

Order

Michigan Supreme Court
Lansing, Michigan

June 4, 2014

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2013-02

Michael F. Cavanagh
Stephen J. Markman

Amendments of Rules 3.800, 3.801,
3.802, 3.804, 3.807, 5.109, 5.125, 5.401,
5.402, and 5.404 of the Michigan Court Rules

Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments are adopted, effective September 1, 2014.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

Rule 3.800 Applicable Rules; Interested Parties; Indian Child

- (A) [Unchanged.]
- (B) Interested Parties.
- (1) [Unchanged.]
- (2) If the court knows or has reason to know the adoptee is an Indian child, in addition to subrule (B)(1)~~the above~~, the persons interested are the Indian 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.
- (3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:
- (a)-(c) [Unchanged.]
- (d) if the court knows or has reason to know the adoptee is an Indian child, the Indian 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.

Rule 3.801 Papers, Execution

- (A) A waiver, affirmation, or disclaimer to be executed by the father of a child born out of wedlock may be executed any time after the conception of the child. If a

putative father acknowledges paternity, he must receive notice of the hearing if the child is an Indian child.

(B) [Unchanged.]

Rule 3.802 Manner and Method of Service

(A) Service of Papers.

(1)-(2)[Unchanged.]

(3) Notice of Proceeding Concerning Indian Child. If the court knows or has reason to know an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6),

(a) 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 and delivery restricted to the addressee, of the pending proceedings on a petition for adoption of 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 Indian child's tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

(b) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the adoption proceeding as provided in this rule. If the identity or location of the parent or Indian custodian, or of the Indian child's 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.

(4) [Unchanged.]

(B) [Unchanged.]

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable. If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2) because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 2.114(B)(2),

of the attempt to locate the noncustodial parent. If the court finds, on reviewing the affidavit or declaration, that service cannot be made because the whereabouts of the person has not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

Rule 3.804 Consent and Release ~~Hearing~~

(A) Contents and Execution of Consent or Release.

In addition to the requirements of MCL 710.29 or MCL 710.44, if a parent of an Indian child intends to voluntarily consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption pursuant to MCL 712B.13, the following requirements must be met:

- (1) except in stepparent adoptions under MCL 710.23a(4), both parents must consent.
- (2) to be valid, consent must be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent. The court shall also certify that either the parent fully understood the explanation in English or that it was interpreted into a language that the parent understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid.
- (3) the consent must contain the information prescribed by MCL 712B.13(2).
- (4) in a direct placement, as defined in MCL 710.22(o), a consent by a parent shall be accompanied by a verified statement that complies with MCL 712B.13(6).

(B) Hearing.

- (1) The consent hearing required by MCL 710.44(1) must be promptly scheduled by the court after the court examines and approves the report of the investigation or foster family study filed pursuant to MCL 710.46. If an interested party has requested a consent hearing, the hearing shall be held within 7 days of the filing of the report or foster family study.

(2) A consent hearing involving an Indian child pursuant to MCL 712B.13 must be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29. Notice of the hearing must be sent to the parties prescribed in MCR 3.800(B) in compliance with MCR 3.802(A)(3).

(C) Withdrawal of Consent to Adopt Indian Child.

A parent who executes a consent under MCL 712B.13 may withdraw that consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the child. Once a demand is filed with the court, the court shall order the return of the child. Withdrawal of consent under MCL 712B.13 constitutes a withdrawal of a release executed under MCL 710.29 or a consent to adopt executed under MCL 710.44.

Rule 3.807 Indian Child

(A) [Unchanged.]

(B) Jurisdiction, Notice, Transfer, Intervention.

(1) [Unchanged.]

(2) If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 3.800(B) in accordance with MCR 3.802(A)(3).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. When the court makes a good-cause determination under ~~this section~~ MCL 712B.7, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i)-(ii) [Unchanged.]

(b)-(d) [Unchanged.]

(3) [Unchanged.]

(C) [Unchanged.]

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 and delivery restricted to the addressee, 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 Indian child's tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested. If a petition is filed with the court that subsequently identifies the minor as an Indian child after a guardianship has been established, notice of that petition must be served in accordance with this subrule.
- (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 Indian child's 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 5.125 Interested Persons Defined

(A) Special Persons. In addition to persons named in subrule (C) with respect to specific proceedings, the following persons must be served:

(1)-(7)[Unchanged.]

- (8) In a guardianship proceeding for a minor, if the minor is an Indian child as defined by the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, the minor'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.

(B)-(E)[Unchanged.]

Rule 5.401 General Provisions

This subchapter governs guardianships, conservatorships, and protective order proceedings. The other rules in chapter 5 also apply to these proceedings unless they conflict with rules in this subchapter. Except as modified in this subchapter, proceedings for guardianships of adults and minors, conservatorships, and protective orders shall be in accordance with the Estates and Protected Individuals Code, 1998 PA 386 and, where applicable, the Michigan Indian Family Preservation Act, MCL 712B.1 et seq., the Indian Child Welfare Act, 25 USC 1901 et seq., or the Mental Health Code, 1974 PA 258, as amended.

Rule 5.402 Common Provisions

(A)-(D)[Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(2)[Unchanged.]

(3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in accordance with MCR 5.109(1).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. When the court makes a good-cause determination under ~~this section~~ MCL 712B.7, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i)-(ii) [Unchanged.]

(b)-(d)[Unchanged.]

- (4) The Indian custodian of the child, ~~and~~ the Indian child's tribe, and the Indian child have a right to intervene at any point in the proceeding pursuant to MCL 712B.7(6).
- (5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall provide notice of the guardianship and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) in accordance with MCR 5.109(1). A copy of the notice shall be mailed to the guardian by first-class mail.

Rule 5.404 Guardianship of Minor

(A) Petition for Guardianship of Minor.

- (1) Petition. A petition for guardianship of a minor shall be filed on a form approved by the State Court Administrative Office. The petitioner shall state in the petition whether or not the minor is an Indian child or whether that fact is unknown. The petitioner shall document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian.
- (2) Investigation. Upon the filing of a petition, the court may appoint a guardian ad litem to represent the interests of a minor and may order the Department of Human Services or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation in accordance with MCL 700.5204(1). If the petition involves an Indian child, the report shall contain the information required in MCL 712B.25(1). The report shall be filed with the court and served no later than 7 days before the hearing on the petition. If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership.
- (3) Guardianship of an Indian Child. If the petition involves an Indian child and both parents intend to execute a consent pursuant to MCL 712B.13 and these rules, the court shall proceed under subrule (B). If the petition involves an Indian child and a consent will not be executed pursuant to MCL 712B.13 and these rules, the petitioner shall state in the petition what active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family as defined in MCR 3.002(1). The court shall proceed under subrule (C).

- (4) Social History. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form approved by the sState eCourt aAAdministrative eOffice. The social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.
- (5) Limited Guardianship of the Child of a Minor. On the filing of a petition for appointment of a limited guardian for a child whose parent is an unemancipated minor, the court shall appoint a guardian ad litem to represent the minor parent. A limited guardianship placement plan is not binding on the minor parent until consented to by the guardian ad litem.

~~(B) Limited Guardianship.~~

- (1) ~~Modification of Placement Plan.~~
- (a) ~~The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.~~
- (b) ~~The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days of the filing of the proposed modified plan.~~
- (c) ~~If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.~~
- (d) ~~If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objections of the court and that they may schedule a hearing or submit another proposed modified plan.~~
- (2) ~~Limited Guardianship of the Child of a Minor.~~ On the filing of a petition for appointment of a limited guardian for a child whose parent is an unemancipated minor, the court shall appoint a guardian ad litem to represent the minor parent. A limited guardianship placement plan is not binding on the minor parent until consented to by the guardian ad litem.

~~(B) Voluntary Consent to Guardianship of an Indian Child.~~

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

(1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid.

(2) Hearing. The court must conduct a hearing on a petition for voluntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing on the petition must be sent to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

(a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).

(b) that a valid consent has been executed by both parents or the Indian custodian as required by MCL 712B.13 and this subrule.

(c) if it is in the Indian child's best interest to appoint a guardian.

(d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.

(3) Withdrawal of Consent. A consent may be withdrawn at any time by sending written notice to the court substantially in compliance with a form approved by the State Court Administrative Office. Upon receipt of the notice, the court shall immediately enter an ex parte order terminating the guardianship and returning the Indian child to the parent or Indian custodian except, if both parents executed a consent, both parents must withdraw their consent or the court must conduct a hearing within 21 days to determine whether to terminate the guardianship.

(C) Involuntary Guardianship of an Indian Child.

- (1) Hearing. The court must conduct a hearing on a petition for involuntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing must be sent to the persons prescribed in MCR 5.125(A)(8) and (C)(19) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:
 - (a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).
 - (b) if the placement with the guardian meets the placement requirements in subrule (C)(2) and (3).
 - (c) if it is in the Indian child's best interest to appoint a guardian.
 - (d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.
 - (e) whether or not each parent wants to consent to the guardianship if consents were not filed with the petition. If each parent wants to consent to the guardianship, the court shall proceed in accordance with subrule (B).

- (2) Placement. An Indian child shall be placed in the least restrictive setting that most approximates a family and in which his or her special needs, if any, may be met. The child shall be placed within reasonable proximity to his or her home, taking into account any special needs of the child. Absent good cause to the contrary, the placement of an Indian child must be in descending order of preference with:
 - (a) a member of the child's extended family,
 - (b) a foster home licensed, approved, or specified by the child's tribe,
 - (c) an Indian foster family licensed or approved by the Department of Human Services,
 - (d) 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 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.

- (3) Deviating from Placement. The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5) and 25 USC 1915(c). If the Indian child's tribe has established a different order of preference than the order prescribed in subrule (C)(2), 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 MCL 712B.23(6). Where appropriate, the preference of the Indian child or parent shall be considered.
- (D) Hearing. If the petition for guardianship of a minor does not indicate that the minor is an Indian child as defined in MCR 3.002(12), 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 shall either dismiss the petition or allow the petitioner to comply with MCR 5.404(A)(1).
- (~~E~~) Limited Guardianship Placement Plans and Court-Structured Plans.
- (1) All limited guardianship placement plans and court-structured plans shall at least include provisions concerning all of the following:
- (a) visitation and contact with the minor by the parent or parents sufficient to maintain a parent and child relationship;
 - (b) the duration of the guardianship;
 - (c) financial support for the minor; and
 - (d) in a limited guardianship, the reason why the parent or parents are requesting the court to appoint a limited guardian for the minor.
- (2) All limited guardianship placement plans and court-structured plans may include the following:
- (a) a schedule of services to be followed by the parent or parents, child, and guardian and

- (b) any other provisions that the court deems necessary for the welfare of the child.

(3) Modification of Placement Plan.

- (a) The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.
- (b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days after the filing of the proposed modified plan.
- (c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.
- (d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objections of the court and that they may schedule a hearing or submit another proposed modified plan.

(~~D~~F) Evidence.

- (1) Involuntary Guardianship of an Indian Child. If a petition for guardianship involves an Indian child and the petition was not accompanied by a consent executed pursuant to MCL 712B.13 and these rules, the court may remove the Indian child from a parent or Indian custodian and place that child with a guardian only upon clear and convincing evidence that:
 - (a) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,
 - (b) these efforts have proved unsuccessful, and
 - (c) continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The evidence shall include the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe. The active efforts must

take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. If the petitioner cannot show active efforts have been made, the court shall dismiss the petition and may refer the petitioner to the Department of Human Services for child protective services or to the tribe for services.

(1)-(3) [Renumbered (2)-(4), but otherwise unchanged.]

(EG) Review of Guardianship for Minor.

(1) [Unchanged.]

(2) Investigation. The court shall appoint the ~~Family Independence Agency~~Department of Human Services or any other person to conduct an investigation of the guardianship of a minor. The investigator shall file a written report with the court within 28 days ~~of~~after such appointment. The report shall include a recommendation regarding whether the guardianship should be continued or modified and whether a hearing should be scheduled. If the report recommends modification, the report shall state the nature of the modification.

(3) [Unchanged.]

(FH) Termination of Guardianship.

(1) Necessity of Order. A guardianship may terminate without order of the court on the minor's death, adoption, marriage, or attainment of majority or in accordance with subrule (H)(6). No full, testamentary, or limited guardianship shall otherwise terminate without an order of the court.

(2) [Unchanged.]

(3) Petition for Family Division of Circuit Court to Take Jurisdiction. If the court appoints an attorney or the ~~Family Independence Agency~~Department of Human Services to investigate whether to file a petition with the family division of circuit court to take jurisdiction of the minor, the attorney or ~~Family Independence Agency~~Department of Human Services shall, within

21 days, report to the court that a petition has been filed or why a petition has not been filed.

(a)-(b) [Unchanged.]

(4) [Unchanged.]

(5) Petition for Termination by a Party Other Than a Parent. If a petition for termination is filed by other than a parent or Indian custodian, the court may proceed in the manner for termination of a guardianship under section 5209 of the Estates and Protected Individuals Code, MCL 700.5209.

(6) Voluntary Consent Guardianship. The guardianship of an Indian child established pursuant to subrule (C) shall be terminated in accordance with subrule (B)(3).

Staff Comment: These amendments incorporate provisions of the Michigan Indian Family Preservation Act and the Indian Child Welfare Act and reflect a more integrated approach to addressing issues specific to Indian children.

The staff comment is not an authoritative construction by the Court.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 4, 2014

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk