.628(3)(c), or sexually abused, and subrule (A)(1) does not apply, the preliminary hearing must commence no later than 24 hours after the agency submits a petition or on the next business day following the submission of the petition.

(B) Procedure.

(1) The court must determine if the parent, guardian, or legal custodian has been notified, and if the lawyer-guardian ad litem for the child is present. The preliminary hearing may be adjourned for the purpose of securing the appearance of an attorney, parent, guardian, or legal custodian or may be conducted in the absence of the parent, guardian, or legal custodian if notice has been given or if the court finds that a reasonable attempt to give notice was made.

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe, and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one expert witness is present to provide testimony.

(D) Pretrial Placement; Reasonable Efforts Determination. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court.

(1) When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required. The court must make this determination at the earliest possible time, but no later than 60 days from the date of removal, and must state the factual basis for the determination in the court order. Nunc pro tunc orders or affidavits are not acceptable.

(2) Reasonable efforts to prevent a child's removal from the home are not required if a court of competent jurisdiction has determined that

(a) the parent has subjected the child to aggravated circumstances as listed in sections 18(1) and (2) of the Child Protection Law, MCL 722.638(1) and (2); or

(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, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter, or

(iv) a felony assault that results in serious bodily injury to the child or another child of the parent; or

(c) parental rights of the parent with respect to a sibling have been terminated involuntarily. *CHAPTER 3 SPECIAL PROCEEDINGS AND ACTIONS Chapter Last Updated 9/29/2011*

(E) Advice; Initial Service Plan. If placement is ordered, the court must, orally or in writing, inform the parties:

(1) that the agency designated to care and supervise the child will prepare an initial service plan no later than 30 days after the placement;

(2) that participation in the initial service plan is voluntary unless otherwise ordered by the court;

(3) that the general elements of an initial service plan include:

(a) the background of the child and the family,

(b) an evaluation of the experiences and problems of the child,

(c) a projection of the expected length of stay in foster care, and

(d) an identification of specific goals and projected time frames for meeting the goals;

(4) that, on motion of a party, the court will review the initial service plan and may modify the plan if it is in the best interests of the child; and

(5) that the case may be reviewed for concurrent planning.

The court shall direct the agency to identify, locate, and consult with relatives to determine if placement with a relative would be in the child's best interests, as required by MCL 722.954a(2). In a case to which MCL 712A.18f(6) applies, the court shall require the agency to provide the name and address

(a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

(b) may order placement of the child after making the determinations specified in subrules (C) and (D), if those determinations have not previously been made. If the child is an Indian child, the child must be placed in descending order of preference with:

petition. The court must read the allegations in the petition in open court, unless waived.

(5) The court shall determine if the petition should be dismissed or the matter referred to alternate services. If the court so determines the court must release the child. Otherwise, the court must continue the hearing.

(6) The court must advise the respondent of the right to the assistance of an attorney at the preliminary hearing and any subsequent hearing pursuant to MCR 3.915(B)(1)(a).

(7) The court must advise the respondent of the right to trial on the allegations in the petition and that the trial may be before a referee unless a demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912.

(8) The court shall allow the respondent an opportunity to deny or admit the allegations and make a statement of explanation.

(9) The court must inquire whether the child is subject to the continuing jurisdiction of another court and, if so, which court.

(10) The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or for other good cause shown. If the preliminary hearing is adjourned, the court may make temporary orders for the placement of the child when necessary to assure the immediate safety of the child, pending the completion of the preliminary hearing and subject to subrules (C) and (D).

(11) Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial. The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b). The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631.

(12) If the court authorizes the filing of the petition, the court:

CHAPTER 3 SPECIAL PROCEEDINGS AND ACTIONS Chapter Last Updated 9/29/2011 (5) No Right to Bail. No one has the right to post bail in a protective proceeding for the release of a child in the custody of the court.

(6) Parenting Time or Visitation.

(a) Unless the court suspends parenting time pursuant to MCL 712A.19b(4), or unless the child has a guardian or legal custodian, the court must permit each parent frequent parenting time with a child in placement unless parenting time, even if supervised, may be harmful to the child.

(b) If the child was living with a guardian or legal custodian, the court must determine what, if any, visitation will be permitted with the guardian or legal custodian.

(7) Medical Information. Unless the court has previously ordered the release of medical information, the order placing the child in foster care must include:

(a) an order that the child's parent, guardian, or legal custodian provide the supervising agency with the name and address of each of the child's medical providers, and

(b) an order that each of the child's medical providers release the child's medical records.

(3) The child's lawyer-guardian ad litem must be present to represent the child at the preliminary hearing. The court may make temporary orders for the protection of the child pending the appearance of an attorney or pending the completion of the preliminary hearing. The court must direct that the lawyer-guardian ad litem for the child receive a copy of the petition. *CHAPTER 3 SPECIAL PROCEEDINGS AND ACTIONS Chapter Last Updated 9/29/2011*

(4) If the respondent is present, the court must assure that the respondent has a copy of the petition. The court must read the allegations in the petition in open court, unless waived.

(5) The court shall determine if the petition should be dismissed or the matter referred to alternate services. If the court so determines the court must release the child. Otherwise, the court must continue the hearing.

(6) The court must advise the respondent of the right to the assistance of an attorney at the preliminary hearing and any subsequent hearing pursuant to MCR 3.915(B)(1)(a).

(7) The court must advise the respondent of the right to trial on the allegations in the petition and that the trial may be before a referee unless a demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912.

(8) The court shall allow the respondent an opportunity to deny or admit the allegations and make a statement of explanation.

(9) The court must inquire whether the child is subject to the continuing jurisdiction of another court and, if so, which court.

(10) The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or for other good cause shown. If the preliminary hearing is adjourned, the court may make temporary orders for the placement of the child when necessary to assure the immediate safety of the child, pending the completion of the preliminary hearing and subject to subrules (C) and (D).

(11) Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial. The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b). The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631.

(12) If the court authorizes the filing of the petition, the court:

(a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

(b) may order placement of the child after making the determinations specified in subrules (C) and (D), if those determinations have not previously been made. If the child is an Indian child, the child must be placed in descending order of preference with:

(i) a member of the child's extended family,

(ii) a foster home licensed, approved, or specified by the child's tribe,

(iii) an Indian foster family licensed or approved by a non-Indian licensing authority,

CHAPTER 3 SPECIAL PROCEEDINGS AND ACTIONS Chapter Last Updated 9/29/2011 (4) If the respondent is present, the court must assure that the respondent has a copy of the

- (i) a member of the child's extended family,
- (ii) a foster home licensed, approved, or specified by the child's tribe,
- (iii) an Indian foster family licensed or approved by a non-Indian licensing authority,
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b). The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(13) The court must inquire of the parent, guardian, or legal custodian regarding the identity of relatives of the child who might be available to provide care. If the father of the child has not been identified, the court must inquire of the mother regarding the identity and whereabouts of the father.

(C) Pretrial Placement; Contrary to the Welfare Determination.

(1) Placement; Proofs. If the child was not released under subrule (B), the court shall receive evidence, unless waived, to establish that the criteria for placement set forth in subrule 3.965(C)(2) are present. The respondent shall be given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence.

(2) Criteria. If continuing the child's residence in the home is contrary to the welfare of the child, the court shall not return the child to the home, but shall order the child placed in the most family-like setting available consistent with the child's needs.

(3) Findings. If placement is ordered, the court must make a statement of findings, in writing or on the record, explicitly including the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding. If the "contrary to the welfare of the child" finding is placed on the record and not in a written statement of findings, it must be capable of being transcribed. The findings may be made on the basis of hearsay evidence that possesses adequate indicia of trustworthiness.

(4) Record Checks; Home Study. If the child has been placed in a relative's home,

(a) the court may order the Family Independence Agency to report the results of a criminal record check and central registry clearance of the residents of the home to the court before, or within 7 days after, the placement, and

(b) the court must order the Family Independence Agency to perform a home study with a copy to be submitted to the court not more than 30 days after the placement.

Rule 3.967 Removal Hearing for Indian Child

(A) Child in Protective Custody. If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974, a removal hearing must be completed within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to 25 USC 1912(a) or the court adjourns the hearing pursuant to MCR 3.923(G). Absent extraordinary circumstances that make additional delay *CHAPTER 3 SPECIAL PROCEEDINGS AND ACTIONS Chapter Last Updated 9/29/2011* unavoidable, temporary emergency custody shall not be continued for more than 45 days.

(B) Child Not in Protective Custody. If an Indian child has not been taken into protective custody and the petition requests removal of that child, a removal hearing must be conducted before the court may enter an order removing the Indian child from the parent or Indian custodian.

(C) Notice of the removal hearing must be sent to the parties prescribed in MCR 3.921 in compliance with MCR 3.920(C)(1).

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(E) A removal hearing may be combined with any other hearing.

(F) The Indian child, if removed from home, must be placed in descending order of preference with:

- (1) a member of the child's extended family,
- (2) a foster home licensed, approved, or specified by the child's tribe,
- (3) an Indian foster family licensed or approved by a non-Indian licensing authority,
- (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed in subrule (F), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b).

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

MCR 9.935(B) DELINQUENCY

(B) Procedure.

- (1) The court shall determine whether the parent, guardian, or legal custodian has been notified and is present. The preliminary hearing may be conducted without a parent, guardian, or legal custodian present, provided a guardian ad litem or attorney appears with the juvenile.
- (2) The court shall read the allegations in the petition.
- (3) The court shall determine whether the petition should be dismissed, whether the matter should be referred to alternate services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.*, whether the matter should be heard on the consent calendar as provided by MCR 3.932(C), or whether to continue the preliminary hearing.
- (4) If the hearing is to continue, the court shall advise the juvenile on the record in plain language of:
 - (a) the right to an attorney pursuant to MCR 3.915(A)(1);
 - (b) the right to trial by judge or jury on the allegations in the petition and that a referee may be assigned to hear the case unless demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912; and
 - (c) the privilege against self-incrimination and that any statement by the juvenile may be used against the juvenile.
- (5) If the charge is a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the court must inquire if the juvenile or a parent is a member of an Indian tribe. If the juvenile is a member, or if a parent is a member and the juvenile is eligible for membership in the tribe, the court must determine the identity of the tribe and comply with MCR 3.905 before proceeding with the hearing.

Subchapter 3.800 Adoption

Rule 3.800 Applicable Rules; Interested Parties; Indian Child

- (A) Generally. Except as modified by MCR 3.801-3.806, adoption proceedings, are governed by the rules generally applicable to civil proceedings.
- (B) Interested Parties.
 - (1) The persons interested in various adoption proceedings, including proceedings involving an Indian child, are as provided by MCL 710.24a except as otherwise provided in subrules (2) and (3).
 - (2) If the adoptee is an Indian child, in addition to the above, the persons interested are the child's tribe and the Indian custodian, if any, and, if the Indian's child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.
 - (3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:
 - (a) the petitioner;
 - (b) the adoptee, if over 14 years of age;
 - (c) the noncustodial parent; and
 - (d) if the adoptee is an Indian child, the child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(D) Computation of Time. MCR 1.108 governs computation of time in probate proceedings.

(E) Responses. A written response or objection may be served at any time before the hearing or at a time set by the court.

Rule 5.109 Notice of Guardianship Proceedings Concerning Indian Child

If an Indian child is the subject of a guardianship proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

(1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition to establish guardianship over the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the guardianship proceeding as provided in MCR 5.105. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

Rule 5.112 Prior Proceedings Affecting the Person of a Minor

Proceedings affecting the person of a minor subject to the prior continuing jurisdiction of another court of record are governed by MCR 3.205, including the requirement that petitions in such proceedings must contain allegations with respect to the prior proceedings.

Rule 5.113 Papers; Form and Filing

(A) Forms of Papers Generally.

(1) An application, petition, motion, inventory, report, account, or other paper in a proceeding must

(a) be legibly typewritten or printed in ink in the English language, and

(b) include the

(i) name of the court and title of the proceeding in which it is filed;

(ii) case number, if any, including a prefix of the year filed and a two-letter suffix for the case-type code (see MCR 8.117) according to the principal subject matter of the proceeding, and if the case is filed under the juvenile code, the petition number which also includes a prefix of the year filed and a two-letter suffix for the case-type code.

(iii) character of the paper; and

LIST OF EXHIBITS

EXHIBIT 1 The Indian Child Welfare Act of 1778: A Court Resource Guide 2011, excerpts

EXHIBIT 2 Court Rules Regarding Indians

EXHIBIT 3 Portion of transcript re: waiver

EXHIBIT 4 SCAO form for petition, child protective proceeding

EXHIBIT 3 Portion of transcript re: waiver

STATE OF MICHIGAN
6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

In The Matter Of:
JEREMIAH LEONARD GORDON

File No. 2008-746988-NA

REVIEW HEARING

BEFORE THE HONORABLE MARTHA D. ANDERSON, CIRCUIT COURT JUDGE

Pontiac, Michigan - Thursday, April 2, 2009

APPEARANCES:

For Mother:

LARRY O. SMITH (P27989)
24750 Lahser Road
Southfield, MI 48033
(248) 358-3920

Guardian ad litem:

LAUREN S. SHEPHERD (P64907)
P.O. Box 80104
Rochester, MI 48308
(248) 840-0272

TRANSCRIBED BY:

THERESA'S TRANSCRIPTION SERVICE
Sally Fritz, CER #7594
P.O. Box 21067
Lansing, Michigan 48909-1067

Theresa's Transcription Service, P.O. Box 21067
Lansing, Michigan 48909-1067, 517-882-0060

1 visiting with Jeremiah one hour weekly at our DHS Office.
2 She has been interacting with him well. She does redirect
3 him when he does something he's not supposed to do. And she
4 is focusing on it -- on him and paying more attention to him
5 as time goes on. So we are recommending unsupervised
6 visitation at DHS's discretion this morning.

7 THE COURT: All right. Ms. Shepherd?

8 MS. SHEPHERD: I participated in the visit on
9 March 30th at the DHS Offices and observed Jeremiah to be --
10 continuing to be a very friendly, cheerful, outgoing young
11 man. He does have a little bump on his head right in the
12 middle of his forehead from a -- a fall as the -- at -- at
13 his aunt's home, at Aunt Charel's home. He is an active
14 little boy and evidently he was running in the house and
15 fell and bumped his head. Otherwise he seems to be in very
16 good shape and -- and is just a delightful little boy.

17 I agree that he should continue in the
18 placement. And I agree with considering unsupervised
19 visitation at DHS's discretion.

20 MS. SMITH: And if I could add one more thing?

21 THE COURT: Yes.

22 MS. SMITH: Last time we were here I wanted to
23 let you know that the grandmother has been receiving papers
24 back from the Native American. We had to send out the
25 information about the --

1 THE COURT: I'm sorry?

2 MS. SMITH: -- the Native American that we

3 were researching.

4 THE COURT: Yes.

5 MS. SMITH: The grandmother just let me know

6 today she's been receiving papers saying that they will not

7 be eligible from the tribe to get Native American benefits.

8 I don't know if you recall that.

9 THE COURT: Yeah, I do. I do.

10 MS. SMITH: Okay.

11 THE COURT: I was going to ask about that when

12 we were done with everything.

13 MS. SMITH: Yes, yes.

14 THE COURT: Well I need something for the file

15 that indicates --

16 MS. SMITH: She -- she says she'll bring me

17 the paperwork -- the letter that she received from them this

18 week at the visit. So I can send that over to the Court.

19 THE COURT: Okay.

20 MS. SMITH: Okay.

21 MR. SMITH: Okay.

22 THE COURT: Is that correct?

23 UNIDENTIFIED SPEAKER: Yes, that is correct.

24 I got told here from relatives that are on the reservation

25 and stuff and helping me try to get my money so I could, you

1 know, help with -- (inaudible) -- it's turned around now.
2 So as soon as I get the paper I will bring it to the DSS
3 Office. We -- we are not entitled -- (inaudible).

4 THE COURT: Okay. You're not entitled to
5 what? I -- I -- I'm not concerned --

6 UNIDENTIFIED SPEAKER: (Undecipherable) -- the
7 membership that's on the reservation, because they found out
8 our grandparents aren't fully qualified. My grandma has not

9 --

10 THE COURT: I just want --

11 UNIDENTIFIED SPEAKER: -- got enough Indian.

12 THE COURT: Okay.

13 UNIDENTIFIED SPEAKER: So we're -- none of us
14 are going to get it. So that means our kids and grand kids.

15 THE COURT: I'm not concerned about money.

16 Okay. That's not my issue. Okay. My issue is the fact --

17 MS. SMITH: (Inaudible) --

18 THE COURT: Pardon me?

19 MS. SMITH: I was saying that --

20 MS. HINKLE: My son and I don't have enough
21 heritage to get -- to be part of the tribe in other words.

22 THE COURT: Okay. That's what I'm looking for

23 --

24 MS. SMITH: Right.

25 THE COURT: -- is a letter indicating that.

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THE COURT: Okay --

UNIDENTIFIED SPEAKER: -- for these ladies the last time.

THE COURT: All right.

UNIDENTIFIED SPEAKER: -- and they said they can't give any information out. Whether --

THE COURT: All right. Just -- just a moment. The Court's only concern is whether or not there is Indian heritage and if so whether someone representing the tribes are going to come in on behalf of the minor child.

UNIDENTIFIED SPEAKER: -- right.

THE COURT: It's got nothing to do with money or trying to get the --

UNIDENTIFIED SPEAKER: That's what I'm saying, I don't care about the money. I'm saying I tried to do that for you the last time and he said he can't give that information out to anybody unless --

THE COURT: Okay.

UNIDENTIFIED SPEAKER: -- one of these ladies or you ask for it.

THE COURT: Well we've all ready -- okay. The request has been sent to ICWA, has it not?

MS. SMITH: Yes.

UNIDENTIFIED SPEAKER: It's not ICWA, it's Shiawass -- I mean Saginaw/Chippewa Indian Tribe of Mount

1 Pleasant.

2 THE COURT: All right.

3 UNIDENTIFIED SPEAKER: And I have the guys
4 business card.

5 THE COURT: All right. But -- but, Ma'am,
6 there is a centralized --

7 UNIDENTIFIED SPEAKER: Right. That's what he
8 said.

9 THE COURT: -- location in Washington where
10 the information is sent by the department to them and they
11 have to respond to us.

12 UNIDENTIFIED SPEAKER: Okay. That's what I'm
13 saying, because I -- I had asked --

14 THE COURT: It's got nothing to do with local
15 tribes. I mean --

16 UNIDENTIFIED SPEAKER: Okay.

17 THE COURT: -- because there are --

18 UNIDENTIFIED SPEAKER: I understand, I just
19 don't know where she would have got her information, because
20 no one else has.

21 THE COURT: Okay. Thank you.

22 All right. I need you to contact ICWA.

23 MS. SMITH: I have sent papers to ICWA, yes.

24 THE COURT: I'm sorry?

25 MS. SMITH: I have sent papers to ICWA.

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THE COURT: But I need you to contact them to see why they haven't responded because we need the response directly from ICWA. And they're not going to send it to anybody else, they're going to send it to the department because you're the one that's making the request.

MS. SMITH: Okay.

THE COURT: Okay?

MS. SMITH: All right. Okay.

THE COURT: So you need to contact ICWA again as to what their status is and why they haven't responded to us.

MS. SMITH: Okay.

THE COURT: All right then, at this time the Court is going to continue the current placement. And I will give the department discretion to allow unsupervised visits. And the next hearing will be a permanency planning hearing.

THE CLERK: July 2nd at 8:30.

THE COURT: All right then. Thank you.

MS. SHEPHERD: Thank you, your Honor.

MR. SMITH: Thank you.

(At 9:59:49 a.m. hearing concluded)

**EXHIBIT 4 SCAO form for petition, child protective
proceeding**

STATE OF MICHIGAN JUDICIAL CIRCUIT - FAMILY DIVISION COUNTY	PETITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 1 <input type="checkbox"/> Supplemental	CASE NO. PETITION NO.
--	--	--

Court address Court telephone no.

ORI
MI-

1. In the matter of (State the name, county of legal residence, race, sex, and date and place of birth of each child, and indicate with whom the child lives.)

a. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with:
				<input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other
b. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with: <input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other
c. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with: <input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other
d. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with: <input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other
e. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with: <input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other
f. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with: <input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other
g. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with: <input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other
h. Name of child and county of legal residence	Race	Sex	Date and place of birth	Living with: <input type="checkbox"/> Father <input type="checkbox"/> Mother <input type="checkbox"/> Other

2. The names and addresses and other relevant information of the parents, guardian, legal custodian, or nearest known relative are as follows: If the father/mother/guardian or legal custodian is a respondent, place a check mark in the column R. Name each father's children and indicate for which child the father is a legal father by placing (LF) after the name of each child. If there is no (LF) designation, the father is presumed to be the putative father of the named child. For example: John Doe (LF), Mary Doe, Susan Doe (LF).

a. Father's name	R	DOB	Address	Telephone no.
Name(s) of child(ren)				
b. Father's name	R	DOB	Address	Telephone no.
Name(s) of child(ren)				
c. Father's name	R	DOB	Address	Telephone no.
Name(s) of child(ren)				
d. Father's name	R	DOB	Address	Telephone no.
Name(s) of child(ren)				
e. Father's name	R	DOB	Address	Telephone no.
Name(s) of child(ren)				
f. Father's name	R	DOB	Address	Telephone no.
Name(s) of child(ren)				
g. Mother's name	R	DOB	Address	Telephone no.
h. Mother's name	R	DOB	Address	Telephone no.
i. Nonparent adult respondent's name		DOB	Address	Telephone no.
j. Guardian/Legal custodian's name	R	DOB	Address	Telephone no.

(SEE SECOND PAGE)

STATE OF MICHIGAN JUDICIAL CIRCUIT - FAMILY DIVISION COUNTY	PETITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 2 <input type="checkbox"/> Supplemental	CASE NO. PETITION NO.
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Court address

Court telephone no.

In the matter of

3. a. There is no other pending or resolved action within the jurisdiction of the family division of the circuit court involving the family or family members of the minor.
- b. An action within the jurisdiction of the family division of circuit court involving the family or family members of the minor has been previously filed in _____ Court, Case Number _____, was assigned to Judge _____, and remains is no longer pending.

4. The named child(ren) come within the provisions of MCL 712A.2(b)(1)-(5) as follows (check all that apply): See page 3 for specific allegations.

- _____ is a/are member(s) of or eligible for membership in an Indian tribe, as stated in the allegations. Removal is requested below, and attached are details describing the active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and documentation and attempts to identify the child's tribe.
- A military/nonmilitary affidavit is attached.
- The parent or other person legally responsible for the care and maintenance of the child(ren), when able to do so, neglected or refused to provide proper or necessary support, education, medical, surgical, or other care necessary for the child(ren)'s health or morals, or he/she has subjected the child(ren) to a substantial risk of harm to his or her mental well-being, or he/she has abandoned the child(ren) without proper custody or guardianship.
- The home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of the parent, guardian, nonparent adult, or other custodian, is an unfit place for the child(ren) to live.
- The parent has substantially failed, without good cause, to comply with a limited guardianship placement plan for the child(ren) pursuant to MCL 700.5205.
- The parent has substantially failed, without good cause, to comply with a court-structured plan for the child(ren) pursuant to MCL 700.5207 and 700.5209.
- The child(ren) has/have a guardian pursuant to the estates and protected individuals code and the parent meets both of the following criteria: (i) the parent, having the ability to support or assist in supporting the child(ren), has failed or neglected, without good cause, to provide regular and substantial support for two years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for two years or more before the filing of the petition, and (ii) the parent, having the ability to visit, contact, or communicate with the child(ren), has regularly and substantially failed or neglected, without good cause, to do so for two years or more before the filing of the petition.

5. The reason(s) why it is contrary to the welfare of the child(ren) for the child(ren) to remain in the home are: (Attach separate sheets as needed.)

6. The reasonable effort(s) made to prevent the removal of the child(ren) include: (Attach separate sheets as needed.)

(SEE THIRD PAGE)

STATE OF MICHIGAN JUDICIAL CIRCUIT - FAMILY DIVISION COUNTY	PETITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 3 <input type="checkbox"/> Supplemental	CASE NO. PETITION NO.
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Court address

Court telephone no.

In the matter of

7. The specific allegations are: (Attach separate sheets as needed.)

8. I request the court to

- a. refer the matter to alternative services.
- b. authorize this petition and take jurisdiction over the child(ren). Further, I request the court to
 - issue an order removing the child(ren) the abuser from the home.
- c. terminate parental rights of father to child(ren) 1.a. 1.b. 1.c. 1.d. 1.e. 1.f. 1.g. 1.h.
- d. terminate parental rights of mother to child(ren) 1.a. 1.b. 1.c. 1.d. 1.e. 1.f. 1.g. 1.h.

I declare that the statements in this petition are true to the best of my information, knowledge, and belief.

 Petitioner's signature Date Agency/Address

 Print or type name City, state, and zip Telephone no.

Approved by: _____
 Prosecutor's signature (optional) and date

9. A preliminary inquiry and/or hearing has been conducted and the filing of this petition
- on the child(ren) the following child(ren) _____ is authorized.
 - on the child(ren) the following child(ren) _____ is not authorized.

 Date Judge/Referee Bar no.

18149 KIRKSHIRE
BEVERLY HILLS, MICHIGAN 48025
TELEPHONE 248-644-7678
FAX 248-644-3871

KAREN GULLBERG COOK

ATTORNEY AT LAW

December 10, 2011

Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909-7552

Re: In re GORDON, Minor: Appellant's supplemental brief

SUPREME CT.. NO. 143673
COA NO. 301592
L. CT. NO. 2008-746988-NA

Dear Clerk:

Enclosed for filing is an original and seven copies of Supplemental Brief In Support of Appellant's Application For Leave To Appeal and a Proof of Service.

Thank you for your cooperation.

Sincerely yours,



Karen Gullberg Cook

KGC

cc: client, Prosecutor, Lawyer-GAL



STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Judges Owens, Wilder, & Cavanaugh

In the Matter Of J.L. GORDON, Minor

-----/

MICHIGAN DEPARTMENT OF HUMAN SERVICES,
Petitioner-Appellee

SUPREME CT.. NO. 143673
COA NO. 301592
L. CT. NO. 2008-746988-NA

v.

COURTNEY HINKLE,
-----/ Respondent-Appellant

KAREN GULLBERG COOK P26141
ATTORNEY FOR RESPONDENT/APPELLANT
18149 Kirkshire
Beverly Hills, MI 48025
TEL. 248-644-7678

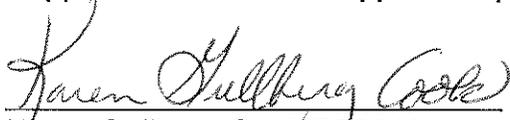
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1200 N. Telegraph Road
Pontiac, MI 48341
TEL. 248-858-0656

-----/

PROOF OF SERVICE

On December 10, 2011, I served Jessica Cooper, Oakland County Prosecutor, Appellate Division, 1200 N. Telegraph Rd., Pontiac, MI. 48341 and Lauren Shepherd, Lawyer-GAL, PO Box 80104 Rochester, MI 48308 by first-class mail with postage fully prepaid to each attorney's above-listed address with a copy of Supplemental Brief In Support of Appellant's Application For Leave To Appeal.


-----/

Karen Gullberg Cook P26141