

Order

Michigan Supreme Court
Lansing, Michigan

October 24, 2012

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2012-19

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

Proposed Amendments of
Rules 3.913, 3.963, 3.965, and
3.974 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.913, 3.963, 3.965, and 3.974 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Pages/Public-Administrative-Hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 3.913 Referees

(A) Assignment of Matters to Referees.

- (1) [Unchanged.]
- (2) Attorney and Nonattorney Referees.
 - (a) [Unchanged.]
 - (b) Child Protective Proceedings. Only a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A), or an emergency removal hearing under MCR 3.974(B). In addition, either an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B).

(c)-(d)[Unchanged.]

(B)-(C)[Unchanged.]

Rule 3.963 ~~Protective~~Acquiring Physical Custody of Child

(A) Taking Custody Without Court Order.

- (1) 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~~believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety. 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 damage or harm to the child.
- (2) An officer who takes a child into protective custody under this rule shall immediately notify the Department of Human Services. While awaiting the arrival of the Department of Human Services, the child shall not be held in a detention facility.
- (3) If a child taken into protective custody under this subrule is not released, the Department of Human Services shall immediately contact the designated judge or referee as provided in subrule (D) to seek an ex parte court order for placement of the child pursuant to subrule (B)(4).

(B) Court-Ordered Custody.

- (1) Order to Take Child into Protective Custody. The court may issue a written order, electronically or otherwise, 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~~after presentment of ~~proofs as required by a petition or affidavit of facts to the court, the judge or referee court~~ reasonable grounds ~~cause~~ 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.~~ all the following conditions exist, together with specific findings of fact:

- (a) The child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety. 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 damage or harm to the child.
 - (b) The circumstances warrant issuing an order pending the hearing.
 - (c) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
 - (d) No remedy other than protective custody is reasonably available to protect the child.
 - (e) Continuing to reside in the home is contrary to the child's welfare.
- (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.~~ The court may include in such an order authorization to enter specified premises to remove the child.
- (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.
- (4) Ex parte Placement Order. If an officer has taken a child into protective custody without court order under subsection (A), or if the Department of Human Services is requesting the court grant it protective custody and placement authority, the Department of Human Services shall present to the court a petition or affidavit of facts and request a written ex parte placement order. If a judge finds all the factors in subrule (B)(1)(a)-(e) are present, the judge may issue a placement order; if a referee finds all the factors in subrule (B)(1)(a)-(e) are present, the referee may issue an interim placement order pending a preliminary hearing. The written order

shall contain specific findings of fact. It shall be communicated, electronically or otherwise, to the Department of Human Services.

(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 or emergency removal 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~~ the hearing;
- (4) if the court is not open, DHS must contact the person designated under ~~MCR 3.934(B)(2)~~ subrule (D) for permission to place the child pending ~~preliminary~~ the hearing;
- (5) ensure that the petition is prepared and submitted to the court;
- (6) ~~prepare~~ file 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~~ with the court that includes:
 - (a) a specific and detailed account of the circumstances that led to the emergency removal, and
 - (b) the names of persons notified and the times of notification or the reason for failure to notify.

(D) Designated Court Contact

- (1) When the Department of Human Services seeks a placement order for a child in protective custody under subrule (A) or (B), DHS shall contact a judge or referee designated by the court for that purpose.
- (2) If the court is closed, the designated judge or referee may issue an ex parte order for placement upon receipt, electronically or otherwise, of a petition or affidavit of facts. The order must be communicated in writing, electronically or otherwise, to the appropriate county DHS office and filed with the court the next business day.

Rule 3.965 Preliminary Hearing

(A) Time for Preliminary Hearing.

- (1) [Unchanged.]
- (2) Severely Physically Injured or Sexually Abused Child. When the ~~Family Independence Agency~~ Department of Human Services 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)-(9) [Unchanged.]
- (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) [Unchanged.]
- (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,
- (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) [Unchanged.]

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

(1) [Unchanged.]

(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. The court may order placement of the child into foster care if the court finds all of the following:~~

- (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
- (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (A).
- (c) Continuing the child's residence in the home is contrary to the child's welfare.
- (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.

- (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.
- (3) Contrary to the Welfare Findings. Contrary to the welfare findings must be made. 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. 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.
- (4) Reasonable Efforts Findings. Reasonable efforts findings must be made. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court. 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. 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; or
- (d) the parent is required to register under the Sex Offender Registration Act.

~~(4)(5)-(7)(8)~~[Renumbered, but otherwise unchanged.]

~~(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~~

~~(e) parental rights of the parent with respect to a sibling have been terminated involuntarily.~~

~~(E)(D)~~[Relettered, but otherwise unchanged.]

Rule 3.974 Post-Dispositional Procedures; Child at Home.

(A) [Unchanged.]

(B) Emergency Removal; Protective Custody.

(1) General. If the child, over whom the court has retained jurisdiction, remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court may order the child to be taken into protective custody ~~to protect the health, safety, or welfare of the child,~~ pending an emergency removal hearing pursuant to the conditions listed in MCR 3.963(B)(1) and upon receipt, electronically or otherwise, of a petition or affidavit of fact. ~~except, that i~~ If the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical damage or harm to the child.

(2) [Unchanged.]

(3) Emergency Removal Hearing. If the court orders the child to be taken into protective custody ~~to protect the child's health, safety, or welfare~~ pursuant to MCR 3.963, the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2). If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967 in order for the child to remain removed from a parent or Indian custodian. Unless the child is returned to the parent pending the dispositional review, the court must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.

(a)-(b) [Unchanged.]

(C) [Unchanged.]

Staff Comment: The proposed changes of MCR 3.913, 3.963, 3.965, and 3.974 are intended to incorporate the statutory changes enacted in 2012 Public Act 163.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-19. Your comments and the comments of others will be posted on the Supreme Court's website at the following address:
<http://www.courts.michigan.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-3-special-proceedings-and-actions.aspx>.



I, Corbin R. Davis, 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.

October 24, 2012

Corbin R. Davis

Clerk