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**The
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Editor's Note

This issue of the Michigan Child Welfare Law Journal touches on a number of diverse topics. In “Should this ICWA case be Transferred to Tribal Court? Issues for Parents’ Attorneys to Consider and Discuss with their Clients” (Fraser) the author notes that from 1974-1977, Congress conducted extensive hearings about Indian child protective matters. In response to concerns raised at these hearings, Congress enacted the Indian Child Welfare Act (“ICWA”) with the goal of keeping Indian families intact. Fraser focuses on issues regarding the transfer of cases from state to tribal court, stressing that the decision whether to transfer a case should not be made lightly and it should be an informed choice.

“Trial Advocacy for the Child Welfare Lawyer: Telling the Story of the Family” is a new book written by Marvin Ventrell, Director of the Juvenile Law Society (JLS) and published jointly by Lexis Publishing and the National Institute for Trial Advocacy (NITA). The book is a comprehensive treatment of the child welfare trial, from case analysis and opening statement through closing argument. It incorporates the traditional art

of trial advocacy into the context of child welfare proceedings. The author and publishers believe it is the first book of its kind. This issue of the *Journal* includes a Chapter 2 from this book, focusing on direct examination.

This issue also includes a summary of proposed budget provisions that most directly affect Michigan’s children and families. This summary was provided by Voices for Michigan’s Children. Michigan’s Children is a non-profit organization based in Lansing that has been an effective, independent and nonpartisan voice seeking social change through improved public policies for children and their families. Michigan’s Children monitors federal and state policy decision-making; provides information to policymakers, communities, the media and the public; works directly with legislators and other policymakers; and gives communities, parents and youths the tools they need to advocate on their own.

I hope you find this issue interesting and useful. As always, the editorial board welcomes your feedback on this and future issues to ensure that the *Child Welfare Journal* is of value to you.

—Joseph Kozakiewicz

Should this ICWA case be Transferred to Tribal Court?

Issues for Parents' Attorneys to Consider and Discuss with their Clients

by Cami Fraser¹

From 1974-1977, Congress conducted extensive hearings about Indian child protective matters. This information revealed between 25 to 35% of all Indian children had been removed from their families and placed with foster parents, adoptive homes or institutions - a rate at least five times greater than non-Indian children.² Of those removed, approximately 90% were placed with non-Indian families.³ Noting the "serious threat [posed to tribes'] existence as on-going self governing communities,"⁴ Congress concluded "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life."⁵ In response, Congress enacted the Indian Child Welfare Act ("ICWA") with the goal of keeping Indian families intact. ICWA is the federal law that sets out minimum requirements for state courts handling child protection cases involving "Indian children." Michigan has determined that the federal ICWA requirements must be met in addition to the state law requirements.⁶

One of the protections afforded in ICWA allows tribes or parents, in cases where the child is not domiciled on the reservation, to seek a transfer of the case to a tribal court:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall

be subject to declination by the tribal court of such tribe.⁷

Congress found "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."⁸ Thus, when Michigan courts have jurisdiction over an Indian child, ICWA "creates concurrent but presumptively tribal jurisdiction" and it may be transferred.⁹

The misconceptions regarding tribal court's treatment of child protection cases vary greatly. At one end, some parents believe that if their case is transferred to tribal court the child will automatically be returned to them. At the other end, some parents are hesitant to have a case transferred because they believe there are no legal protections of parental rights afforded under tribal laws. Neither is accurate. This article will provide broad comparisons of the processes and key protections afforded in the ten Michigan tribal courts that currently handle child protection matters in hopes that attorneys practicing in state courts will be able to help their clients make an informed and strategic decision whether their particular case should be transferred.¹⁰

Which Tribes in Michigan Handle Currently Child Welfare Matters?

Ten of the twelve federally recognized tribes in Michigan currently handle child protection matters.¹¹ Eight of the tribes have enacted very similar child protection laws, although there are some

slight differences, as well as a few major differences: Bay Mills Indian Community (“Bay Mills”), Grand Traverse Band of Ottawa and Chippewa Indians (“Grand Traverse Band”), Hannahville Potawatomi Indian Community (“Hannahville”), Lac Vieux Desert Band of Lake Superior Chippewa Indians (“Lac Vieux Desert”), Little River Band of Ottawa Indians (“Little River”), Little Traverse Bay Bands of Odawa Indians (“Little Traverse”), Pokagon Band of Potawatomi Indians (“Pokagon”), and Sault Ste Marie Tribe of Chippewa Indians of Michigan (“Sault Ste Marie”). The Keweenaw Bay Indian Community (“Keweenaw Bay”) and Saginaw Chippewa Indian Tribe of Michigan’s (“Saginaw Chippewa”) child protection laws are substantially different from the laws of the other Michigan tribes.¹²

When do Tribal Courts have Jurisdiction?

Tribal Courts have exclusive jurisdiction over any proceeding involving an Indian child who resides or is domiciled within the reservation or is a ward of the court.¹³ Where an Indian child is not residing on the reservation, tribal courts have concurrent, though presumptive, jurisdiction over foster care placements and termination of parental rights proceedings.¹⁴ Either parent, an Indian custodian or the tribe may, at any time in the proceeding, petition to transfer the proceeding to a tribal court. The petition will be granted unless one of the narrow exceptions is met. The 2010 amendments to the Michigan Court Rules make clear this includes adoptions, child protection proceedings, some juvenile delinquency cases, and guardianships.¹⁵

Under What Circumstances May a State Court Deny a Request to Transfer Jurisdiction?

Where there is concurrent jurisdiction, either parent or an Indian custodian may prevent the state court from transferring the case.¹⁶ Tribal courts also may decline jurisdiction.¹⁷ Although lacking veto power, a guardian ad litem (“GAL”) may argue good cause not to transfer exists.¹⁸

When no objection is raised, ICWA mandates that the state court “in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe.”¹⁹ The 2010 amendments to

the Michigan Court Rules mandate state court judges consider the Bureau of Indian Affairs “Guidelines for State Courts; Indian Child Custody” discussion of “good cause” and that any perceived inadequacy of the tribal court or tribal services does not constitute good cause.²⁰ Per the BIA Guidelines, good cause not to transfer exists where there is not a tribal court to which the case can be transferred or when

i) the proceeding [is] at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing; ii) the Indian child is over twelve years of age and objects to the transfer; iii) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses; and iv) the parents of a child over five years of age are not available and the child has had little or no contact with the child’s tribe or members of the child’s tribe.²¹

The Guidelines also state the “socio-economic conditions and perceived adequacy of tribal or BIA social services or judicial systems may not be considered in a determination that good cause exists.”²² Additionally, the Guidelines state the party opposing transfer has the burden of establishing good cause.²³

Does ICWA Apply in Tribal Courts?

No. ICWA was largely enacted to combat cultural biases and judgments in the state systems.²⁴ Understandably, Congress did not have those concerns about tribal court proceedings. That said, Bay Mills, Grand Traverse, Hannahville, Lac Vieux Desert and Little Traverse laws provides the court “may apply the policies of the Indian Child Welfare Act, 25 USC 1901-1963, where they do not conflict” with applicable tribal law.²⁵ Thus, when any of the ICWA protections are not explicitly included in tribal law, a party can argue for its application. However, the Grand Traverse Appellate Court has found it not to be error to forgo imposition of the higher ICWA standards for termination of parental rights.²⁶ Additionally, Little River law explicitly allows for the use of Michigan substantive and procedural law, including case law, to be used as a guide.²⁷

What Process do the Tribal Courts in Michigan Follow in Child Welfare Proceedings?

Similar to the state process, tribal child welfare cases generally follow the same progression and below are comparisons of the tribal and state laws for each key stage.

Removal Hearing

In very limited situations, tribal and Michigan laws do allow for the removal of children without a court order; however, generally a removal hearing is required.²⁸ Under Michigan law, a state court may issue a written order authorizing the taking of a child into protective custody when the court 1) 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 2) that remaining in the home would be contrary to the welfare of the child.²⁹ Also under state law, the court is required to “make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required.”³⁰ Prior to removing an Indian child from their home, ICWA requires state courts to make two additional findings. First, ICWA requires:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.³¹

Second, ICWA also requires:

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.³²

Pursuant to the 2010 amendments to the Michigan court rules, a removal hearing is supposed to be held within 14 days of removal and the state court is

required to make findings regarding the two ICWA provisions listed above.³³

The tribes in Michigan have adopted legal standards for removals that are similar to, but less stringent than, what is required of state courts for non-native children. As Bay Mills states:

Upon application by any person which may be *ex parte*, if the Court finds probable cause to believe the child is a child in need of care and that the conditions in which the child is found present a substantial risk of harm to the child’s life, physical health or mental well being the Court may order the child be taken into custody.³⁴

Grand Traverse Band, Hannahville, Little River, Lac Vieux Desert, Little Traverse, and Sault Ste Marie have similar requirements.³⁵ Keweenaw Bay law requires a finding of probable cause that the juvenile is dependent or neglected before the court shall issue a pick up warrant.³⁶ Saginaw Chippewa law requires a finding upon probable cause that the child is in need of care and

There is reasonable cause to believe that the minor is in immediate danger from his parents, guardian or custodian or the surroundings maintained thereby and that his removal from them is necessary.³⁷

Pokagon law requires a judicial determination that “it is contrary to the welfare of the child to remain in his or her home.”³⁸ In addition, Pokagon law singularly requires a finding concerning the services provided to the family:

a judicial determination that reasonable efforts were made to prevent removal of the child from the home or that the lack of such efforts was reasonable under the circumstances, such as the existence of an imminent threat of harm to the child in the home.³⁹

None of the Michigan tribes have adopted the ICWA provisions, discussed above, for removal of an Indian child from their home. Thus, the tribal laws in Michigan tend to be not only less stringent than ICWA but somewhat less stringent than state law as well.

Preliminary Hearing

Under Michigan law, a preliminary inquiry is held if the petitioner is not seeking removal of a child and a preliminary hearing is held if the petitioner is seeking removal or has removed the child.⁴⁰ The court may authorize the petition for filing if, after the preliminary hearing, the court determines that there is probable cause to believe 1) that one or more of the allegations in the petition is true and 2) those allegations, if proven, would bring the child within the court's protective jurisdiction.⁴¹ Second, if appropriate, the court must determine whether to place the children outside the home.⁴² Pursuant to the 2010 amendments to the court rules, a preliminary hearing may be adjourned until the ICWA provisions are addressed at a removal hearing.⁴³

For the preliminary hearing, the tribal laws similarly require the courts 1) to determine whether there is probable cause to conclude that the Indian child is in need of care and 2) to make a finding concerning the potential harm the child would face if returned home.⁴⁴ For example, Pokagon law specifically requires the court to determine "it would be contrary to the welfare of the child to remain in the home and [whether] custody of the child with a parent, guardian, or custodian presents a substantial risk of harm to the child."⁴⁵ Saginaw Chippewa law demands that the court determine whether "there is reasonable cause to believe that the minor is in immediate danger from his parents, guardian or custodian or the surroundings maintained thereby and that his removal from them is necessary."⁴⁶ Thus, the legal standards applied to preliminary hearings under tribal and state laws are remarkably similar.

Adjudication Trial

There are substantial differences between both the tribal and state provisions for adjudication and among the different tribes. Under Michigan law, the adjudication is held to determine whether one or more of the statutory grounds alleged in the petition are proven by a preponderance of the evidence.⁴⁷ Similarly, the Bay Mills, Lac Vieux Desert, Little Traverse, Pokagon and Sault Ste Marie codes require the tribal courts to use a preponderance of the evidence standard in determine whether the subject child is in need of care.⁴⁸ In contrast, Grand Traverse, Hannahville, Keweenaw Bay, Little River and Saginaw Chippewa all use the higher clear and convincing evidence standard.⁴⁹

Under Michigan law, if the child is placed outside parental custody, the adjudication "must commence as soon as possible," but not later than 63 days after placement.⁵⁰ Otherwise, the adjudication must take place within six months. Pokagon law requires the adjudication take place within 30 days from taking the child into care.⁵¹ Bay Mills, Grand Traverse, Lac Vieux Desert, Little River, Little Traverse and Hannahville all require that the adjudication occur as soon as possible but no later than 45 days after the petition is filed with the court.⁵² The Keweenaw Bay and Saginaw Chippewa codes do not specify when the adjudication must occur.

Although child protective proceedings in the Michigan state courts are generally informal,⁵³ the Michigan Rules of Evidence apply during adjudication; although hearsay statements of children describing acts of child abuse or neglect if the court has found that the statements have adequate indicia of reliability are admissible.⁵⁴ The rules of evidence applied during tribal adjudications are far less strict. For example, Little Traverse law provides:

The formal rules of evidence shall not apply at these proceedings. All relevant and material evidence which is reliable and trustworthy may be admitted at the trial and may be relied upon by the Court to the extent of its probative value.⁵⁵

The tribal codes for Bay Mills, Hannahville, Lac Vieux Desert, Little River, Pokagon, and Sault Ste Marie provide similar to that of the Little Traverse.⁵⁶ At Grand Traverse,

The formal rules of evidence shall not apply at Children's Court. All reliable, probative and material evidence may be admitted at trial and may be relied upon by the court. Hearsay evidence is not admissible except as provided for MRE 804 or pursuant to any general rules of evidence promulgated under authority of the GTB Civil and Criminal Codes. In determining the admissibility of evidence, the court may use the Michigan Rules of Evidence as a guide.⁵⁷

Grand Traverse law also explicitly provides:

The parties shall be afforded an opportunity to examine and controvert all evidence present including written reports received by the Court

and shall be allowed to cross-examine individuals who generate the reports whenever those individuals are reasonably available.⁵⁸

Bay Mills, Hannahville, Lac Vieux Desert, Little River, Little Traverse, Pokagon, Sault Ste Marie have similar provisions.⁵⁹ The Keweenaw Bay and Saginaw Chippewa codes are silent upon what, if any, rules of evidence apply at adjudication.

Under Michigan law, respondents are allowed to request a jury trial for the adjudication.⁶⁰ Similarly, Keweenaw Bay and Saginaw Chippewa laws allow respondents to be tried by a jury.⁶¹ The remaining tribal codes are silent on the right to an adjudication by jury. However, the Grand Traverse Court has on at least one occasion refused to impanel a jury for the adjudication trial.⁶² As a result, transfer at this stage might not be beneficial to a parent because the jury trial is the only opportunity for their actions to be judged by their peers, who are arguably those best positioned to evaluate the care or lack given to a child. Overall, because there are substantial differences between the tribal and state provisions, whether a family's interests are better served by a tribal adjudication hearing is going to be case specific.

Dispositional Proceedings

If, after an adjudication, a Michigan court determines it has jurisdiction, the initial disposition is held "to determine what measures the court will take with respect to a child properly within its jurisdiction" and, as a result, a case plan is prescribed. The hearing can be held immediately following the adjudication or plea. At the latest, the disposition must be held within 28 days of the trial if the child is placed outside the parent's home, unless there is good cause for a longer delay.⁶³ The child may be placed in the home⁶⁴ or, if an Indian child is involved, in accordance with the ICWA placement preferences.⁶⁵

Disposition hearings serve the same function in tribal courts and the courts will review the same types of information. As Grand Traverse states, "a disposition hearing shall be . . . conducted to determine a plan of remedial measures designed to achieve the reunification of the family, or concurrently a preliminary permanency plan for termination of parental rights."⁶⁶ In the tribal courts, the dispositional hearing may take place immediately following the adjudica-

tion. At Grand Traverse, the hearing must be held within 30 days except for good cause shown.⁶⁷ At Bay Mills, Lac Vieux Desert, Little River, Pokagon and Sault Ste Marie, it must be held within 35 days.⁶⁸ Little Traverse and Saginaw Chippewa set 60 days as the outside limit.⁶⁹ Keweenaw Bay law is silent as to when the disposition hearing must take place.

Under Michigan law, the rules of evidence do not apply at the dispositional hearing and the court may consider any relevant evidence, including the case service plan offered by the agency and the results of any court-ordered assessments or treatment.⁷⁰ Similar to the Michigan provisions, the tribal codes allow "all probative and material evidence, including oral and written reports," to be admitted at disposition.⁷¹ Michigan law also provides:

no assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination interview, or course of treatment.⁷²

The majority of the tribes have adopted the same rule.⁷³ In addition, many of the tribal laws provide "the parties shall be given an opportunity to examine and controvert evidence including written reports so received and may be allowed to cross-examine individuals generating reports."⁷⁴ Keweenaw Bay and Saginaw Chippewa laws are, however, silent as to what evidence is admissible at this stage.

Under the Michigan Court Rules, the state court is authorized "include a statement in the order of disposition as to whether reasonable efforts were made a) to prevent the child's removal from the home, or b) to rectify the conditions that caused the child to be removed from the child's home."⁷⁵ The tribes in Michigan use the lower reasonable efforts standard at disposition.⁷⁶ However, Pokagon singularly requires a determination if "it is contrary to the welfare of the child to remain in his or her home."⁷⁷

The Michigan state courts are required to periodically review child welfare case.⁷⁸ The case manager must submit a report to the court and parties regarding the family members' progress.⁷⁹ At disposition review, the state court must consider 1) the services provided to the family; 2) whether the parent benefit-

ted from the services; 3) the extent of parenting time and the reasons if it did not take place or was infrequent; 4) the extent to which the parent complied with the case plan and court orders; 5) the likely harm to the child if the child is returned to the parent; and 6) if the child is an Indian child, whether the child's placement complies with ICWA.⁸⁰ Under Michigan law, if the child has been removed from their home, the first review must take place within 182 days⁸¹ and a review hearing be held every 91 days thereafter for the first year the child is in foster care. If the child remains under the court's jurisdiction beyond one year, the court need review the case only every 182 days for as long as the child remains a temporary ward of the court. If the child is placed permanently with a relative or is the subject of a permanent foster family agreement, the court need review the case only every 182 days.⁸²

Disposition review hearings serve the same purposes in tribal courts: 1) compliance with the case plan, 2) progress made by parents, and 3) whether the child's placement is necessary and appropriate.⁸³ Akin to ICWA, Pokagon law additionally requires:

If the parents, guardian, or custodian did not comply with the requirement for services or do not appear to have gained the desired benefit from services, the Court shall make an inquiry into the active efforts to obtain the compliance of the parent, guardian, or custodian or improve the benefit from the services.⁸⁴

Bay Mills, Grand Traverse, Hannahville, Keeweenaw Bay, Lac Vieux Desert, Little River, and Little Traverse similarly require that a dispositional review be held at least every six months.⁸⁵ Sault Ste Marie and Pokagon require a review hearing every 90 days⁸⁶ and Saginaw Chippewa every 60 days.⁸⁷ Accordingly, disposition hearings serve the same function in tribal courts and the courts will review the same types of information.

Permanency Planning Hearing

At the permanency planning hearing ("PPH"), Michigan courts are to determine "the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court."⁸⁸ In general, the PPH must be held withing twelve months

from when the child was removed.⁸⁹ However, a PPH must be held within 28 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required, which is in conjunction with a mandatory petition to terminate parental rights.⁹⁰ If the child remains a ward of the court after the first PPH, the state court must hold an additional hearing every 12 months the child is in care.⁹¹

The Michigan rules of evidence do not apply and the state court must consider any written information provided by the parties, the child's caregiver, and "any other evidence ... offered at the hearing."⁹² The court must order the child returned to the parent's custody if the court determines at the hearing that returning the child to the parent will not place the child at a substantial risk of harm⁹³ and "the parent's compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody."⁹⁴ If the court determines that the child may not be returned home, the court may order the agency to file a petition to terminate parental rights or order the child into a permanent guardianship.⁹⁵

PPHs serve the same function under tribal law as they do in the state court system; as Grand Traverse law provides:

A Permanency planning hearing shall be conducted to review the status of the child and the progress made towards successful completion of the reunification plan when the child has remained a ward of the Court for at least one year or when reunification efforts have been substantially unsuccessful and there is little likelihood that reunification goals can be achieved through new or modified plans or when aggravated circumstances [] warrant immediate termination procedures.⁹⁶

The Grand Traverse, Little River, Little Traverse, Pokagon, and Sault Ste Marie codes require the first PPH be held within 12 months of disposition.⁹⁷ Little River mandates a second PPH hearing within 6 months if the child is still in care. Sault Ste Marie allows for 90 days and Little Traverse and Pokagon allow for 1 year to pass for a second PPH. A PPH has to occur within 24 months after disposition at Bay Mills, to be reviewed within one year.⁹⁸ Hannahville and Lac Vieux Desert require that a first PPH be held within 18 months and review again within

18 months.⁹⁹ Neither the Keweenaw Bay nor Saginaw Chippewa codes specifically speak to PPHs.

Pursuant to the 2008 amendments to Michigan's child welfare laws, with a few exceptions, if the child has been in foster care for 15 of the past 22 months, the state court must order DHS to file a petition to terminate parental rights.¹⁰⁰ This time line is in conformity with the federal Adoption and Safe Families Act and is mandatory when the state receives federal foster care funding under Title IV-E of the Social Security Act.¹⁰¹ This federal requirement is not placed on tribes unless they receive Title IV-E funds and, as a result, children under the jurisdiction of a tribal court can remain in care for longer periods of time.¹⁰²

Pursuant to the 2008 amendments to the Michigan child protection laws, the state courts are allowed to order permanent juvenile guardianships in lieu of terminating parental rights or returning the child home.¹⁰³ Most of the tribes in Michigan allow more options in terms of alternative permanency plans. For example, Bay Mills law provides:

if the court determines at a permanency planning hearing that the child should not be returned to his parent, Case Management Team and Child Welfare Committee shall each propose one of the following alternative permanent placement plans:

- a. The child be placed permanently with a relative within the primary service area of the Tribe.
- b. The child be placed permanently with a relative who is outside the primary service area of the Tribe.
- c. The child remain in long-term foster or residential care.
- d. A petition for guardianship under the Tribal Code be filed by the current caretaker of the child, the child or the Tribal Social Services.
- e. A petition to terminate parental rights under this Chapter be filed by Tribal Social Services.¹⁰⁴

Grand Traverse, Hannahville, Lac Vieux Desert, Keweenaw Bay, Little River, Little Traverse, Pokagon and Sault Ste Marie have similar provisions whereby social workers are allowed to recommend alternatives to termination of parental rights when it is determined that the child cannot return home.¹⁰⁵ Further, the Keweenaw Bay presenting officer can only petition if "in his judgment termination of parental rights shall be the only appropriate dispositional alternative."¹⁰⁶ Accordingly, if a parent is likely going to need additional time to substantially complete court ordered services or if the state is considering termination of parental rights, the flexibility afforded by tribal law could be of substantial benefit to a parent.

Termination of Parental Rights at Initial Disposition

Under Michigan law, in particular circumstances, Michigan Department of Human Services ("DHS") is statutorily obligated to seek termination of parental rights at the initial disposition¹⁰⁷ and has discretion over to seek termination of parental rights at the initial disposition in all other cases.¹⁰⁸ The majority of the tribes in Michigan allow the petitioners discretion to seek termination of parental rights at the initial disposition hearing in any case.¹⁰⁹ However, Grand Traverse law only allows for petitions to terminate parental rights at initial disposition under certain circumstances such as imprisonment for more than 2 years, parental rights to a sibling terminated, parental kidnaping, and conviction for specific felonies or violent crimes.¹¹⁰ Echoing Michigan law, Little Traverse law singularly mandates the petitioner seek termination at initial disposition in specific situations:

The Department of Social Services shall include a request for termination of parental rights within the initial petition filed with the Court, if the parent is a suspected perpetrator or a parent is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk. In the following circumstances, the Court will consider the request for termination at the initial dispositional hearing. The mandated petition must include one of the following citations. 1) Abandonment of a young child; 2) Criminal sexual conduct involving penetration,

attempted penetration, or assault with intent to penetrate; 3) Battering, torture or other severe physical abuse; 4) Loss or serious impairment of an organ or limb; or 5) Life threatening injury; murder or attempted murder.¹¹¹

The Keweenaw Bay and Saginaw Chippewa child welfare laws are silent on the issue of whether parental rights can be terminated at the initial disposition hearing. Accordingly, if a parent is facing a mandatory termination petition under state law, it will likely be beneficial to the family to have the case transferred to tribal court.

Termination of Parental Rights

Under Michigan law, upon petition, the state court may terminate the parental rights of one or both parents upon a finding, by clear and convincing evidence, that one or more of the statutory grounds are met. Those grounds include desertion; parent harmed child or sibling; 182 days have past and the conditions have not been rectified; pursuant to a guardianship; parent failed to provide proper care or custody; parental imprisonment for at least two years; a prior termination of parental rights; likelihood of future harm; serious abuse or neglect; and conviction for specific crimes.¹¹² Under the 2008 amendments to the child welfare laws, Michigan now requires the petitioner additionally to prove that termination is in the child's best interests.¹¹³

Prior to the termination of parental rights to an Indian child, ICWA requires state courts make two additional findings. First, ICWA requires:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.¹¹⁴

Second, ICWA also requires:

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, 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.¹¹⁵

Although tribes might be more reluctant to terminate parental rights than states courts, terminations do happen.¹¹⁶ Like Michigan law, the child welfare laws of the Michigan tribes require a finding of one of more statutory ground for termination. However, the tribal codes do vary as to the specific grounds listed and accompanying defining language. For example, the Grand Traverse Band sets out this list as grounds for termination of parental rights: abandonment, physical injury or sexual abuse, un-rectified conditions and circumstances, failure to provide proper care, conviction of violent or sexual crime, conviction of a felony, imprisonment for more than 2 years, parental rights to a sibling terminated, or parental kidnapping.¹¹⁷ At the other extreme, Bay Mills only permits termination of parental rights on the following grounds: abandonment, physical injury or physical or sexual abuse, 12 months in care plus non-compliance of the parent, prior termination of parental rights.¹¹⁸

The manner in which the tribal codes define the listed grounds also varies substantially. For example, the Saginaw Chippewa code defines abandonment as "when a parent leaves a child without communication or fails to support a child and there is no indication of the parent(s) willingness to assume the parental role(s) for a period exceeding six months."¹¹⁹ Whereas, the Sault Ste Marie code defines it as "the failure of the parent to provide reasonable support and to maintain regular contact with his or her child when such failure resulted in destruction of the parental role with the child" and provides that abandonment "shall be judged according to customary practices in the Indian community."¹²⁰

The standard of proof required to make the statutory findings also differs under the various tribal codes. Like Michigan law, the Grand Traverse, Keweenaw Bay, Pokagon, Saginaw Chippewa and the Sault Ste Marie codes all use the clear and convincing evidence standard.¹²¹ Bay Mills, Hannahville, Lac Vieux Desert, Little River and Little Traverse all require the higher proof beyond a reasonable doubt standard.¹²²

The Sault Ste Marie code states:

Termination of the parent-child relationship should be used only as a last resort, when, in

the opinion of the Tribal Court, all efforts have failed to avoid termination and it is in the best interests of the child concerned to proceed under this section.¹²³

Bay Mills, Grand Traverse Band, Hannahville, Lac Vieux Desert, Little Traverse, and Pokagon similarly provide for the same purpose in their tribal codes; however, all also fall short of explicitly requiring the court to make specific findings regarding the failure of services provided and that termination is in the best interests of the child.¹²⁴ That said, the Grand Traverse court does consider the best interest of the child in the consideration of whether termination of parental rights is appropriate.¹²⁵ Neither Saginaw Chippewa nor Keweenaw Bay law require the court to make any finding regarding services provided to the families prior to the termination of parental rights. Sault Ste Marie law does require the court to terminate parental rights upon find the statutory grounds “unless the Tribal Court finds that termination is clearly not in the best interest of the child.”¹²⁶ Akin to ICWA requirements, Little River law singularly provides:

The Court may terminate the parental rights of a parent to a child adjudicated a child-in-need-of-care if the Court finds by evidence beyond a reasonable doubt that remedial services, rehabilitative programs and active efforts have been provided to prevent the break up of the Indian family and that despite such efforts, one or more of the following conditions exists . . .¹²⁷

Because of the higher ICWA requirements, including the proof beyond a reasonable doubt standard, there are substantially more legal hurdles to termination of parental rights regarding Indian children in state court proceedings.

Under Michigan law, the Michigan Rules of Evidence do not apply to all termination of parental rights hearings:¹²⁸ Similarly, the tribes do not impose formal rules of evidence. The Bay Mills, Grand Traverse Band, Hannahville, Lac Vieux Desert, Little River, Little Traverse and Sault Ste Marie codes state that the “same rules of evidence that apply at adjudication shall apply in [all] termination of parental rights proceedings.”¹²⁹ Pokagon also does not impose formal rules of evidence and allows “all relevant and material

evidence.”¹³⁰ The Keweenaw Bay and Saginaw Chippewa tribal codes are silent as to what, if any, rules of evidence apply.

The tribal laws in Michigan tend to be less stringent regarding terminate parental rights than Michigan law and ICWA. Thus, if the tribe is inclined to seek terminate, a parent would benefit from the additional ICWA protections required of the state court proceeding.

Do Tribes Appoint Attorneys and Guardian ad Litems?

Under ICWA and Michigan law, parents are entitled to court-appointed attorneys and the court “may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.”¹³¹ When a case is transferred, it is unlikely that the same appointed attorney or GAL will remain in the case. The Michigan tribal courts routinely appoint GALs. Bay Mills, Little River, Pokagon, Sault Ste Marie and Saginaw Chippewa also appoint attorneys for respondents. Grand Traverse Band has a program where respondents will be appointed attorneys but then are charged a reduced rate which can potentially be paid from a future per capita payment. Hannahville Court appoints attorneys to their enrolled members. Keweenaw Bay has one lay advocate on staff and appoints her to provide assistance. Lac Vieux Desert and Little Traverse do not currently appoint attorneys for parents. Michigan Indian Legal Services, Inc. is available statewide to provide representation to any income-eligible parent in a tribal court child welfare matter if the court does not appoint an attorney.

What Discovery Must be Provided?

The Michigan Court Rules provide for discovery to parents if requested twenty-one days prior to the adjudication trial.¹³² ICWA also provides for discovery:

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.¹³³

By comparison, Bay Mills, Grand Traverse, Hannahville, Lac Vieux Desert, Little River and Little Traverse codes provide the their rules of civil procedure apply, including discovery, provided they are not in conflict with specific provisions contained within the Child Protection Codes.¹³⁴ Sault Ste Marie explicitly provides for discovery for child welfare proceedings:

Upon written request, the respondent shall have the right to inspect, copy and photograph social, psychiatric, psychological, medical and school reports and records concerning the child in the possession of the prosecutor or other community official assigned to the case relating to the child.¹³⁵

The Sault Ste Marie code further provides for court procedures to enforce discovery rights.¹³⁶

Do Tribal Courts use State Social Workers?

Many of the tribes have social services departments that provide services during tribal and state court proceedings.¹³⁷ However, whether case management is handled by a tribal social worker, a DHS worker, a DHS contractor¹³⁸ or a combination of the above depends on the tribe. Little Traverse primarily uses its own staff to handle case management. Hannahville currently uses Michigan Indian Child Welfare Agency; Keweenaw Bay primarily uses DHS; and Grand Traverse uses a mixture.¹³⁹ As a result, a social worker might remain when a case is transferred.

As discussed above, most of the tribal codes do not impose ICWA's "active efforts" requirement upon the social workers. However, when a DHS worker or DHS contractor provides case management, they are still mandated to comply with ICWA provisions, such as active efforts, of the DHS Policy and Procedure Manual.¹⁴⁰ Further, many tribal social workers provide assistance well beyond what is legally required of them.

Are Proceedings and Records Confidential?

Unless ordered by the state court, child protection proceedings in Michigan are open to the public.¹⁴¹ The opposite is true in most of the tribal courts.¹⁴² The Michigan Court Rules also provide "records of the juvenile cases, other than confidential files, must be open to the general public."¹⁴³ Under the tribal laws,

child protection records are confidential and not open to inspection except to the parties, counsel, court personnel and others by court order.¹⁴⁴

Conclusion

The Little Traverse Code declares:

Children are the Tribe's most vital and cherished resource. The Tribe's future depends on the health and well being of its children. Children have a sacred right to receive the care and guidance necessary for their spiritual, emotional, mental and physical development. Feeling pride from their identity as Odawak will help them grow into strong, healthy responsible adult Tribal Citizen.¹⁴⁵

There is real value in a tribe being able to make decisions in its children's best interest. However, whether an individuals parent's interests are better suited to state or tribal court depends on the facts of their case, the stage of the proceeding, the protections available under a particular tribe's laws, as well as their comfort level in a state or tribal court. In addition to the legal concerns discussed above, there are some practical concerns that should also be discussed. As a matter of practicality and ideology, a tribal court is more likely to ensure compliance with tribal or ICWA placement preference. Also, if the family lives near the reservation, a transfer to tribal court and the utilization of tribal services could be a huge benefit to a parent. However, if a parent and child reside some distance from the tribe and do not intend to relocate, a transfer of jurisdiction could create some major logistical problems. Also, if the children of one mother have different fathers, different courts might have jurisdiction over the children. It would be difficult for a parent to potentially satisfy different obligations and case plans for different courts. The decision of whether to transfer a case should not be made lightly and it should be an informed choice. ©

Endnotes

1. Cami Fraser is a staff attorney with Michigan Indian Legal Services, which provides civil legal services to low-income American-Indian individuals and tribes to further self-sufficiency, overcome discrimination, assist tribal governments and preserve American-Indian families. Ms. Fraser is admitted to practice in Alaska, Michigan, and Washington State, and is a 2000 graduate of the University of

- Michigan Law School. She wishes to thank Kate Fort, James Keedy, Erin Lane and Ann Tweedy for their comments and suggestions.
2. See H.R. Rep. No. 95-1386 at 9 (1978), *reprinted* in 1978 U.S. CODE CONG. & AD. NEWS 7530.
 3. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36-37, 109 S. Ct. 1597 (U.S. 1989)
 4. 124 Cong. Rec. H38102 (daily ed. Oct. 14, 1978) (statement of Rep. Udall).
 5. H.R.Rep. No. 95-1386, at 9.
 6. *In re Roe*, 764 N.W.2d 789, 794, 281 Mich.App. 88, 96 (Mich. Ct. App. 2008). An “Indian child” is any unmarried person who is under age eighteen 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. 25 U.S.C. § 1903(4); Mich. Ct. R. 3.002(5).
 7. 25 U.S.C. § 1911(b).
 8. 25 U.S.C. § 1901(5).
 9. *Holyfield*, 490 U.S. at 36.
 10. Although ICWA applies to a range of cases, this article focuses primarily on child welfare proceedings.
 11. At present, neither Match-E-Be-Nash-She-Wish Band of Pottawatomis of Michigan (Gun Lake) nor Nottawaseppi Huron Band of Potawatomi currently handle child welfare matters.
 12. Many of the tribes have their codes on their web sites. The remainder can be obtained by contacting a tribal court clerk.
 13. 25 U.S.C. § 1911 (a).
 14. 25 U.S.C. § 1911(b). ICWA defines “foster care placement” as “any action removing an Indian child from its 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.” 25 U.S.C. § 1903(a); *see also* Mich. Ct. R. 3.002(1). ICWA defines termination of parental rights as “any action resulting in the termination of the parent-child relationship.” 25 U.S.C. § 1903(a); *see also* Mich. Ct. R. 3.002(1).
 15. Mich. Ct. R. 3.807(B)(2)(a) (adoptions); Mich. Ct. R. 3.905(C)(1) (child welfare and juvenile delinquency); Mich. Ct. R. 5.402(E)(3)(a) (guardianships). ICWA requires application of whatever law provides the highest standard of protection to the rights of the parent or Indian custodian of an Indian child. 25 U.S.C. § 1921. The court rules also recognize that a petition to transfer may be filed at any time during the proceeding. Mich. Ct. R. 3.807(B)(1)(d); Mich. Ct. R. 3.905(C)(4); Mich. Ct. R. 5.402(E)(3)(d).
 16. 25 U.S.C. § 1911(b); Mich. Ct. R. 3.807(B)(1)(a); Mich. Ct. R. 3.905(C)(1); Mich. Ct. R. 5.402(E)(3)(a).
 17. 25 U.S.C. § 1911(b); Mich. Ct. R. 3.807(B)(1)(c); Mich. Ct. R. 3.905(C)(3); Mich. Ct. R. 5.402(E)(3)(c).
 18. 25 U.S.C. § 1911(b); Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts).
 19. 25 U.S.C. § 1911(b).
 20. Mich. Ct. R. 3.807(B)(1)(a); Mich. Ct. R. 3.905(C)(1); Mich. Ct. R. 5.402(E)(3)(a); *see also* 44 Fed. Reg. 67584 (Nov 1979).
 21. Fed. Reg. 67584, 67591-67592 (Nov 1979), *available at* <http://www.narf.org/icwa/federal/biaguide.pdf>.
 22. *Id.*
 23. *Id.*
 24. 25 U.S.C. § 1901(5); *see also Holyfield*, 490 U.S. at 34-35, 37.
 25. Little Traverse Code § 5.106(A); *see also* Bay Mills Code § 705; Grand Traverse Code § 10.104; Lac Vieux Desert Children’s Code § 2(A); Hannahville Code § 2.301.
 26. *In re K.M.C.*, ___ Am. Tribal Law ___, 1999 WL 34986349 (Grand Traverse 1999); *In re S.R.S.*, 8 Am. Tribal Law 172 (Grand Traverse Tribal Ct. 2009).
 27. Little River Children’s Protection Code § 3.07(b).
 28. Mich. Comp. Laws § 712A.14(1); Mich. Ct. R. 3.963(A). Hannahville law provides
A child may be taken into protective custody without a court order by a law enforcement officer or the tribe’s protective services worker if such a person has probable cause to believe the child is a child-in-need-of-care, and
 - a. Failure to remove the child may result in a substantial risk of death, serious injury, or serious emotional harm, or;
 - b. The parent, guardian or custodian is absent and it appears, from the circumstances, that the child is unable to provide for his own basic necessities of life, and, no satisfactory arrangements have been made by the parent, guardian or custodian to provide for such necessities and no alternative arrangements except removal are available to protect the child.
- Hannahville Code § 2.1103(1); *see also* Bay Mills Code § 712(c); Grand Traverse Code § 10.114(c); Hannahville Code § 2.1103; Keweenaw Bay Code § 4.503; Lac Vieux Desert Children’s Code § 11(C); Little River Children’s Protection Code § 10.03; Little Traverse Code § 5.112(B); Pokagon Child Protection Code § 18(B); Saginaw Chippewa Code § 2.703; Sault Ste. Marie Code § 30.402.
29. Mich. Ct. R. 3.963(B)(1); *see also* Mich. Comp. Laws § 712A.13a(5); Mich. Comp. Laws § 712A.15.
 30. Mich. Ct. R. 3.963(B)(1).

31. 25 U.S.C. § 1912(d); *In re Lee*, 770 N.W.2d 853; 483 Mich. 300 (2009).
32. 25 U.S.C. § 1903(e).
33. Mich. Ct. R. 3.967(D).
34. Bay Mills Code § 712(B).
35. Grand Traverse Code § 10.114(b); Hannahville Code § 2.1102; Lac Vieux Desert Children's Code § 11(B); Little River Children's Protection Code § 10.02, Little Traverse Code § 5.112(B); Sault Ste. Marie Code § 30.402(2).
36. Keweenaw Bay Code § 4.502. Keweenaw Bay and Saginaw Chippewa refer to their removal hearings as applications for a warrant or a pickup order.
37. Saginaw Chippewa Code § 2.710(e)(2).
38. Pokagon Child Protection Code § 15(A); Pokagon Child Protection Code § 18(c).
39. Pokagon Child Protection Code § 15(A); Pokagon Child Protection Code § 18(c).
40. Mich. Ct. R. 3.962; Mich. Ct. R. 3.965.
41. Mich. Comp. Laws § 712A.2; Mich. Ct. R. 3.965(B)(11).
42. Mich. Ct. R. 3.965(B)(11)-3.965(C).
43. Mich. Ct. R. 3.965(B)(2); Mich. Ct. R. 3.967(D).
44. Bay Mills Code § 719(a)(2); Grand Traverse Code § 10.120; Hannahville Code § 2.1707; Keweenaw Bay Code § 4.509, 4.511, 4.512; Lac Vieux Desert Children's Code § 17; Little River Children's Protection Code § 14.02; Little Traverse Code § 5.118(A)(2); Pokagon Child Protection Code § 20(I); Saginaw Chippewa Code § 2.710 (e); Sault Ste. Marie Code § 30.423(5).
45. Pokagon Child Protection Code § 20(I)(2).
46. Saginaw Chippewa Code § 2.710(e)(2).
47. Mich. Ct. R. 3.973.
48. Bay Mills Code § 720 (E); Little Traverse Code § 5.119(E); Pokagon Child Protection Code § 11(E); Lac Vieux Desert Children's Code § 18(F); Sault Ste. Marie Code § 30.425(9).
49. Grand Traverse Code § 10.121(f); Hannahville Code § 2.1806; Keweenaw Bay Code § 4.609; Little River Children's Protection Code § 15.05; Saginaw Chippewa Code § 30.425(9).
50. Mich. Ct. R. 3.972(A).
51. Pokagon Child Protection Code § 21(b).
52. Bay Mills Code § 720(B); Grand Traverse Code § 10.121(b); Hannahville Code § 2.1802; Lac Vieux Desert Children's Code § 18(B); Little River Children's Protection Code § 15.01; Little Traverse Code § 5.119.
53. Mich. Comp. Laws § 712A.17(1).
54. Mich. Ct. R. 3.972(C).
55. Little Traverse Code § 5.119(D).
56. Bay Mills Code § 720(D); Hannahville Code § 2.1805(1); Lac Vieux Desert Children's Code § 18(E); Little River Children's Protection Code § 15.04; Pokagon Child Protection Code § 11(C); Sault Ste. Marie Code § 30.425(5).
57. Grand Traverse Code § 10.121(e)(1).
58. Grand Traverse Code § 10.122(e)(2).
59. Bay Mills Code § 700, (D)(2); Hannahville Code § 2.1805(2); Lac Vieux Desert Children's Code § 18(E); Little River Children's Protection Code § 15.04(b); Little Traverse Code § 5.119(D)(2); Pokagon Child Protection Code § 11(D); Sault Ste. Marie Code § 30.425(6).
60. Mich. Comp. Laws § 712A.17(2); Mich. Ct. R. 3.911-912.
61. Keweenaw Bay Code § 4.608; Saginaw Chippewa Code § 2.503(d).
62. *In re D.H.*, 8 Am. Tribal Law 164 (Grand Traverse Tribal Ct 2009).
63. Mich. Ct. R. 3.973.
64. Mich. Comp. Laws § 712A.18(1)(b).
65. 25 U.S.C. § 1915(b); *see also* Mich. Ct. R. 3.965(B)(12).
66. Grand Traverse Code § 10.122(a).
67. Grand Traverse Code § 10.122(d).
68. Bay Mills Code § 721(A); Hannahville Code § 2.1902; Lac Vieux Desert Children's Code § 19(B); Little River Children's Protection Code § 16.01; Pokagon Child Protection Code § 22(B); Sault Ste. Marie Code § 30.426(2).
69. Little Traverse Code § 5.120(b); Saginaw Chippewa Code § 2.716(a).
70. Mich. Ct. R. 3.973(E)(1); Mich. Ct. R. 3.973(F)(2).
71. Grand Traverse Code § 10.122(d); *see also* Bay Mills Code § 721(C); Hannahville Code § 2.1904; Lac Vieux Desert Children's Code § 19(D)(1); Little River Children's Protection Code § 16.03; Little Traverse Code § 5.120(D); Pokagon Child Protection Code § 11(c); Sault Ste. Marie Code § 30.426(3).
72. Mich. Ct. R. 3.973; *see also* Mich. Comp. Laws § 722.631.
73. Bay Mills Code § 721(E)(2); Grand Traverse Code § 10.122(d)(30); Hannahville Code § 2.1904(3); Lac Vieux Desert Children's Code § 19(D)(3); Little River Children's Protection Code § 16.03(c); Little Traverse Code § 5.120(D)(2).
74. Grand Traverse Code § 10.122(d)(1); *see also* Bay Mills Code § 721(c); Hannahville Code § 2.1904; Lac Vieux Desert Children's Code § 19(D)(2); Little River Children's Protection Code § 16.03; Little Traverse Code § 5.120(D); Pokagon Child Protection Code § 11(D).
75. Mich. Ct. R. 3.973(f)(3). Presumably, when an Indian child is involved, the state court will use the

- active efforts standard of ICWA.25 U.S.C. § 1912(d).
76. Bay Mills Code § 721(D); Grand Traverse Code § 10.122 (e); Hannahville Code § 2.1905(1); Keweenaw Bay Code § 4.610(a); Lac Vieux Desert Children's Code § 19(E)(1); Little River Children's Protection Code § 16.04(a); Little Traverse Code § 5.120(E); Pokagon Child Protection Code § 22(E)(3); Saginaw Chippewa Code § 2.715(b); Sault Ste. Marie Code § 30.426(3).
 77. Pokagon Child Protection Code § 22(E)(3).
 78. Mich. Comp. Laws § 712A.19(3).
 79. Mich. Comp. Laws § 712A.18f; Mich. Comp. Laws § 712A.19(11); Mich. Ct. R. 3.975(E).
 80. Mich. Ct. R. 3.975(F)(1).
 81. Mich. Comp. Laws § 712A.19; Mich. Ct. R. 3.975(C)(1).
 82. Mich. Ct. R. 3.975(C).
 83. Bay Mills Code § 722; Grand Traverse Code § 10.123; Hannahville Code § 2.20 *et seq*; Lac Vieux Desert Children's Code § 19; Little River Children's Protection Code § 17.01 *et seq*; Little Traverse Code § 5.121; Sault Ste. Marie Code § 30.428.
 84. Pokagon Child Protection Code § 23(B)(2).
 85. Bay Mills Code § 722(A); Grand Traverse Code § 10.123; Hannahville Code § 2.2001; Keweenaw Bay Code § 4.614; Lac Vieux Desert Children's Code § 20(A); Little River Children's Protection Code § 17.01; Little Traverse Code § 5.121(A).
 86. Pokagon Child Protection Code § 23(A); Sault Ste. Marie Code § 30.428.
 87. Saginaw Chippewa Code § 2.716.
 88. Mich. Comp. Laws § 712A.19a(3).
 89. Mich. Ct. R. 3.976(B)(2); *see also* Mich. Comp. Laws § 712A.19a(1).
 90. Mich. Ct. R. 3.976(B)(1).
 91. Mich. Ct. R. 3.976(B)(3).
 92. Mich. Comp. Laws § 712A.19a(8).
 93. Mich. Comp. Laws § 712A.19a(5).
 94. *In re JK*, 661 N.W.2d 216, 468 Mich. 202 (2003); *see also In re Trejo*, 612 N.W.2d 407, 462 Mich. 341, 360–363 (2000).
 95. Mich. Comp. Laws § 712a.19a; Mich. Ct. R. 3.979.
 96. Grand Traverse Code § 10.124(d).
 97. Grand Traverse Code § 10.124(a); Little River Children's Protection Code § 18.01; Little Traverse Code § 5.122(A); Pokagon Child Protection Code § 26(B); Sault Ste. Marie Code § 30.429(1).
 98. Bay Mills Code § 723(B).
 99. Hannahville Code § 2.2101; Lac Vieux Desert Children's Code § 21(A).
 100. Mich. Comp. Laws § 712a.19a.
 101. 42 U.S.C. § 675(5)(E) (2006); *see also In re Lee*, 770 N.W.2d 853; 483 Mich. 300 (2009).
 102. US Dept of Health and Human Services, Considerations for Indian Tribe, Indian Tribal Organizations or Tribal Consortia Seeking to Operate a Tribal Title IV-E Program, *available at* http://www.acf.hhs.gov/programs/cb/laws_policies/tribal_considerations.htm (“Section 475(5)(E) of the Act requires that a title IV-E agency file a petition for termination of parental rights for any child who has been in foster care for at least 15 of the previous 22 months, subject to certain exceptions. While we recognize that termination of parental rights and adoption may not be a part of an Indian Tribe's traditional belief system or legal code, there is no statutory authority to provide a general exemption for Indian tribal children from the requirement to file a petition for TPR. Federal law provides some examples of exceptions to filing TPR that can be used on a case by case basis, including such as the child is being care for by a relative, the agency hasn't provided reasonable efforts to reunify the family consistent with the case plan, adoption is not appropriate for the child, or no legal grounds for TPR exist. What constitutes the legal grounds for TPR are at the Indian Tribe's discretion.”). Several of the tribal-state agreements concerning Title IV-E are *available at* <http://www.mfia.state.mi.us/olmweb/ex/tam/tam.pdf>.
 103. Mich. Comp. Laws § 712a.19a; Mich. Ct. R. 3.979.
 104. Bay Mills Code § 723 (C)(2).
 105. Grand Traverse Code § 10.104(f); Hannahville Code § 2.2104 ; Keweenaw Bay Code § 4.701; Lac Vieux Desert Children's Code § 21(D); Little River Children's Protection Code § 18.04; Little Traverse Code § 5.122(C)(2); Pokagon Child Protection Code § 26(E); Sault Ste. Marie Code § 30.429(4).
 106. Keweenaw Bay Code § 4.701.
 107. Mich. Comp. Laws § 722.638. For a discussion of the interaction of this provision of Michigan law and ICWA *see In re Lee*, 770 N.W.2d 853; 483 Mich. 300 (2009); *In re Roe*, 764 N.W.2d 789, 281 Mich. App. 88 (Mich. Ct. App. 2008).
 108. Mich. Comp. Laws § 712A.19b(4); *e.g., In re AH*, 627 N.W.2d 33, 245 Mich. App. 77 (Mich. Ct. App. 2001)
 109. Bay Mills Code § 724(c); Hannahville Code § 2.2203; Lac Vieux Desert Children's Code § 22(C); Little River Children's Protection Code § 19.02; Pokagon Child Protection Code § 24(c); Sault Ste Marie Code § 30.305.
 110. Grand Traverse Code § 10.125(c).
 111. Little Traverse Code § 5.126(B).
 112. Mich. Comp. Laws § 712A.19b(3).
 113. Mich. Comp. Laws § 712a.19b(4).

114. 25 U.S.C. § 1912(d); Mich. Ct. R. 3.977(G)(1); *see also In re Lee*, 770 N.W.2d 853; 483 Mich. 300 (2009).
115. 25 U.S.C. § 1903(f); Mich. Ct. R. 3.977 (G)(2).
116. *E.g., In re KMC*, ___ Am. Tribal Law ___, 1999 WL 34986349 (Grand Traverse); *In re SRS*, 8 Am. Tribal Law 172 (Grand Traverse Tribal Ct. 2009); *In re AS*, ___Am. Tribal Law___; 1999 WL 34986338 (Grand Traverse Tribal Ct. 1999). In fact, two of the most recent published Michigan ICWA opinions concerned families who had parental rights terminated to other children through a tribal court. *E.g., In re Lee*, 770 N.W.2d 853, 483 Mich 300 (2009); *In re Roe*, 764 N.W.2d 789, 281 Mich.App. 88 (Mich. Ct. App. 2008).
117. Grand Traverse Code § 10.125(b); *see also In re KMC*, ___ Am. Tribal Law ___, 1999 WL 34986349 (Grand Traverse 1999); *In re SRS*, 8 Am. Tribal Law 172 (Grand Traverse Tribal Ct 2009); *In re AS*, ___ Am. Tribal Law ___, 1999 WL 34986338 (Grand Traverse Tribal Ct. 1999).
118. Bay Mills Code § 724(B).
119. Saginaw Chippewa Code § 2.201.
120. Sault Ste. Marie Code § 30.302.
121. Grand Traverse Code § 10.125(b); Keweenaw Bay Code § 4.707; Pokagon Child Protection Code § 24(B); Saginaw Chippewa Code § 2.909(b); Sault Ste. Marie Code § 30.503(a), 30.504.
122. Bay Mills Code § 724; Hannahville Code § 2.2202; Lac Vieux Desert Children's Code § 22(B); Little River Children's Protection Code § 19.01; Little Traverse Code § 5.126(c).
123. Sault Ste. Marie Code §, 30.501.
124. Bay Mills Code § 724(A); Grand Traverse Code § 10.125(a); Hannahville Code § 2.2201; Lac Vieux Desert Children's Code § 22(A); Little Traverse Code § 5.126(A); Pokagon Child Protection Code § 24(A).
125. *In re SRS*, 8 Am. Tribal Law 172 (Grand Traverse Tribal Ct. 2009).
126. Sault Ste. Marie Code § 30.503(b).
127. Little River Children's Protection Code § 19.01.
128. The Rules of Evidence apply only when the termination of parental rights hearing is held at the initial disposition, Mich. Ct. R. 3.977(E)(3), or if a supplemental petition based on different circumstances is filed that requests termination of parental rights. Mich. Ct. R. 3.977(F)(1)(b). Mich. Ct. R. 3.977(G)(2) ("The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.")
129. Bay Mills Code § 724(D); Grand Traverse Code § 10.125(d); Hannahville Code § 2.2204; Lac Vieux Desert Children's Code § 22(D); Little River Children's Protection Code § 19.03; Little Traverse Code § 5.126(D); Sault Ste. Marie Code § 30.506.
130. Pokagon Child Protection Code § 11(C).
131. 25 U.S.C. § 1903(b); Mich. Comp. Laws § 712A.17c(4); Mich. Comp. Laws § 712A.17d; Mich. Ct. R. 3.915(B).
132. Mich. Ct. R. 3.922(A).
133. 25 U.S.C. § 1903(c).
134. Bay Mills Code § 706(A); Grand Traverse Code § 10.107(a); Hannahville Code § 2.304; Lac Vieux Desert Children's Code § 4(A); Little River Children's Protection Code § 3.01(b); Little Traverse Code § 5.107(A).
135. Sault Ste. Marie Code § 30.418.
136. Sault Ste. Marie Code § 30.418.
137. For example Sault Ste Marie has Anishnabek Community & Family Services, Little Traverse has a Human Services Department, and Grand Traverse has Anishnaabek Family Services.
138. *E.g.* MICWA, Child and Family Service, Bethany Christian Services, or Catholic Charities of Western Michigan.
139. Copies of the Tribal-State agreements are *available at* <http://www.mfia.state.mi.us/olmweb/ex/tam/tam.pdf>.
140. DHS Policy and Procedure Manual, *available at* <http://www.mfia.state.mi.us/olmweb/ex/naa/naa.pdf>.
141. Mich. Ct. R. 3.925(A).
142. Grand Traverse Code § 10.121(d); Hannahville Code § 2.1804; Lac Vieux Desert Children's Code § 18(D); Little River Children's Protection Code § 15.03; Pokagon Child Protection Code § 211(B); Sault Ste. Marie Code § 30.417(3), 30.711; Saginaw Chippewa Code § 2.504.
143. Mich. Ct. R. 3.925(D).
144. Bay Mills Code § 730; Grand Traverse Code § 10.130; Hannahville Code § 2.2701-2.2702; Keweenaw Bay Code § 4.801-4.802; Lac Vieux Desert Children's Code § 30; Little River Children's Protection Code § 20.01-20.02; Little Traverse Code § 5.128; Pokagon Child Protection Code § 32; Saginaw Chippewa Code § 2.508, 2.814; Sault Ste. Marie Code § 30.711.
145. Little Traverse Code § 5.102(A).

Trial Advocacy for the Child Welfare Lawyer: Telling the Story of the Family

The following is an excerpt from a new book scheduled for release in the summer of 2011. The book, *Trial Advocacy for the Child Welfare Lawyer: Telling the Story of the Family*, is written by Marvin Ventrell, Director of the Juvenile Law Society (JLS) and published jointly by Lexis Publishing and the National Institute for Trial Advocacy (NITA).

The book is a comprehensive treatment of the child welfare trial, from case analysis and opening statement through closing argument. It incorporates the traditional art of trial advocacy into the context of child welfare proceedings. The author and publishers believe it is the first book of its kind.

Trials, effectively presented, are stories – stories of mothers, fathers, children – stories of the family. The book instructs attorneys who represent children, parents, and state agencies how to present the story of the family from the unique perspective of each litigant.

In addition to general circulation, the book will be used as the core curriculum for trial skills training conducted by JLS and NITA. A pilot training was conducted for the New Mexico Department of Children, Youth, and Families in Albuquerque, NM in January 2011.

What follows is the chapter on Direct Examination, the part of the trial from which the author maintains all other trial parts are derived. (More information on the book, child welfare trial skills training, and ordering can be found at www.juvenilelawsociety.org (303.689.9786) and www.lexisnexis.com/nita/)

Chapter Two:

DIRECT EXAMINATION THE WORDS OF THE STORY

*I keep six honest serving-men:
(They taught me all I knew)
Their names are What and Where and When
And How and Why and Who*¹

Take-Away

Tell the witness's part of the story with nonleading sensory perception questions divided by topic and headlines.

Direct examination is the essential element of the trial. It is the means by which the case is proved. If a trial is a story, then the direct examination constitutes the words of the story. There are many parts of the

trial where a case is lost, but only one part where the case is won: direct examination.

Direct examination is the foundation of the case from which all other parts of the case are derived. In opening statement, we foreshadow what will be said in direct examination. In cross-examination, we attempt to marginalize that which may limit our evidence on direct examination. In closing argument, we apply the law to the evidence we elicited on direct and argue why that demands a finding for our client. All of these are derivatives of direct examination.

Direct examination tells the story of the case through the witnesses' words, sometimes enhanced by visual aids and the physical evidence the witnesses use.

In child welfare court, witnesses typically include parents, foster parents, extended family, social workers, teachers, therapists, neighbors, doctors, law enforcement professionals, and children themselves. Each of these witnesses tells a unique and potentially powerful part of the story of the family.

The Rule of Sensory Perception of Facts

The substance of a witness's testimony on direct examination should be factual information that the witness possesses, having acquired such information through the senses. Senses are the physiological methods of human perception, typically consisting of sight, sound, feel, hearing, and taste. When we add to these the witness's actions (i.e., What did you do? *I ran, I hid, I screamed for help*), the substance of direct examination is formed.

Topics for direct examination, therefore, consist primarily of a witness's immediate perceptions and actions. Children may testify as to what was done to them or what they saw done to a sibling. Parents may testify as to their parenting actions and observations of the other parent's conduct. Caseworkers may testify as to what they observed during an investigation and, with certain hearsay limitations, what they heard from others.

This focus on the witness testifying from experience can be thought of as *the rule of sensory perception*, and it can be illustrated by the exception to the rule: lay witness opinion. As a general rule, lay or fact witnesses are not allowed to give opinions and must testify about facts. The exception is a proper lay witness opinion where a fact witness, not qualified as an expert witness, may opine on a matter only if it is rationally based on the witness's *perception*. A social worker may be allowed to testify not only that a child cried during a scheduled visitation (clearly an observed fact), but also that the child was distressed (an opinion of condition based on the observed fact of crying). The latter may be seen as a proper lay witness opinion because, while not technically a factual observation, it is an opinion that is nonetheless "rationally based on the *perception* of the witness."²

Conversely, the same caseworker would likely not be allowed to testify that a mother of a child disliked her (dislike being a subjective emotional opinion), but could testify about facts consistent with the condition of dislike, such as name-calling. Effective direct examination, therefore, requires that the examiner seek to elicit facts and not opinions or conclusions.

Understanding this distinction is aided by differentiating direct examination from closing argument. It is unpersuasive and arguably objectionable to attempt to elicit a caseworker's opinion or conclusion that a parent was uncooperative. Lack of cooperation is better proved by eliciting from the witness a series of facts, such as: *the father used abusive language; he missed 90 percent of his appointments; he failed to return any phone calls; he refused to attend parenting classes*. These are the facts that lead to the conclusion that the parent was uncooperative. Then, during closing argument, the lawyer may recite those facts and draw the conclusion that the parent is uncooperative. Failure to distinguish facts from conclusions, coupled with a hurried desire to elicit a quick conclusion without building the facts for the record, may be the most common and problematic error on direct examination.

The key to successful direct examination of a fact witness, therefore, is focus on the witness's direct personal perceptions and actions and not their opinions, conclusions, or feelings.

Case Analysis

Prepare for direct examination by determining which witnesses to call, in which order to call them, and what to ask them. Having engaged in the case analysis process from the outset, you have combined the legal theory (the elements of the case) with a persuasive explanation (the theme) to form the story of the family. Direct examination calls on us to determine the most persuasive way to organize the telling of the story through the witnesses. At this point, refer to your Proof Chart (*see* Case Analysis, chapter one) and organize the calling of the witnesses in the most persuasive order, based on which elements of the story each witness can best tell.

Failure to distinguish facts from conclusions —coupled with a hurried desire to elicit a quick conclusion without building the facts for the record—may be the most common and problematic error of the lawyer on direct examination.

It is imperative to not overvalue a witness's scope of information. A witness knows what he or she knows and no more. You can disrupt the flow of the case and cause serious damage to it by overstating what the witness can say. Witness credibility must be paramount at all times.

Focus on the Witness

Because direct examination is an opportunity for a witness to tell part of the story of the case in the witness's own words, describing the witness's direct experience and perceptions, it is the witness—not the lawyer—who must be the focus of direct examination. This is the opposite of cross-examination. It is lawyer's job on direct to highlight the witness in such a way that the witness can tell his or her part of the story in the most persuasive possible fashion.

It can be useful at this point to check our work against five basic questions:

1. Is the testimony I plan to elicit entirely consistent with theory and theme?
2. Is this the best witness from whom to elicit this information?
3. Is the information relevant to proving the case theory and theme?
4. Does the witness possess the requisite legal foundation to testify about this information?
5. Is the statement hearsay, and if so, is there an exception to allow the testimony?

Once these five criteria are satisfied, you should prepare the direct examination.

Imagine hearing a compelling story about a real-life event. As the storyteller proceeds, you become engaged and want to know what is going to happen. The storyteller pauses. At that point, you ask, "And then what happened?" In a sense, that is what the lawyer does in direct exam—he prompts the witness through the storytelling process.

Of course the lawyer does a great deal more than just ask *what happened next*. Witnesses are not allowed to narrate their testimony, but rather must respond to specific questions. So it is the lawyer's job to headline

story topics and then prompt the witness to give succinct and responsive segments of the story through short, open-ended, nonleading questions.

It is sometimes suggested that direct examination should be like a conversation. This is true in the sense that on direct the witness should use conversational language to describe her observations and actions. It is at best a very one-sided conversation, where the witness provides all of the information. Remember—the focus is on the witness, not the lawyer.

Witness Preparation

The witness, therefore, has a difficult job to do. She is asked, typically with little if any communication training or familiarity with the court process, to thoroughly and clearly describe important information to the fact finder. It is also likely that the witness has an interest in the outcome and has significant anxiety about testifying. It is your job, therefore, to prepare the witness by making sure the witness knows the substantive information that will be requested and helping the witness become comfortable with the role of providing persuasive facts.

Witness preparation is allowed and expected in the U.S. by court convention.

While it is unethical to "coach" a witness by telling a witness what to say—or worse, encouraging false testimony³—you should talk to your direct examination witness about what you will be asking the witness and how you will ask it. Assure the witness that it is appropriate to prepare. Be sure to explain to witnesses that they are required to tell the truth and that they may ask for clarification, restatement, or simply answer, "I don't know" or "I don't understand the question" where appropriate.

Because very little discovery is conducted in child welfare court, it is even more important to prepare witnesses for court testimony in these types of cases. This, combined with the reality that child welfare court witnesses are difficult to access and lawyers typically have inadequate time to prepare witnesses, is a serious systemic flaw. While system policy change is not the subject of this publication, there can be no doubt that effective direct examination is tied to the level of witness preparation. This can be particularly acute on occasions where a child witness is called to testify.

The Rule and Reason Against Leading Questions

Leading questions are prohibited on direct examination, with minor exceptions.⁴ Apart from the statutory prohibition against leading the witness on direct examination, leading questions are an ineffective technique because they detract from the witness's ability to tell a story.

Leading questions ask merely for the witness to confirm or deny that which the questioner has stated. The leading question, "The house was filthy, correct?," instructs the investigator witness to confirm the questioner's belief and no more. Yet it is not the questioning lawyer's belief about which we should be concerned. We should be concerned about what the witness knows and volunteered without being told to what to recall. Testifying from one's independent recollection is a fundamental tenant of our evidentiary system. It is also the most persuasive form of storytelling and communication with the fact finder.

Question form can be separated into three types:

1. Leading

Q: The house was *filthy*, correct?

A: Yes.

The question contains the answer and instructs the witness to agree to the answer.

2. Suggesting

Q: Was the house *filthy*?

A: Yes.

The question contains the answer and arguably suggests it to the witness. Some courts may consider this a leading question.

3. Open

Q: What was the condition of the house?

A: It was *filthy*. I was actually uncomfortable going in there. It smelled horrible. There were dirty clothes strewn about the floor. There were dozens of dirty dishes with left-over food on them. The garbage was overflowing onto the floor. Flies were everywhere. It was really awful.

This question neither suggests nor contains the answer. It calls on the witness to recall and articulate the answer. It also allows and even encourages the witness to engage in responsive, descriptive storytelling. It is, therefore, this "open" type question that satisfies not just the law, but also the purpose of direct. Open questions should comprise the vast majority of questions asked on direct examination.

Questioning Techniques⁵

Use Six Honest Words

Rudyard Kipling referred to "six honest men" in connection with the six words *what, where, when, how, why, who*. They are honest words because when one seeks information with them, they prohibit the questioner from imposing or suggesting the answer. Questions formed with these words are necessarily fair questions. Questions formed with these words cannot be leading questions. As such, they should be the first words of the majority of questions on direct examination.

Avoid the natural tendency to use the words: "is," "was," "did," and "were" to begin a direct examination question. The questions: "Is the house filthy?" "Was the house filthy?" "Did you see the filthy house?" or "Were you at the filthy house?" all contain the sought-after information, are suggestive, call for a confirmation and not a persuasive answer, and may be seen as leading.

It can be challenging to construct a direct examination with only the six honest words. Experience and practice will make the task easier. The occasional suggestive transitional question will help the process (Did you visit the house?), as will the liberal use of headlines and the occasional use of the phrases: "please describe" or "please explain," as in: "Please describe the condition of the house."

Use Headlines

Headlines, sometimes called headnotes, are extremely useful to the organization and flow of the direct examination. It is difficult to construct a direct examination using only open-ended, nonleading questions without this tool. Headlines direct the witness and allow the fact finder to better follow the examination. They serve as transitions between topic areas. Headlines are sometimes described as the chapter titles to the book that is the story of the case.

Headlines are statements by the lawyer directing the witness to a particular topic—they typically begin with phrases such as: *let's talk about . . .*; *I'd like to ask you some questions about . . .*; and, *I'd like to refer you to . . .* In this way, the lawyer sets up a series of questions about a particular topic without asking a leading question, alerting the witness and fact finder of the change in topic. It also allows the fact finder to refocus attention, which might have wandered. It is important to use headlines properly—don't try to place facts in the record by using the headline to sneak in argumentative facts or conclusions or facts not in evidence.

While headlines are used regularly in courts throughout the U.S. by convention, you may occasionally be faced with an objection that you are testifying or not asking a question. The headline is not testimony so long as it does not include facts not in evidence. Further, headlines should be allowed as proper examination organization that simply alerts the witness (and the fact finder) to the area of questioning that would follow.

The illustration that resonates with many judges is the time-honored headline by the prosecutor: "Officer, I would like to direct your attention to the afternoon of April 1, 201_." While not a question, it is universally accepted as a proper organizational and directive questioning technique. Additional legal authority exists for headlines in that "the court shall exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective . . ." ⁶ Further, some leading of witnesses on direct may be allowed "as may be necessary to develop . . . testimony." ⁷

Use Loopbacks

Loopback questions are effective to focus the witness and fact finder and to emphasize an important fact already in evidence. They are used as a predicate or condition to a question. They are permissible because they are part of a proper nonleading question, are not argumentative, and do not assume facts not in evidence.

Assume, for example, that a caseworker testified that a father was uncooperative with the investigation. A follow-up, loopback question would be: "You said earlier that the father was uncooperative; how was he uncooperative?" One might even combine a loopback question with a headline transition: "You stated on direct that the father was uncooperative; I'd like to ask you some questions about that."

Organization

The Three Parts of Direct Examination

It is useful to organize and divide direct examination of fact witnesses into three basic parts:

1. Introduce and accredit the witness;
2. Ask the witness to set the scene; and
3. Ask the witness to describe the action.

Introduce and Accredite the Witness

To persuade the fact finder that the witness should be believed, the fact finder must have an appreciation for the witness: who the witness is, why the witness is here, why the witness knows the information, and why the witness should be trusted and believed. This is the role of introduction and accreditation, and lawyers frequently minimize it as a mere formality. You should take adequate time, without belaboring the obvious or delving into irrelevant or minor details, to establish the credibility of the witness through introduction and accreditation.

The following codes are used to illustrate technique:

Bold Word = One of the seven honest words

Bold Sentence = *Headline*

Italics = *Loopback*

Good morning.

Q: Please tell us your name?

A: My Name is Theresa Gordon.

Q: **Where** do you live Ms. Gordon?

A: Right here in Nita City.

Q: **How** long have you lived in Nita City?

A: All my life, except for when I left for college.

Q: **How** old are Ms. Gordon?

A: I'm thirty-nine years old.

Q: **Where** do you work?

A: Nita Elementary School.

Q: **What** do you do at Nita Elementary School?

A: I'm the third grade teacher.

Q: **How** long have you worked at Nita Elementary?

A: Seventeen years.

Q: **How** long have you taught third grade?

A: I've taught third grade for most of that time, the last ten years anyway.

Q: Ms. Gordon, do you know a child named Victoria Jones?

A: Yes I do.

Q: **How** do you know Victoria?

A: I'm her teacher.

Q: **Why** are you here today Ms. Gordon?

A: I was asked to come here and testify regarding my observations of Victoria in my class.

Before you do that, I'd like to ask you a few questions about your teaching qualifications.

Q: *Ms. Gordon, you mentioned earlier that you left Nita City to go to college; where* did you go to college?

A: Nita State.

Q: **What**, if any, degree did you obtain?

A: I received a BA in Elementary Education with a minor in Spanish.

Q: **How** did you do in college?

A: Very well I think. I love education, learning and teaching, and I graduated with high honors.

Q: Ms. Gordon, as part of your preparation for teaching, **what**, if any, courses did you take regarding young children's behavior.

A: I took several, including the core requirement called child and adolescent behavior and psychology.

Q: **What** is child and adolescent behavior and psychology?

A: It is the study of normal and abnormal behavioral patterns and what causes those patterns.

Q: *You said this was a core requirement; why* is it considered important?

A: Two reasons. First, it impacts a child's ability to learn, and second, it helps teachers identify children in potential crisis.

Q: **What**, if any, other courses or training have you had in identifying children in potential crisis?

A: Several. Most notably I took the Nita School

District mandatory training on recognizing signs of child maltreatment.

Q: Ms. Gordon, **why** are you a teacher?

A: Simple—I love kids. I love helping them reach their potential.

* * *

The forgoing sample examination illustrates how a teacher can be presented to a fact finder as relevant, interesting, and credible. Such examinations should be shortened or expanded based on the facts and story of the case. Do not be deterred by the occasional impatience of the court and opposing counsel on such matters.

While it is advisable to be respectful of the court's time and to never waste time, it is the duty of the lawyer to persuade within the rules and court conventions. A lawyer may, on such occasions, advise the court that the lawyer respects the court's time, but that it is important to hear a reasonable amount of the witness's background because it will relate to testimony about maltreatment and thereby assist the court.

Ask the Witness to Set the Scene

Scene setting is that portion of direct examination that leads up to the action, places the witness in the action, and provides further and more specific foundation for the ultimate action testimony. It may overlap a bit with the accreditation information of part 1.

Ms. Gordon, I'd like to ask you some questions now about the morning of Tuesday, November 20, 201_.

Q: Do you remember that morning?

A: Yes, I do.

Q: **Where** were you at approximately 8:00 a.m.?

A: I was at the school.

Q: **What** time did you get to school?

A: My usual time, about 7:00 a.m.

Q: **What** did you do?

A: A little busy work, housekeeping matters first.

Q: **What** did you do next?

A: I got out my roll call book and reviewed my lesson plan for the day.

Q: **When** did the children arrive for school?

A: The bell rings at 8:10, and they come into the classroom by 8:15.

Q: **What** did you do once the children arrived?

A: I took roll.

Q: **What** did you find out from your roll call?

A: That all sixteen of my students were in the class except one.

Q: **Who** was absent?

A: Victoria Jones.

Q: **What** did you do next?

A: Well, because the office had not informed me that I had any absences, I told the children to be still, that I would be right back, and I went to the office to turn in my roll sheet and advise them that Victoria was absent.

Q: **What** happened when you went to the office?

A: I never made it to the office.

Q: **Why** not?

A: Because when I opened my door, I saw Victoria standing there in the hall all by herself.

Ms. Gordon, before we talk about what happened after you discovered Victoria in the hall, I want to talk about what kind of student Victoria is in your class.

Q: **How** long have you known Victoria?

A: I have known her since she started school here three years ago as a kindergartner.

Q: **How** long have you been her teacher?

A: Since the beginning of this school year, so about three months.

Q: **What** kind of student is she?

A: She's a good student.

Q: **Why** do you say that?

A: Because she is socially well adjusted and does well academically.

You mentioned two things just now, let's take those one at a time, starting with social adjustment.

Q: **What** do you mean when you say she is socially well adjusted?

A: She interacts with the other students and the teachers very well, has friends, and easily participates in activities.

Q: *You also described her as a good student, why?*

A: She regularly and eagerly participates in class, does her work, and gets A's and B's in her subjects.

Q: **What** if any behavioral problems have you had with Victoria?

A: None.

Let's talk now about Victoria's family.

Q: **How** do you know the family, if you do?

A: I do; I met Victoria's parents at the fall parent-teacher conferences.

Q: **Why** do you hold parent-teacher conferences?

A: So that the school, teacher, and parents can all be on the same page participating in the education of the student. Also we find out if there are special family issues.

Q: **What** were your impressions of the parents' ability to be part of this educational team process?

A: Good. They were very cooperative and engaged.

Q: You mentioned earlier that conferences also are held to discover any special family issues. **What**, if any such issues did you discover with Victoria's family?

A: Well, they were concerned about the house being crowded and different because the mother's brother had lost his home to foreclosure and he and his family were coming to live with them. Also, there was some concern about the brother having been in some kind of trouble.

Q: **What** is the brother's name?

A: Sean Watson.

At this point in the examination, the scene is set for something to happen, the fact finder is poised to hear it, and the witness is placed in a position to describe it.

Ask the Witness to Describe the Action

The description of the action varies depending on the type of “action” involved. An eyewitness to violence will describe the violent action observed, such as witnessing a parent strike a child in the car of a parking lot. A caseworker may describe the action observed at a supervised visit. Sometimes, action may be less event based, such as a neighbor describing his observations that the family seemed to keep to themselves and were rarely seen coming and going. The action part of direct examination is the reason for calling the witness. The witness must describe the action with such clarity and precision that the lawyer is certain that the legal elements and the story components for which this witness is responsible have become evidence.

Ms. Gordon, I want to return now and talk to you now about what you saw and what you did once you saw Victoria in the hall on the morning of November 20.

Q: **What** was the very first thing you noticed when you saw Victoria standing in the hall all by herself?

A: Well, it was odd to me that she was out there, and I noticed that she was just standing in the middle of the hall, stiff like a board, just staring at the classroom door.

Q: **What** did you do when you saw her like that?

A: I went to her, spoke to her, and put my arm around her to bring her into the class?

Q: **What** did Victoria do?

A: At first she jerked a little, like she was startled when I touched her.

Q: **What** happened when you took her into the classroom?

A: She was moving a little slowly so it took a minute but I took her to her seat and she sat down.

Now I would like to direct your attention to later the same morning, in your classroom, at about 10:00 a.m.

Q: **What** happened at 10:00 a.m.?

A: Well, the students were to be working quietly by themselves on a project when I heard the students begin to make noise and shuffle about

in their desks.

Q: **What** did you do?

A: I asked the students to quiet down and focus on their work.

Q: **How** did the students respond?

A: Not well.

Q: **Why?**

A: Well, I didn’t know at first, but then I saw several students pointing at Victoria.

Q: **What** did you do?

A: I looked at Victoria.

Q: **What** did you see?

A: She was crying and shaking.

Q: **What** did you do when you saw her *crying and shaking*?

A: I went to her desk to comfort her and find out what was wrong.

Q: **What** did you find out?

A: Well, that Victoria was clearly very distressed and that she had had an accident—she had urinated all over herself and the desk seat.

Q: **How** did you respond to this?

A: Well, I was surprised and concerned. I took steps to comfort Victoria, settle down the class, get a temporary teacher in the class, clean up the desk, and take Victoria to the school nurse.

Let’s talk about taking Victoria to the school nurse.

Q: Please describe how you did that.

A: First, I took Victoria to the girls’ bathroom, and we got her cleaned up. Then I explained that we were just going to the nurse’s office and we would get her some dry things and it that was OK.

Q: **What** did you do next?

A: We knocked on Nurse Smith’s door, and she let us in.

Q: **What** did you and Nurse Smith do?

A: We comforted Victoria and asked her if anything was wrong.

Q: **How** did Victoria react?

A: She started crying and shaking and putting her hands between her legs in her crotch, but she would not talk.

Q: **What** did you do next?

A: I called Nita CPS—Child Protective Services.

Q: **Why** did you call Nita CPS?

A: Because I was required to.

Q: **Why** were you *required* to do so?

A: Because school teachers and school nurses are mandatory child abuse reporters.

Q: **What** does that mean, that you are a *mandatory child abuse reporter*?

A: It means that I am legally required to report possible child abuse when I observe known indicators of it.

Q: **Where** are these *known indicators* found?

A: In the Nita School District training materials and procedures guide.

Q: **What** indicators found in your guidelines did you observe with Victoria?

A: I observed four.

Q: **What** was the first?

A: Standing in the hall by herself, after class had begun, appearing shocked.

Q: **What** was the second?

A: Urinating on herself.

Q: **What** was the third?

A: Inability to answer questions about what happened or why she was distressed.

Q: And **what** was the fourth?

A: Holding her crotch.

Q: Ms. Gordon, what happened after you called CPS?

A: A CPS investigator arrived at the school to meet with Victoria.

No further questions at this time, your Honor. Thank you, Ms. Gordon.

By the close of the direct examination, the witness has described the event or events she perceived, in her

own words, as prompted and organized by her lawyer. Any testimony that is not unquestionably a fact is rationally based on the witness's perception. The witness has told her part of the story of the family.

Sequencing within the Topic

Events are best understood when presented in a logical, orderly sequence. It is difficult to understand stories told out of order. Make your direct examination points in a sequence where questions build one upon another, in order, leading to an ending. In the example of Ms. Gordon's testimony above, the sequence begins with Ms. Jones training, moves to her job as a teacher; she then meets Victoria, learns about her family, observes Victoria as a good student, notices something is wrong, investigates, and reports child abuse. These events build each from the prior and follow each other.

At the same time, however, we want to tell compelling and persuasive stories, and this calls for some variability of sequence. It is frequently advisable to move from strictly sequential, chronological organization to a topical organization. In our example, while setting the scene in part two, Ms. Gordon reveals that she found Victoria alone in the hall. Next, however, the lawyer changes topics to discuss Victoria's typical conduct as a student so that we can better appreciate what happens when we return to Victoria in the hall. The key is to remain sequential within the topics that may vary in time and place.

Engage: Stop, Look, and Listen

Anxiety can cause the lawyer to focus on a list of questions rather than the witness. When the lawyer is connected to the witness, a meaningful exchange is likely and the fact finder is more likely to engage with the witness as well. As a general rule, the fact finder will look where the lawyer looks, and that should be at the witness on direct examination.

This requires us to engage with the witness and not disengage until there are no further questions. Yet there is a tendency, wedded as we are to our game plan, pen in hand, and notes on the lectern, to disengage from the witness as if we were merely taking inventory of our data. We may look up briefly, ask a question, then, while the witness is answering, we look down, check off our list, and prepare the next question. You are well advised, however, to leave the pen at

counsel table, set down the notes nearby in case they are needed, and *engage the witness*. When we listen, the witness's answers will not only cue the next question, they will enable us to follow up naturally and make appropriate and logical deviations from our script.

Visual Aids

If a picture is worth anything close to a thousand words, you are well advised to use one. Visual aids can make a direct examination more effective by clarifying an event. In other words, our book can have pictures.

Visual aids, demonstrative exhibits, and witness demonstrations bring verbal testimony to life. Where possible, a lawyer should use these tools to enhance testimony. A physician who testifies that a child had a twisting fracture consistent with inflicted harm can enhance the testimony by standing and showing the clearly apparent fracture line on an x-ray illuminated by a portable x-ray machine, Elmo, or computer projection, while she explains—and shows how—the white fracture line was caused by a twisting motion. This kind of demonstration by a witness is an effective visual aid itself, and you should encourage witnesses, with the court's permission, to get up and demonstrate an action they observed or in which they participated.

Photographs and diagrams are also excellent aids and can be blown up and projected for impact.

Defensive Direct

Lawyers do not make the facts of the case. Nor is it ethical (or our job) to distort them. Acceptance of this reality is a key to good trial work because it acknowledges that something is inconsistent and requires reconciliation. It is likely that every case has some bad facts with which we must acknowledge and deal. Where it is probable that the opposing party will bring up these facts, either in cross-examination or through another witness, it is usually a good idea to deal with them ourselves. When such factual shortcomings are acknowledged honestly and in a nondefensive manner, they may be seen as less significant to the fact finder. This is called defensive direct examination. We should ask, with regard to each witness, whether there are weaknesses that should be acknowledged, explained, or minimized. A good rule of thumb is to ask ourselves whether we would bring out the particular fact if we were on the other side.

Primacy and Recency: Start Strong, End Strong

The principles of primacy and recency have important applications in direct examination. The principles apply to both witness sequence and question/topic sequence. Because we know that fact finders retain best and focus on that which they hear first and last, we should organize witness order and examination topic order so that we start strong and end strong, placing weaker matters in the middle.

Call the strongest (and hopefully most important) witnesses first and last, placing less significant or weaker witnesses in the middle. Organize your examination topics so that the strongest (and hopefully most important) topics are discussed first and last. Be particularly careful to avoid potentially objectionable matters at the beginning and end of an examination. Imagine the damage caused by a sustained objection to the last direct examination question or answer—and the lawyer sheepishly saying, “No further questions,” and shuffling back to counsel table.

In the example of Ms. Gordon, the examination builds to the point where Ms. Gordon reveals what she observed of Victoria and how she responded by calling CPS. These are the most powerful points of the examination and the purpose for calling the witness. They are Ms. Gordon's portion of the story of the family.

Check Your Work

Apply the five-part test to again check your work:

1. Is the testimony I plan to elicit entirely consistent with theory and theme?
Yes. It supports the theory that Victoria was sexually abused, possibly by her uncle.
2. Is this the best witness from whom to elicit this information?
Yes. As Victoria's teacher, Ms. Gordon is likable, credible, knowledgeable, and was the witness for the events she describes.
3. Is the information relevant to proving the case theory and theme?
Yes. It tends to prove a fact at issue: Victoria was sexually abused, possibly by her uncle.

4. Does the witness possess the requisite legal **foundation** to testify to this information?

*Yes. Ms. Gordon describes what she directly perceived and how she acted in response to what she perceived.*⁸

5. Is the statement *hearsay*, and if so, is there an exception that would allow the testimony? *She gives no answer based on an out-of-court statement.*

Redirect Examination

Relax, because on the eighth day God created redirect examination (goes the trial lawyer adage). Redirect examination gives the lawyer the opportunity to repair damage caused on cross-examination through rehabilitation, explanation, and new information. Rehabilitation is the process of reviving an impeached witness's credibility by justifying the inconsistency on which the witness was impeached. Explanation is the process of detailing an alternate understanding or impression of the facts left by the cross-examiner. On occasion, a lawyer may also be able to provide new information not previously disclosed on direct, so long as the new information does not exceed the scope of the cross-examination.

Redirect examination follows cross-examination and is generally allowed by court convention. It is typically limited to the scope of cross. Redirect examination is subject to the same rules as direct examination, including the prohibition against asking leading questions. It is not uncommon, however, to hear lawyers lead the witness on redirect, perhaps unintentionally, having become accustomed to hearing leading questions on cross-examination. Still, it is not permitted.

Redirect should be waived where no substantial harm was done on cross, or where, despite having been harmed, there is nothing that can be done to fix the problem. Counsel should ask for the opportunity to redirect if the court does not recognize counsel to do so. Remember to prepare your witness for the possibility of redirect to avoid confusing your witness. ©

About the Author

Marvin Ventrell founded the Juvenile Law Society in 2009, following 16 years as the chief executive officer of the National Association of Counsel for Children (NACC). Mr. Ventrell was educated at St. Johns University (MN), the University of London, and the University

of Montana, where he received his law degree. He lives in Denver, CO.

From 1985 – 1989 Mr. Ventrell was an Associate with the Billings, MT law firm, Olsen, Christensen & Gannett (OCG), a general practice and litigation firm. While at OCG, in addition to trial practice, he began representing children and youth in delinquency and dependency cases. From 1989 – 1993, he was a partner in the Billings firm Gannett & Ventrell. During that time, he continued to represent children in dependency cases and became the Yellowstone County Juvenile Public Defender. He was hired by the NACC in 1993.

While chief executive of the NACC, Mr. Ventrell grew to national prominence as a writer, scholar, teacher, and consultant in the child welfare arena. The NACC grew from 1000 to 2500 members and its budget grew by ten times its size. The NACC became a national leader in training, education, and technical assistance for child advocates, and rose to prominence as an influence in the development of law and policy for children and families. NACC received the Meritorious Service to the Children of America Award from the National Council of Juvenile and Family Court Judges and the Outstanding Association Award from the American Society of Association Executives. Mr. Ventrell was awarded the ABA Child Advocacy Award and the Kempe Award, and was named a Fellow of the Colorado Bar Foundation.

Mr. Ventrell, together with his colleague Donald Duquette from the University of Michigan, with funding from the U.S. Dept. of HHS Children's Bureau, established Child Welfare Law as a formal legal specialty in the U.S. They then created the NACC Child Welfare Attorney Certification Program through which attorneys may obtain the Child Welfare Law Specialist (CWLS) credential. Mr. Ventrell and Professor Duquette wrote and edited the national treatise, Child Welfare Law and Practice used as a law school text, practice tool, and certification exam preparation guide. Professor Duquette and Mr. Ventrell also wrote and compiled the national examination for child welfare law proficiency.

Mr. Ventrell is the author of numerous articles and book chapters including, The Evolution of the Dependency Component of the Juvenile Court. He is currently completing a new book, Trial Advocacy for the Child Welfare Lawyer: Telling the Story of the Family, publishers Lexis / NITA, scheduled for publication April 2011. Mr. Ventrell is responsible for the National Children's Law Office Project (CLOP) which supports the creation and maintenance of model children's law offices

through the project publication, Children's Law Office Guidebook (*The Blue Book*).

Mr. Ventrell brought his trial practice expertise from his litigation practice to the juvenile law arena and, together with the National Institute for Trial Advocacy (NITA), established the Rocky Mountain Child Advocacy Training Institute, now in its 15th year. He serves as a faculty trial skills trainer for NITA's National, Regional, and Specialty Programs

Endnotes

- 1 RUDYARD KIPLING, *The Elephant's Child* (emphasis added). Thank you Mark Caldwell, NITA Program Director, for identifying this reference.
- 2 FED. R. EVID. 701.
- 3 MODEL RULES OF PROF'L CONDUCT, R. 3.4(b).
- 4 FED. R. EVID. 611(c): "Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony." Such exceptions typically include, by convention and

common law, foundation for further testimony, foundation for introduction of exhibits, preliminary matters, questions for the very young and very old, and the efficient development of testimony (headlining). See *People v. Petschow*, 119 P.3d 495 (2005).

- 5 The techniques of Six Honest Words, Headlines, and Loopbacks are attributable to and part of NITA training.
- 6 FED. R. EVID. 611(a).
- 7 FED. R. EVID. 611(c).
- 8 Note that Ms. Gordon was not asked to opine as to whether Victoria was abused. She was not qualified as an expert witness in child abuse and such information would likely be seen as asking for an expert opinion beyond the scope of permissible lay witness opinion. Neither is Ms. Gordon asked for a lay witness opinion. Instead, she is asked what happened and how she acted. Nonetheless, be cautious here and know your jurisdiction. It is possible that some courts could construe Ms. Gordon's justifications for calling CPS as improper lay witness opinion, in which event it would be unwise to attempt to end on this point.

The Michigan Child Welfare Law Journal Call for Papers

The editorial board of *The Michigan Child Welfare Law Journal* invites manuscripts regarding current issues in the field of child welfare. The *Journal* takes an interdisciplinary approach to child welfare, as broadly defined to encompass those areas of law that directly affect the interests of children. The editorial board's goal is to ensure that the *Journal* is of interest and value to all professionals working in the field of child welfare, including social workers, attorneys, psychologists, and medical professionals. The *Journal's* content focuses on practice issues and the editorial board especially encourages contributions from active practitioners in the field of child welfare. All submissions must include a discussion of practice implications for legal practitioners.

The main text of the manuscripts must not exceed 20 double-spaced pages (approximately 5000 words). The deadline for submission is September 30, 2011. Manuscripts should be submitted electronically to kozakiew@msu.edu. Inquiries should be directed to:

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Spotlight on: Voices for Michigan's Children

Since 1992, Voices for Michigan's Children has been an effective, independent and nonpartisan advocacy organization, creating social change through improved public policies and investments for children and their families.



Michigan's Children monitors federal and state policy decision-making; provides information to policymakers, communities, the media and the public; works directly with legislators and other policymakers; and gives communities, parents and youths the tools they need to advocate on their own behalf.

Through our Budget Watch project, Michigan's Children provides a wide range of information on budget decisions including analyses of pending budget proposals, budget advocacy tips, action alerts, and a weekly e-bulletin. In addition, Michigan's Children has worked aggressively to ensure that children are front and center in the budget debates by engaging communities in budget advocacy and communicating

to the public and policymakers through the media and other communications tools.

We believe that all children have the right to be healthy, safe, educated and economically secure. Vulnerable children need informed and persuasive voices when decisions are being made that affect them. Michigan's Children has expanded public awareness about the impact of public investments in children and families most affected by state budget decisions, with a particular focus on low-income communities and communities of color.

Michigan's Children also works with national organizations, such as Voices for America's Children, First Focus, and America's Promise Alliance to improve federal policies that impact children and to increase funding for programs that help change the odds of success for vulnerable children. To learn more, go to our website: www.michiganschildren.org

Governor Snyder Releases Fiscal Year 2012 Budget: A Summary of Provisions Affecting Children and Youths

On Thursday, February 17, 2011, Governor Snyder released his proposed state budget for fiscal year 2012, which begins on October 1st of this year and ends on September 30th of 2012. The House and Senate appropriations subcommittees have already begun to meet to review the Governor's proposal and discuss their own recommendations for the budget.

The Governor's budget addresses a projected deficit of \$1.3 billion through tax and budget reforms, as well as deep budget cuts. The Governor also presented indicators against which he will be assessing the success of public programs.

Proposed tax reforms include significant changes in the way businesses pay taxes, and the elimination of several tax deductions utilized by families with children, including the Earned Income Tax Credit – a credit available to low-income working families to help support their employment. The Governor's proposed budget follows a decade of disinvestment in programs for children and families throughout the public sector, mitigated temporarily in the last several fiscal years by an influx of federal economic stimulus dollars for health care and education. Proposals for fiscal year 2012 include the following spending provisions affecting children, youth and families.

Education

Overview of the Education Omnibus Budget Bill

The Governor's proposed budget for fiscal year 2012 combines funding for local and intermediate school districts, community colleges and higher education into an omnibus education budget bill which would ultimately be known as the State Education Funding Act. The Governor's budget includes a total of \$13.8 billion for the State Education Funding Act, including \$11 billion in revenues from the School Aid Fund, \$1.1 billion in state general funds, and \$1.75 billion in federal funding.

Traditionally, revenues from the School Aid Fund have been reserved for programs administered by local and intermediate school districts. Of the total \$13.8 billion proposed by the Governor for the State Education Funding Act, \$12.2 billion would be appropriated for K-12 education, down from \$12.9 billion in fiscal year 2011; \$296 million would fund community colleges, including \$196 million in School Aid revenues; and \$1.4 billion would be available for higher education, with \$700 million coming from the School Aid Fund.

In the budget proposal, the Governor presented indicators against which he will be assessing the success of public education programs. The "dashboard" outcome measures include reading at grade level by 3rd grade, college readiness, and high school dropout rates. Transitional performance measures include district participation in the Superintendent's Dropout Challenge and the seat time waiver program; completion rates for on-line courses; adequate yearly progress; the availability of training and technical assistance for school districts; the number of partners assisting low-performing schools; and measures of post-secondary remediation, retention and degrees awarded.

The Governor's FY 2012 Budget Recommendation

Included in the Governor's budget for fiscal year 2012 are the following:

A deep cut in K-12 per pupil foundation grants. The Governor proposes a total per pupil cut of \$470 in fiscal year 2012, a reduction of approximately 5 percent. To offset the per pupil cut, the Governor recommends that districts seek economies of scale for non-instructional services and explore cost-cutting measures in employee compensation. The Governor recommends setting aside \$300 million in foundation allowance

discretionary funds for an incentive fund for districts that are adopting cost-saving measures.

In addition to per-pupil allocation cuts, the Executive Budget eliminates \$20 million in grants to school districts with declining enrollments, as well supplemental funding for rural and geographically isolated districts (\$9.4 million).

Cuts in funding for Intermediate School District (ISD) operations and special grants to districts. The Governor proposes to cut ISD operations by \$3.3 million or 5 percent, with total funding falling from \$65.4 million to \$62.1.

Continuation funding for early childhood education. The Governor provided continuation funding for the following early education programs:

- *Great Start Readiness Program (GSRP):* Funding for the School Aid GSRP would continue at \$88.1 million, with \$7.6 million for the GSRP competitive program (\$7.6 million).
- *Great Parents/Great Start:* Funding for the Great Parents/Great Start program is
- continued at \$5 million.
- *Great Start Collaboratives:* Continuation funding for local Great Start Collaboratives through the ECIC at \$6 million.

Cuts in programs to improve academic achievement and reduce dropout rates. The Governor's budget reduces or eliminates funding for a range of programs that are intended to improve achievement or prevent youths from dropping out of school. Included in the cuts were the following programs:

- *Middle College Program:* Funding for the Middle College program (\$2 million) is eliminated.
- *Bilingual Education:* Funding for bilingual education is eliminated (\$2.8 million.)
- *Precollege Engineering Programs:* Funding is eliminated (\$905,100.)
- *Positive Behavior Support Program:* State funding is eliminated (\$300,000.)
- *Class Size Reduction Grants:* A total of \$19.7 million in funding to reduce class sizes is eliminated.
- *Educational services for juvenile justice facilities:* Funding for educational costs in Juvenile Justice facilities is reduced by 27% to \$1.1 million.

Continuation funding for a range of programs designed to improve achievement and career opportunities.

- *Career and technical education:* The Governor included continuation funding (\$26.6 million) for career and technical education.
- *Adult education:* Funding in the Executive Budget is continued at \$22 million.
- *Michigan Virtual University:* The Governor maintains funding at \$4.4 million, to be used for the development and operation of the Michigan virtual high school, as well as for professional development opportunities for educators.
- *Math and science centers:* The Governor recommends continuation funding of \$7.8 million for math and science centers.

Continuation funding for the At Risk Program. The Governor includes continuation funding (\$309 million) for services for at-risk students. At Risk program dollars are available to districts through an allocation formula, and can be used for a range of academic and supportive services.

Continuation funding for child and adolescent health programs. The Governor's budget includes continuation funding for child and adolescent health programs (\$3.6 million), as well as hearing and vision screenings (\$5.2 million).

Changes in programs designed to increase college access. The Governor proposes the following related to college access:

- *Continuation funding for community colleges:* The Governor included continuation funding (\$296 million) for the state's community colleges.
- *A deep reduction in funding for state universities:* The Governor recommends a 15 percent reduction for state Universities.
- *Increased funding for the Tuition Incentive Program (TIP):* The Governor included an additional \$6.4 million (total recommendation of \$43.8 million), for TIP scholarships for low-income students who have received Medicaid for 24 out of 36 months.
- *Pathway to Higher Education program:* The

Governor merges the Michigan Competitive Scholarship and the Tuition Grants programs into a single Pathway to Higher Education program, and maintains flat funding.

Funding to improve educational data systems.

- *Data collection and reporting:* The Governor provides continuation funding to local districts (\$34 million) for data collection and reporting.
- *Reduced funding for data collection and analysis resulting from Michigan's failure to receive federal Race to the Top funding.* The Governor recommends a decrease of \$7.2 million for the Center for Educational Performance and Information (CEPI), reflecting Michigan's unsuccessful bid for Federal Race to The Top funding.

Overview of the Department of Education Executive Budget

The Governor's proposal maintained funding for the Michigan Department of Education separate from the State Education Funding Act. The Governor recommends a total of \$113.9 million for the MDE, down more than 10 percent from current year funding levels. Savings are realized primarily through a 10 percent reduction in library services, a 35 percent reduction in funding for student data collection and savings through eliminating some MDE education reform functions.

Changes to the Department's education reform directions would need to be made in statute, as they were enacted through legislation passed late in 2009.

Health

Overview of the Department of Community Health Executive Budget

The Michigan Department of Community Health (DCH) budget is the now the largest state budget, with a total appropriation of over \$14 billion in the current fiscal year. Two of every three dollars spent in the DCH budget are from federal sources--primarily federal Medicaid funds. Less than 20 percent of DCH funding (19.3 percent) is state funding. Total funding for the DCH budget has grown by over 54 percent since fiscal year 2002, from \$9.2 billion to \$14.1 billion.

The Governor's FY 2012 DCH Budget Recommendation

The Governor recommends a total of \$13.97 billion for the DCH in fiscal year 2012, down approximately 1 percent from current year funding. State general funds for the DCH would increase by over 11 percent from \$2.4 billion to \$2.7 billion. Over 72 percent of DCH funding (\$10.1 billion) is for health care services, including Medicaid and services for children with special health care needs. Approximately 20 percent (\$2.7 billion) supports mental health and substance abuse services. Less than 3 percent (\$393 million) is for public health and supportive services for families, children and senior citizens.

The Governor's DCH budget assumes that the Legislature will approve a new health care insurance claims assessment of one percent applied to all health insurers in the state. The assessment would replace the existing use tax on Medicaid health maintenance organizations and community mental health pre-paid in-patient health plans, and would generate nearly \$400 million in revenue. If the insurance claims assessment is not approved, deep cuts in Medicaid provider payments are projected.

The Governor has restructured the DCH budget, reducing and consolidating many budget line items, and eliminating most of the budget "boilerplate," or language describing how funds are to be expended. As a result, it is difficult to quickly compare the Governor's fiscal year 2012 budget recommendation to prior fiscal years. The fiscal year 2012 Executive Budget for the DCH is focused on specific data indicators or metrics. Included are "dashboard" outcome measures related to obesity and infant mortality; as well as transitional performance measures connected to access to public mental health services, teen births, breastfeeding among WIC 19 to 35 months of age who receive all recommended vaccines.

Among the highlights affecting children and youths in the Governor's proposed fiscal year 2012 budget are the following:

Medicaid eligibility and provider reimbursement rates are maintained, without further reductions.

- *No further cuts in Medicaid eligibility or provider payments:* The Governor's budget does not change Medicaid eligibility or call for further cuts in payments to Medicaid providers. Between 1999 and 2005, physician

reimbursement rates for Medicaid remained flat. In 2005, rates were cut by 4 percent in the face of rising health care cost. In 2010, payments to Medicaid providers were cut by up to 8 percent. As a consequence of lagging reimbursement rates, the number of physicians participating in the Medicaid programs has dropped and access has been limited in many areas of the state.

- *The budget assumes continued growth in Medicaid caseloads, costs and utilization.* In fiscal year 2009, approximately 1 million children, or 45 percent of all children in the state were enrolled at some time in the state's Medicaid or MICHild programs. In September of 2010, more than half (57%) of all Medicaid enrollees in the state were children, and Medicaid caseloads for children in Michigan are growing faster than the national average. Also growing is the reliance on Medicaid for costs related to pregnancy and delivery, with the percent of total Michigan births covered by Medicaid rising from 35 percent in 2003 to 51 percent in 2010. The Governor is projecting a 3 percent growth in the number of individuals eligible for Medicaid in fiscal year 2012, as well as a 3 percent increase in inflationary costs and health care utilization for most programs.

Funding for graduate medical education is cut. The Governor recommends a 40 percent cut in funding for graduate medical education for a savings of \$67.3 million total, including \$22.8 million in state funds. This cut will affect access to pediatric services in Michigan.

Funding for the MICHild program is slightly reduced. The Governor projects that the cost of MICHild services will fall slightly from the \$52.7 million appropriated in the current fiscal year to \$51.8 million in fiscal year 2012.

Funding for mental health services for persons eligible for Medicaid continues to grow, but services will be more scarce for adults and children who are not Medicaid-eligible. The Governor provides a total of \$2.7 billion for mental health and substance abuse services. Included in the Governor's recommendation are the following:

- *An increase in costs related to Medicaid mental health services:* The Governor increases funding for mental health services for Medicaid-eligible

individuals from \$2.019 billion in the current year appropriation to \$2.055 billion in fiscal year 2012. Between fiscal year 2001 and January of 2010, funding for Medicaid mental health services increased by 69 percent.

- *A reduction in non-Medicaid community mental health services:* The Governor further reduces funding for community mental health services for low-income families not eligible for Medicaid, cutting total funding by \$8.5 million or 3 percent. Funding for non-Medicaid community mental health services was cut by \$10 million in 2009, an additional \$40 million in 2010, and \$5.4 million in the current fiscal year.
- *Slightly increased funding is projected for the children with serious emotional disturbance waiver.* The waiver, which provides services for children up to age 20 with serious emotional disturbances, is administered by Community Mental Health Services Programs in partnerships with other community agencies. MDCH partners with the Department of Human Services to serve children in foster care in eight counties. Funding for the waiver is expected to increase from \$7.2 million to \$8.2 million.

Funding is cut for prevention and health promotion programs supported by the Healthy Michigan Fund. The Governor's budget includes a 10 percent reduction in the Healthy Michigan Fund, with cuts anticipated in the following programs related to children and youths:

- Smoking prevention programs are reduced from \$4.64 million to \$4.37 million.
- Pregnancy prevention programs are cut from \$1.71 million to \$1.33 million.

Continuation or slightly increased funding is provided for several prevention and maternal and child health programs. Under the Governor's budget, the following maternal and child health programs would be funded at the same level as the current fiscal year or slightly changed:

- *Family planning and local agreements:* Funding is continued at the current year level of \$9.1 million.
- *Local maternal and child health services:* Funding is continued at \$7.02 million.

- *Prenatal care outreach and service delivery support:* Funding is cut from \$50,100 to \$42,500.
- *School health and education programs:* Funding for health education programs is continued at \$405,300.
- *Minority health grants and contracts:* Funding will continue at \$1.1 million.
- *Immunization program:* Funding is increased slightly to \$15.87 million.
- *Childhood lead program and lead abatement:* Funding for the lead program increases slightly to \$1.6 million, while lead abatement rises from \$2.44 million to \$2.65 million.
- *Newborn screening follow-up and treatment services:* Funding is increased from \$4.73 million to \$5.34 million.
- *Women, Infants and Children Nutrition program (WIC):* Funding for WIC payments is expected to increase slightly from \$253.8 million to \$254.2 million.

Funding for local health department operations is reduced. The Governor recommends a 5 percent cut in state funds (\$1.7 million) for local health department operations. Funding for local public health operations fell from \$40.8 million in 2003 to \$39.1 million in 2011. Funding was reduced by \$1 million in the current year budget.

Costs are cut through a switch to managed care for services for children with special health care needs. The Governor proposes to save \$3.7 million in state funds by requiring Medicaid-eligible children in the state's Children's Special Health Care Services program (CSHCS) to be enrolled in managed care. Overall funding for CSHCS medical care and services is expected to rise from \$241.4 million to \$282 million.

Human Services

Overview of the Department of Human Services Executive Budget

The Michigan Department of Human Services (DHS) budget has a total appropriation of \$6.9 billion in the current fiscal year. More than 85 percent of the dollars spent through the DHS budget are from federal sources; only 13 percent is state funding. Total funding for the DHS budget has grown 73

percent since fiscal year 2002, from \$4.0 billion to \$6.9 billion, with the growth driven by large increases in demand for the federally-funded food assistance program.

The Governor's FY 2012 DHS Budget Recommendation

The Governor recommends a total of \$6.9 billion for the DHS in fiscal year 2012, of which \$1.1 billion is state funding. The Governor's budget reflects a slight reduction in total spending over the current year (-0.8%), but an increase in state funds of nearly 19 percent—largely due to the loss of federal stimulus dollars. Approximately 65 percent of total DHS funding (\$4.5 billion) is for public assistance, including the federal food assistance program and the Family Independence Program (FIP). Approximately 15 percent (\$1 billion) supports child welfare services. Only 5 percent (\$369 million) is for adult and family services.

The Governor also restructured the DHS budget, reducing and consolidating many budget line items, and eliminating most of the budget “boilerplate,” or language describing how funds are to be expended. While the budget bill includes a “schedule of programs” with some limited program information, that language is not binding, and it is assumed that if the budget was approved as written, the DHS would have significant authority to decide which programs to fund and at what levels—without additional legislative approval.

While the services provided by the DHS affect many of the Governor's “dashboard” outcome measures, including infant mortality, obesity, 3rd grade reading levels and college readiness, a special focus of the DHS's mission is on reducing the number of children in poverty.

Transitional performance measures for the DHS include Family Independence program (FIP) cases closed due to earned income, the percent of children leaving the foster care system for permanent placements, the percent of children adopted within 24 months of their latest removal from home, and metrics related to fraud and administrative efficiencies.

Among the highlights affecting children and youths in the Governor's proposed fiscal year 2012 DHS budget are the following:

Reductions in funding for the Family Independence Program (FIP) through more aggressive implementation

of lifetime limits on public assistance. The Governor's budget includes savings of \$77.4 million (\$65 million in state funds) as a result of a 48 month lifetime limit for FIP benefits. Under federal law, the limit for federal reimbursement for TANF recipients is 60 months, with state flexibility to exempt up to 20 percent of its caseload due to hardship, including high unemployment rates. In 2007, Michigan law was changed to establish a 48 month lifetime limit (with a potential 12 month extension), with a range of exceptions, including deferral from work requirements, domestic violence victims, and counties with exceptionally high unemployment rates. Although details are not yet available, the DHS Director has stated that an estimated 12,600 FIP cases (15%) will be affected, and that exceptions will be available for persons who are incapacitated or in cases of hardship. Cuts of this magnitude would presumably be related to a change in the exceptions or more aggressive implementation of the current 48 month lifetime limit for FIP.

Reductions in funding for child care subsidies for low-income families.

- *Caseload reductions:* The Governor's budget assumes that 27,000 low-income families will receive a child care subsidy in order to work or participate in training programs next year, from a peak of over 67,000 in fiscal year 2003. The Governor's recommendation is to cut total subsidy funding by 5.6 percent, with all of the reduction coming in unlicensed care--where funding will fall from \$81.4 million in the current year budget to \$62.6 million in fiscal year 2012, a cut of 23 percent. Funding for licensed child care would increase slightly from \$100.7 million to \$109.2 million. If the Governor's recommendation is adopted, total funding for child care subsidies will have fallen from \$499 million in 2003 to only \$172 million in 2012.
- *Reductions in payments to unlicensed relatives and aide caregivers:* The Governor recommends a cut in rates paid to relatives of aides, for a savings of \$13.9 million. Unlicensed providers currently receive either \$1.60 or \$1.85 per hour, depending on the age of the children they care for. A flat rate of \$1.35 per hour is recommended. This year, relatives and aides were required to complete six hours of basic

health and safety training as a condition of continued payment. Providers that complete 10 hours of additional “Tier 2” training are eligible for incentive payments of between 25 to 35 cents per hour.

Continuation funding for child care quality initiatives. The Governor includes continuation funding of \$14.6 million for child care quality improvements through the Early Childhood Investment Corporation.

Continued investments in the state’s child system to meet requirements of the lawsuit settlement agreement.

- *Child welfare improvement funding:* The Governor recommends an additional \$69.3 million (\$49.7 million in state funds) for child welfare improvements, including an added 500 child welfare workers needed to reduce caseloads, technology improvements, and the continued expansion of foster care eligibility to age 21.
- *Foster care payments and caseloads:* The Governor recommends a total of \$206.8 million for foster care payments for a projected 7,200 children. The number of children in the state’s foster care system fell from 12,262 in fiscal year 2002 to an expected 7,312 in the current fiscal year.
- *Adoption support services:* The Governor’s budget reduces funding for adoption support services from \$33.6 million that is appropriated in the current year budget to \$28.6 million.
- *Youth in transition:* Funding for youth in transition programs would be reduced from \$14.2

million in the current year budget to \$11.4 million in fiscal year 2012.

- *Guardianship assistance program:* Funding for the program would be reduced by \$1 million under the Governor’s budget, from \$3.2 million to \$2.2 million.

Continued reductions in child abuse and neglect prevention programs. The Governor’s budget removed line items for specific child abuse and neglect programs. According to the House Fiscal Agency, among the assumptions within that line item are the following cuts:

- *Families First:* The Families First program, which is funded at \$18.5 million in the current fiscal year, would be cut by \$500,000.
- *Strong Families/Safe Children:* The Strong Families/Safe Children program, which is funded at \$16.6 million, would be cut by \$1.5 million.
- *Child Protection and Permanency:* The Child Protection and Permanency program, which is currently funded at approximately \$19 million, would be reduced by \$2.8 million.
- *O to 3 Prevention:* The 0 to 3 Prevention program, which is currently funded at \$3.8 million, would be eliminated.

Reductions in residential facilities for juvenile offenders. The Governor reduces funding for juvenile justice services by closing the Shawano Center, which currently houses 27 juveniles, and by reducing the number of beds at Maxey Training School from 80 to 60. ©

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