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Chapter 1: Introduction

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In this chapter... 

This chapter provides a “roadmap” for using this benchbook and directs the user to the applicable law. It summarizes the different types of proceedings described in this benchbook and contains cross-references to the chapters applicable to each type of proceeding. Section 1.6 distinguishes among the various methods by which a juvenile may be tried and sentenced criminally.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

1.1 Summary of Benchbook Contents

This benchbook details the procedures used in juvenile delinquency cases, personal protection order cases involving a minor respondent, and cases in which a juvenile may be tried and sentenced as an adult, either by designation in the Family Division or by waiver to the Criminal Division.
Thus, it covers proceedings that occur in the Family Division of the Circuit Court and the Criminal Division of the Circuit Court.

**Note:** Throughout this benchbook, “Family Division” is used to describe the Family Division of the Circuit Court, and “Criminal Division” is used to refer to the division of the circuit court that normally handles felony offenses committed by adults. References to the probate court or “juvenile court” and recorder’s court used in statutes, court rules, or case law have been altered to conform to this usage. MCR 3.903(A)(4) states that “court” means the Family Division of the Circuit Court when used in Subchapter 3.900, and MCL 600.1009 states that a reference to the former Juvenile Division of the Probate Court in any statute shall be construed as a reference to the Family Division of Circuit Court.

The organization* of this Benchbook reflects five different types of proceedings involving juveniles charged with criminal offenses, status offenses, and violations of personal protection orders. The five types of proceedings are:

**Delinquency and Status Offense Proceedings—Chapters 4–14**

Delinquency proceedings involve juveniles under age 17 charged with a violation of a criminal law or ordinance, or with a status offense. Delinquency proceedings occur within the Family Division. If the juvenile is found responsible for the offense, the court may order a juvenile disposition, such as placing the juvenile on probation or committing the juvenile to the custody of the state.

Although the Michigan Court Rules include proceedings involving status offenders within the definition of “delinquency proceeding,” there are important differences between the two. For example, a status offender may only be placed in a secure (locked) facility in limited circumstances. This and other special requirements in status offense cases are noted throughout this benchbook.

**Minor Personal Protection Order Proceedings—Chapter 15**

Personal protection orders (PPOs) may be used to enjoin abusive conduct and stalking by persons adults and minors 10 years old or older. The Family Division has jurisdiction under the Juvenile Code to conduct minor PPO proceedings involving respondents 10 years old or older. However, a PPO may not be issued if the petitioner and respondent have a parent-child relationship and the child is an unemancipated minor. In such cases, a delinquency or child protective proceeding may be instituted. Violations of PPOs result in contempt proceedings. If a respondent is under 17 years old at the time of the violation of a PPO, the court may impose a juvenile disposition for the violation. If a respondent is 17 years old or older, the

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*Chapters 1–3, 7, 11, and 24–25 contain material applicable to all of the five types of proceedings listed below.*
court must impose criminal sanctions for criminal contempt violations of a PPO or civil contempt sanctions for civil contempt violations of a PPO.

“Traditional Waiver” Proceedings—Chapter 16

Where a juvenile is charged with a felony, the prosecuting attorney may file a motion asking the Family Division to waive its jurisdiction to allow the juvenile to be tried as an adult in the Criminal Division. If the Family Division waives its delinquency jurisdiction over the juvenile, a criminal trial takes place in the Criminal Division. Following conviction, the juvenile must be sentenced as an adult.

Designated Proceedings—Chapters 17–19, 22, and 23

In designated proceedings, a juvenile of any age is tried in adult criminal proceedings that occur within the Family Division. If a “specified juvenile violation”* is alleged, the prosecuting attorney may designate the case for criminal trial. If a non-specified juvenile violation is alleged, the Family Division judge must decide whether to designate the case for criminal trial. The juvenile is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction. A plea of guilty or nolo contendere, or a verdict of guilty, results in the entry of a judgment of conviction. Following conviction, the court may sentence the juvenile as an adult, delay imposition of an adult sentence, or order a juvenile disposition.

“Automatic Waiver” Proceedings—Chapters 20–23

Where a “specified juvenile violation”* is alleged, “automatic waiver” allows the prosecuting attorney to vest jurisdiction in the Criminal Division by filing a complaint and warrant in district court rather than filing a petition in the Family Division. The juvenile is tried in criminal proceedings that occur within the Criminal Division. Following conviction, the juvenile may be sentenced as an adult or placed on probation and committed to public wardship. For some “specified juvenile violations,” an adult sentence is mandatory.

1.2 Table Summarizing Statutes and Court Rules Governing Proceedings Involving Juveniles

The following table provides general guidance in locating statutes and court rules governing various proceedings involving juveniles in the Family Division and the Criminal Division. Other statutes and court rules may be incorporated by reference in these provisions. Court rules take precedence over statutes only in matters involving judicial rules of practice and procedure, not substantive law. See, generally, McDougall v Schanz, 461
MCR 3.901(A) states as follows:

“(1) The rules in [Subchapter 3.900], in subchapter 1.100 and in MCR 5.113, govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

“(2) Other Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides.”

The other court rules that are specifically made applicable to juvenile proceedings are listed below.

- MCR 2.003 (disqualification of a judge);
- MCR 2.104(A) (proof of service of a summons);
- MCR 2.106(G)(1) and (G)(3) (proof of service by publication);

<table>
<thead>
<tr>
<th>Type of Proceeding</th>
<th>Statutes</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Delinquency Cases in Family Division, Including Status Offenses</td>
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</tr>
<tr>
<td>Personal Protection Order Actions With Minor Respondents in Family Division</td>
<td>Sections 2, 2a, 2c, 14, 15, 17, 17c, 18, and 26 of the Juvenile Code, MCL 712A.1 et seq., MCL 600.2950 and 600.2950a (PPOs), MCL 600.1701 et seq. (contempt of court), and MCL 764.15b (warrantless arrest) and 764.15c (report requirements)</td>
<td>MCR 3.701–3.707, 3.709, 3.981–3.989, 3.993</td>
</tr>
<tr>
<td>Designated Proceedings in Family Division</td>
<td>Sections 2d, 9a, 18, 18h, and 18i of the Juvenile Code, MCL 712A.1 et seq.</td>
<td>MCR 3.951–3.956</td>
</tr>
<tr>
<td>“Automatic Waiver” of Family Division Jurisdiction</td>
<td>MCL 600.606 (jurisdiction), MCL 764.1f (arraignment in district court), MCL 769.1 et seq. (sentencing)</td>
<td>Subchapter 6.900, MCR 6.901 et seq.</td>
</tr>
<tr>
<td>“Traditional Waiver” of Family Division Jurisdiction</td>
<td>MCL 712A.4 (Juvenile Code)</td>
<td>MCR 3.950</td>
</tr>
</tbody>
</table>
• MCR 2.107(D) (proof of service of papers other than a summons);
• MCR 2.114(A) (verification of petitions);
• MCR 2.117(B) (appearance of attorney);
• MCR 2.119 (motion practice);
• MCR 2.313 (sanctions for discovery violations);
• MCR 2.401 (scope and effect of pretrial conferences, “except as otherwise provided in or unless inconsistent with the rules of [Subchapter 3.900]”);
• MCR 2.506 (service of subpoenas);
• MCR 2.508–2.516, except as modified by MCR 3.911 (jury procedure in juvenile delinquency cases);
• MCR 2.602(A)(1)–(2) (form and signing of judgments);
• MCR 2.613 (limitations on correction of error);
• MCR 3.205 (manner of notice from Family Division to another Michigan court with jurisdiction over a minor);
• MCR 3.206(A)(4) (required information in the petition to identify other Family Division matters involving members of the same family);
• MCR 3.604 (bond, except as otherwise provided in MCR 3.935);
• MCR 3.606 (contempts committed outside the presence of the court);
• MCR 3.700 et seq. (issuance, dismissal, modification, or rescission of PPOs; appeals in PPOs are governed by MCR 3.709 and MCR 3.993);
• MCR 6.110 (preliminary examinations in designated cases);
• MCR 6.300 et seq. (pleas in designated cases);
• MCR 6.400 et seq., except for MCR 6.402(A) (trial procedure in designated cases, except for waiver of jury trial);
• MCR 6.401–6.420 (jury procedure in designated cases);
• MCR 6.425 (imposition of adult sentence in designated cases);
• MCR Chapter 7, except as modified by MCR 3.993 (appeals); and
• MCR 8.108 or as provided by statute (records of proceedings).
Section 1.3

MCR 6.901(A) states that the rules in Subchapter 6.900, which govern “automatic waiver” proceedings, “take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders.”

1.3 Applicability of Criminal Statutes and Rules of Criminal Procedure to Juvenile Delinquency Cases

A. Applicability of Penal Statutes

The penal statutes that apply to adult criminal defendants also apply to juvenile offenders. MCL 712A.2(a)(1) provides that the Family Division has jurisdiction over proceedings if a juvenile under age 17 is alleged to have violated a criminal law or ordinance. Under the Michigan Court Rules, an “offense by a juvenile” is defined in part as “an act that violates a criminal statute, a criminal ordinance[, or] a traffic law. . . .” MCR 3.903(B)(3). See also MCR 3.903(A)(5) (a delinquency proceeding means “a proceeding concerning an offense by a juvenile, as defined in MCR 3.903(B)(3).” The Court of Appeals has stated that “criminal” statutes apply to juvenile delinquency proceedings. In re Alton, 203 Mich App 405, 407 (1994), and In re McDaniel, 186 Mich App 696, 699–700 (1991) (the “aiding and abetting statute,” MCL 767.39, applies to delinquency proceedings).

Note: MCR 3.903(B)(3) also includes violations of MCL 712A.2(a) and (d) in its definition of “offense by a juvenile.” MCL 712A.2(a)(2)–(4) contain “status offenses,” acts that are violations of law only when committed by a minor (running away from home without sufficient cause, incorrigibility, and truancy). Status offenses are governed wholly by the Juvenile Code. MCL 712A.2(d)(1)–(5) contain rarely used provisions dealing with “wayward minors.” See Sections 2.3 and 2.4 for discussion of Family Division jurisdiction over status offenders and “wayward minors.”

The disposition of a juvenile who has committed a criminal offense is governed by the Juvenile Code, and not all of the penalty provisions contained in criminal statutes apply. MCR 3.943(E)(1) states that “[i]f the juvenile has been found to have committed an offense, the court may enter an order of disposition as provided by MCL 712A.18.” MCL 712A.18 provides that following adjudication the court may enter one or more of several orders concerning a juvenile, including a warning and dismissal, probation, commitment to a public or private institution, and placement in a juvenile boot camp. See In re Whittaker, 239 Mich App 26, 29, n 1 (1999) (placement of a juvenile on probation following a delinquency adjudication of first- and second-degree criminal sexual conduct involving a four-year-old victim highlights the differences between a juvenile disposition and an adult sentence). The court may also order a juvenile to pay “a civil fine in
the amount of the civil or penal fine provided by the ordinance or law." MCL 712A.18(1)(j).

Historically, juvenile dispositions have emphasized rehabilitation rather than punishment. Currently, Michigan law reflects in part this emphasis. MCR 3.902(B)(1)–(2) state as follows:

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

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

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

MCL 712A.1(3) contains similar language. However, several provisions of Michigan law emphasize punishment rather than rehabilitation. For example, as noted in Section 1.6(A), juveniles of any age may be tried and sentenced in the Family Division in the same manner as an adult criminal defendant. Also, juveniles must be placed in secure detention if they are found to have used a firearm during a criminal offense. MCL 712A.18g and MCR 3.943(E)(7).

B. Applicability of Statutory Rules of Criminal Procedure

Although delinquency proceedings are not criminal proceedings, MCL 712A.1(2), statutory rules of criminal procedure may apply to such proceedings. MCR 3.901(A)(1) sets forth the rules of “practice and procedure” that apply to juvenile delinquency proceedings. That rule states in part that “[t]he rules in [Subchapter 3.900 and] in subchapter 1.100 . . . govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.”

MCR 1.104 deals with rules of “practice and procedure” contained in statutes. “Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court.” Thus, statutory rules of criminal procedure, if not in conflict with the court rules governing juvenile delinquency proceedings, apply to such proceedings. In re McDaniel, 186 Mich App 696, 698–99 (1991) (MCL 767.39, which abolishes the common law distinction between principal and accessory, applies to delinquency proceedings), and In re Carey, 241 Mich App 222, 234 (2000) (absent a conflicting statute or court
rule, the competency provisions of the Mental Health Code provide a useful guide for competency determinations in delinquency cases. However, in In re Whittaker, 239 Mich App 26, 29 (1999), the Court of Appeals held that MCL 763.3 governing waiver of jury trial in criminal cases is inapplicable to delinquency cases even though no court rule governs waiver of jury trial in delinquency cases. The Court in Whittaker did not cite MCR 1.104.

As a constitutional matter, not all of the procedures required by due process in a criminal case are required in delinquency cases. People v Hana, 443 Mich 202, 225 (1993). “Fundamental fairness” is the applicable due process standard in delinquency proceedings. McKeiver v Pennsylvania, 403 US 528, 543 (1971). “While juveniles are entitled to appropriate notice, to counsel, to confrontation and cross-examination, to a privilege against self-incrimination, and to a standard of proof beyond a reasonable doubt, there is no constitutional right to a jury trial.” Whittaker, supra at 28, citing McKeiver, supra at 533.* See, generally, In re Gault, 387 US 1 (1967) and In re Winship, 397 US 358 (1970).

C. Applicability of Rules of Evidence

MCR 3.901(A)(3) states in part:

“The Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under this subchapter, except where a rule in this subchapter specifically so provides.”

See also MRE 1101(b)(7) (the Michigan Rules of Evidence, other than those with respect to privileges, do not apply wherever a rule in Subchapter 3.900 states that they don’t apply). The applicability of the Michigan Rules of Evidence is explained in relevant sections throughout this benchbook.

1.4 Procedural Options in Delinquency Proceedings

Under the Juvenile Code and related court rules, the Family Division has several procedural options when a petition is filed in a delinquency proceeding.* Pursuant to MCR 3.932(A)(1)–(5) (preliminary inquiries) and MCR 3.935(B)(3) (preliminary hearings), the court may choose one of the following procedural options that will best serve the interests of the juvenile and the public:

• deny authorization of the petition or dismiss the petition;
• direct that the parent, guardian, or legal custodian and juvenile appear so that the matter can be handled through further informal inquiry;
• without authorizing a petition to be filed, refer the matter to a public or private agency pursuant to the Juvenile Diversion Act;
• without authorizing a petition to be filed, proceed on the consent calendar; or
• after authorizing a petition to be filed, proceed on the formal calendar.

**Diversion.** A case may be “diverted” from adjudication on a petition by a police officer or court intake worker. If a referral accompanies the diversion, the juvenile may be required to comply with the terms of a diversion agreement. If the juvenile fails to comply with the agreement, the court may authorize a petition formally charging the juvenile with the offense.

**Consent calendar.** If the court finds that “protective and supportive action by the court will serve the best interests of the juvenile and the public,” the court may place the case on the consent calendar. MCR 3.932(C). The petition is not authorized for filing, and the juvenile and his or her parent, guardian, or legal custodian must agree to have the case placed on the consent calendar. If it appears to the court that the juvenile has committed an act that would bring him or her within the court’s jurisdiction, the court may issue a case plan, but the juvenile may not be removed from the custody of the parent, guardian, or legal custodian. The court may at any time transfer the case to the formal calendar.

**Formal calendar.** If the case is placed on the formal calendar, the court will conduct a formal adjudicative hearing and, if the juvenile is found responsible for the offense, a dispositional hearing.

In addition, a court may “take a plea of admission or no contest under advisement” pursuant to MCR 3.941(D) and later dismiss the case if the juvenile complies with the court’s directives. See, for example, *In the Matter of Raphael Hastie*, unpublished opinion of the Court of Appeals, decided March 28, 2000 (Docket No. 213880) (a plea taken under advisement in a first-degree criminal sexual conduct case was later properly accepted by the court where the juvenile did not successfully complete therapy) and *In re JS & SM*, 231 Mich App 92, 95 (1998), overruled on other grounds 462 Mich 341, 353 (2000).

**Criminal traffic violations.** A court may utilize an informal procedure contained in the Juvenile Code for certain criminal traffic violations. Under MCL 712A.2b, if a violation of the Michigan Vehicle Code is alleged, the court may hold an informal hearing. If the court finds that the allegation is true, it may impose a disposition.
Section 1.5

**1.5 Summary of Minor Personal Protection Order Proceedings**

The Family Division has jurisdiction over minor respondents 10 years old or older in personal protection order (PPO) proceedings* under both the domestic relationship PPO statute, MCL 600.2950, and the non-domestic relationship stalking PPO statute, MCL 600.2950a. The domestic relationship PPO” protects individuals who live or have lived with the respondent, have a child in common with the respondent, or who have a past or present marriage or dating relationship with the respondent. The “non-domestic stalking PPO” protects victims of stalking, regardless of whether they have a relationship with the respondent. A “domestic relationship PPO” is available to restrain a number of specified abusive acts, as well as “any other specific act or conduct that imposes upon or interferes with personal liberty, or that causes a reasonable apprehension of violence.” MCL 600.2950(1)(j). A “non-domestic stalking PPO” is available to restrain conduct that is prohibited under the criminal stalking statutes.

The Family Division may not issue a PPO if either:

- the unemancipated respondent is the petitioner’s minor child, or
- the unemancipated petitioner is the respondent’s minor child.

However, alternative remedies may be available in these situations. For example, if an unemancipated minor under 17 years old violates a criminal law or ordinance, jurisdiction may be proper under MCL 712A.2(a)(1). Jurisdiction may also be proper under MCL 712A.2(a)(3) if the juvenile is under 17 years old and “is repeatedly disobedient to the reasonable and lawful commands of his or her parent, guardian, or custodian and the court finds on the record by clear and convincing evidence that court-accessed services are necessary.”

If the respondent is under age 18, issuance of either type of PPO is subject to the Juvenile Code. Issuance proceedings in PPO actions under the Juvenile Code are governed by subchapter 3.700 of the Michigan Court Rules, so that they are substantially similar to actions involving an adult respondent.* Subchapter 3.700 contains some special provisions for issuing PPOs with a minor respondent, however, particularly in the areas of venue and service of process.

In cases where a respondent under age 18 has allegedly violated a PPO, enforcement proceedings are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A) and 3.982(B). Court action to enforce a PPO against a respondent under age 18 is initiated by a supplemental petition that may be filed by the original petitioner, a law enforcement officer, a prosecutor, a probation officer, or a caseworker. Upon receipt of a supplemental petition submitted by the original petitioner, the court must either set a date for a preliminary hearing and issue a summons to appear, or issue an order authorizing a peace officer or other person designated by the
court to apprehend the respondent. A law enforcement officer may also apprehend a respondent under age 18 without a court order for violating a PPO. In that case, the officer is responsible to ensure that the supplemental petition is prepared and filed with the court.

If the court exercises its jurisdiction over a minor respondent in a PPO proceeding, jurisdiction continues until the order expires, even if the respondent reaches adulthood during that time. However, “action regarding the personal protection order after the respondent’s eighteenth birthday shall not be subject to [the Juvenile Code].” MCL 712A.2a(3). Instead, the court would apply adult PPO laws and procedures to actions regarding the PPO after the respondent’s 18th birthday.

Although they are subject to the enforcement procedures for minor respondents, violations committed on or after the respondent’s 17th birthday are subject to the same sanctions for criminal and civil contempt to which adult respondents are subject and may be committed to a county jail within the adult prisoner population. If the respondent is under age 17, he or she is subject to the dispositional alternatives contained in MCL 712A.18.

1.6 A Comparison of Designated Cases and Waiver Cases

There are now five options available to prosecuting attorneys when a juvenile commits a criminal offense. As explained above in Section 1.4, the prosecutor may file a delinquency petition against the juvenile in the Family Division. If the juvenile is found responsible for the offense following a plea or trial, he or she may be required to remain under the jurisdiction of the Family Division until age 19, with possible extension of jurisdiction until age 21.

Because delinquency proceedings are not criminal proceedings, the juvenile who is found responsible for an offense in a delinquency case may not be sentenced as an adult. Because it has determined that there are juveniles who will not benefit from the services available in the juvenile justice system, the Legislature has made available to prosecuting attorneys four different types of proceedings that can lead to a criminal conviction for a juvenile. These are prosecutor-designated proceedings, court-designated proceedings, “automatic waiver” proceedings, and “traditional waiver” proceedings.

Although each of these proceedings can lead to a criminal conviction, each has distinguishing characteristics. The discussion that follows points out some of these characteristics.

A. Age Requirements

In both prosecutor-designated and court-designated cases, the juvenile may be any age under 17 when the offense occurs. In “automatic” and
“traditional waiver” cases, the juvenile must be older than 14 but younger than 17 when the offense occurs.

B. Judicial Discretion That Must Be Exercised

Each type of proceeding may require a circuit court judge to decide whether the juvenile should be tried or sentenced as an adult. When such a decision is required, the criteria that judges must use in making these decisions are identical in all four types of cases.* However, the proceedings differ in the time that the decisions must be made and the interests that the judge must consider when making them.

- In prosecutor-designated cases, no hearing is held prior to trial to determine whether to try the juvenile in criminal proceedings. The judicial decision to sentence the juvenile as an adult or to impose a juvenile disposition is not made until after conviction. The Family Division judge may impose a juvenile disposition or, if the judge determines that it is in the best interest of the public, sentence the juvenile as an adult. The court may also delay imposition of an adult sentence.

- In court-designated cases, a judge or attorney-referee must hold a hearing to determine whether to try the juvenile in criminal proceedings. In making that decision, the Family Division judge must consider the best interests of both the juvenile and the public. Following conviction, the Family Division judge may impose a juvenile disposition or, if the judge determines that it is in the best interest of the public, sentence the juvenile as an adult. The court may also delay imposition of an adult sentence.

- In “automatic waiver” cases, no hearing is held prior to trial to determine whether to try the juvenile in criminal proceedings. For certain serious offenses, the juvenile must be sentenced as an adult following conviction. For other offenses, the decision to sentence the juvenile as an adult or place the juvenile on probation and commit the juvenile as a public ward is made by a Criminal Division judge. The judge must consider only the best interest of the public in making that decision.

- In “traditional waiver” cases, a two-phase hearing may be held in the Family Division to determine whether the juvenile will be tried and sentenced as an adult in the Criminal Division. The Family Division judge must consider the best interests of both the juvenile and the public during the second phase of the waiver hearing. If convicted following waiver, the juvenile must be sentenced as an adult.

*These criteria are discussed in Sections 2.8(B), 16.19, 17.11, 19.2, and 21.4.
C. Types of Offenses That May Be Charged

Prosecutor-designated cases and “automatic waiver” cases may only be used when a specified juvenile violation* is alleged.

Court-designated cases may be used for any type of offense (felony or misdemeanor), and “traditional waiver” cases may be used when a felony is alleged.

D. Division of Circuit Court That Has Jurisdiction

The Family Division of the Circuit Court has jurisdiction over both types of designated cases and “traditional waiver” cases prior to the decision to waive jurisdiction. The Criminal Division of the Circuit Court has jurisdiction over “automatic waiver” cases, and it has jurisdiction over “traditional waiver” cases after jurisdiction has been waived by the Family Division.

E. Types of Sentences That May Be Imposed

- In prosecutor-designated cases, the Family Division judge may order a juvenile disposition, sentence the juvenile as an adult, or delay imposition of the sentence and place the juvenile on probation (commonly known as a “blended sentence”). If the juvenile is sentenced as an adult, he or she may be committed to the Department of Corrections. If the judge delays imposition of sentence, he or she enters a judgment of sentence but delays its imposition and enters a dispositional order. The court must review the juvenile’s performance during the time in which it has jurisdiction over the juvenile to determine whether sentence should be imposed at any point during that period.

- In court-designated cases, the Family Division judge has the same options as in prosecutor-designated cases, except that, initially, the juvenile may not be committed to the Department of Corrections. If the judge delays imposition of sentence and the juvenile fails to comply with the terms of the dispositional order, the court may then commit the juvenile to the Department of Corrections.

- In “automatic waiver” cases, the Criminal Division judge must sentence the juvenile as an adult following conviction of one of 12 very serious offenses. For offenses not requiring adult sentencing, the judge may place the juvenile on probation and commit the juvenile to public wardship or impose an adult sentence. If the juvenile is placed on probation as a public ward, the court must review the sentence until the end of the juvenile’s probationary period to determine whether sentence should be imposed at any point during that period.
• In “traditional waiver” cases, the juvenile must be sentenced as an adult following conviction.

F. Table Summarizing Procedures in Designated Cases and Waiver Cases

The following table summarizes the procedures applicable to proceedings in which a juvenile may be tried and sentence as an adult under Michigan law. For more detailed discussion of the required procedures, see Chapter 16 (“traditional waiver” proceedings), Chapters 17–19 and 22 (designated case proceedings), Chapters 20–22 (“automatic waiver” proceedings).
<table>
<thead>
<tr>
<th>Case Type</th>
<th>Court With Jurisdiction</th>
<th>Hearing to Determine Whether to <em>Try</em> Juvenile as Adult?</th>
<th>Hearing to Determine Whether to <em>Sentence</em> Juvenile as Adult?</th>
<th>Authority to Sentence While Juvenile on Probation?</th>
<th>Authority to Sentence at Final Review Hearing?*</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Prosecutor-Designated” Cases</td>
<td>Family Division</td>
<td>No (Specified Juvenile Violation must be alleged)</td>
<td>Yes</td>
<td>Yes, and revocation is mandatory if juvenile is adjudicated or convicted of a felony or misdemeanor punishable by more than one year imprisonment.</td>
<td>Yes</td>
</tr>
<tr>
<td>“Court-Designated” Cases</td>
<td>Family Division</td>
<td>Yes (any felony or misdemeanor may be alleged)</td>
<td>Yes, but juvenile may not be committed to the Department of Corrections.</td>
<td>Yes, and revocation is mandatory if juvenile is adjudicated or convicted of a felony or misdemeanor punishable by more than one year imprisonment. Juvenile may be committed to Department of Corrections.</td>
<td>Yes, and juvenile may be committed to Department of Corrections.</td>
</tr>
<tr>
<td>“Automatic” or Prosecutorial Waiver</td>
<td>Criminal Division</td>
<td>No (Specified Juvenile Violation must be alleged)</td>
<td>No, for 12 very serious Specified Juvenile Violations Yes, for remainder of Specified Juvenile Violations</td>
<td>Yes, and revocation is mandatory if juvenile is adjudicated or convicted of a felony or misdemeanor punishable by more than one year imprisonment.</td>
<td>Yes</td>
</tr>
<tr>
<td>“Traditional” or Judicial Waiver</td>
<td>Family Division prior to waiver; Criminal Division after waiver</td>
<td>Yes, two-phase hearing If juvenile was previously subject to waiver, only probable cause phase need be held</td>
<td>No, adult sentence mandatory</td>
<td>Yes, under rules applicable to adults</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Chapter 2: Jurisdiction, Transfer, and Venue

In this chapter...

This chapter discusses courts’ authority to conduct all of the proceedings involving juveniles covered in this benchbook except minor personal
Section 2.1

Subject Matter Jurisdiction and Jurisdiction Over the Juvenile

Distinguishing subject matter and personal jurisdiction. A court’s assumption of subject matter jurisdiction should be distinguished from the court’s exercise of jurisdiction over the juvenile. Subject matter jurisdiction is a court’s authority to exercise judicial power over a particular class of cases (e.g., delinquency cases). Jurisdiction over a juvenile may be exercised only after the court makes a determination regarding the specific facts of a case. In re AMB, 248 Mich App 144, 166 (2001). Jurisdiction over the juvenile, “personal jurisdiction,” may be established only after parties have received proper notice and the finder of fact determines that the juvenile has committed a delinquent act or status offense, has violated a personal protection order (PPO), or has committed a civil infraction. In In re Hatcher, 443 Mich 426, 437 (1993), the Michigan Supreme Court found that subject matter jurisdiction is established if
“the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous. The valid exercise of the [Family Division’s] statutory jurisdiction is established by the contents of the petition after the [Family Division] judge or referee has found probable cause to believe that the allegations contained within the petitions are true.”

On the other hand, a determination that the Family Division has jurisdiction over a juvenile is made following a plea or trial. See MCR 3.903(A)(26) (“[t]rial’ means the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court”), and MCL 712A.18(1) (if a court finds that a juvenile is within its jurisdiction under the Juvenile Code, the court may enter a dispositional order).* In addition, once a court establishes personal jurisdiction over a juvenile, it has authority to enter orders concerning the juvenile’s parents. See Section 2.13, below, for a discussion of this authority.

**Subject matter jurisdiction.** Prior to January 1, 1998, the juvenile division of the probate court had “original jurisdiction in all cases of juvenile delinquents . . . , except as otherwise provided by law.” Const 1963, art 6, § 15. Effective January 1, 1998, the newly created Family Division of the Circuit Court ("Family Division") was assigned jurisdiction over proceedings involving juveniles. MCL 600.601(3), MCL 600.1001, and MCL 712A.1(c). A “juvenile” is defined in MCR 3.903(B)(2) as “a minor alleged or found to be within the jurisdiction of the court for having committed an offense.” “Minor’ means a person under the age of 18, and may include a person of age 18 or older over whom the juvenile court has continuing jurisdiction pursuant to MCL 712A.2a.” MCR 3.903(A)(15).*

**Note:** MCL 600.1009 states that a reference to the former juvenile division of the probate court in any statute shall be construed as a reference to the Family Division of Circuit Court. See also MCR 3.903(A)(4) (“court” means Family Division of the Circuit Court when used in court rules).

MCL 600.1021(1) provides that the Family Division has “sole and exclusive jurisdiction” over the following types of cases discussed in this benchbook:

- cases under the Juvenile Code, including delinquency, status offense, and designated cases, MCL 600.1021(1)(e); and
- “cases involving personal protection orders under [MCL 600.2950 and 600.2950a],” MCL 600.1021(1)(k).*

The Family Division also has ancillary jurisdiction over cases involving mentally ill or developmentally disabled persons under the Mental Health Code, MCL 330.1001 et seq. MCL 600.1021(2)(b).
MCR 3.903(A)(1) defines “case” as follows:

“‘Case’ means an action initiated in the family division of circuit court by:

(a) submission of an original complaint, petition, or citation;

(b) acceptance of transfer of an action from another court or tribunal; or

(c) filing or registration of a foreign judgment or order.”

2.2 Informal Jurisdiction and Diversion

The Family Division may determine that services should be offered to a juvenile without the filing or authorization of a formal petition. The Family Division has the authority to establish or assist in the development of programs within the county to prevent delinquency and to provide services to act upon reports submitted to the court related to the behavior of juveniles who do not require formal court jurisdiction but otherwise fall within the provisions of MCL 712A.2(a) (criminal and status offenses). These services must be voluntarily accepted by the juvenile and his or her parents, guardian, or custodian. MCL 712A.2(e). Furthermore, the court may use informal procedures only if the court complies with the requirements of the Juvenile Diversion Act. MCL 712A.11(7).*

2.3 Jurisdiction Over Status Offenders

“Status offender” is the term commonly used to refer to juveniles who are alleged to fall within the exclusive original jurisdiction of the Family Division pursuant to MCL 712A.2(a)(2)-(4).*

Status offenders are juveniles under 17 years of age who are found within the county and who meet any of the following requirements:

“Runaways”

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

*See Chapter 4 for a detailed explanation of diversion and informal procedures.

*See Sections 2.17 (transfer), 3.3(G) (emergency removal from home), and 5.15 (placement) for special requirements if the status offender is an Indian child.
“Incorrigibles”

“(3) The juvenile is repeatedly disobedient to the reasonable and lawful commands of his or her parents, guardian, or custodian and the court finds on the record by clear and convincing evidence that court-accessed services are necessary.”

In *In re Weiss*, 224 Mich App 37, 39 (1997), the juvenile’s father testified at trial that the juvenile was caught smoking marijuana by police, was suspended for bringing a bow and arrow to school, and was “arrested” for committing retail fraud. On appeal, the juvenile argued that he should have been charged with criminal violations and “truancy” rather than “incorrigibility” under MCL 712A.2(a)(3). The Court of Appeals found that “the concept of disobeying one’s parents’ commands encompasses getting suspended from school or performing illegal acts.” Id. at 41. Although the prosecuting attorney could have charged the juvenile with criminal violations, he or she chose to charge general disobedience under the “incorrigibility” provision, and the court properly considered the criminal violations in deciding whether the juvenile had committed this status offense. Id.

“Truants”

“(4) The juvenile wilfully and repeatedly absents himself or herself from school or other learning program intended to meet the juvenile’s educational needs, or repeatedly violates rules and regulations of the school or other learning program, and the court finds on the record that the juvenile, the juvenile’s parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile’s educational problems and educational counseling and alternative agency help have been sought. As used in this sub-subdivision only, ‘learning program’ means an organized educational program that is appropriate, given the age, intelligence, ability, and any psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.”

The “compulsory education statute,” MCL 380.1561, under which a child is legally required to attend school subject to certain exceptions enumerated in the statute,* may be applied to children through this provision of the Juvenile Code. *In re Marable*, 90 Mich App 7, 10–11 (1979), and *Flint Bd of Educ v Williams*, 88 Mich App 8, 17 (1979). In the case of a child in a special education program who allegedly repeatedly violates school rules, a school board may not petition the Family Division under MCL 712A.2(a)(4)

*One of the exceptions to compulsory school attendance is “home schooling.” See MCL 380.1561(3)(f) and (4).*
Section 2.4

until administrative proceedings pursuant to MCL 380.1701 et seq. have terminated. *Flint Bd of Educ, supra.*

MCL 712A.11(4) states that “[i]f the juvenile attains his or her seventeenth birthday after the filing of the petition, the court’s jurisdiction shall continue beyond the juvenile’s seventeenth birthday and the court may hear and dispose of the petition under [the Juvenile Code].”

A juvenile is “found within the county” where the offense occurred or where the juvenile is physically present at the time the petition is filed. MCR 3.926(A).

2.4 Concurrent Jurisdiction Over 17-Year-Old “Wayward Minors”

MCL 764.27 states in part:

“If during the pendency of a criminal case against a child in a court of record other than the family division of circuit court it is determined that the child is 17 years of age, the court, if the court finds that any of the conditions exist as outlined in [MCL 712A.2(d)], upon motion of the prosecuting attorney, the child, or his or her representative, may transfer the case together with all papers connected with the case to the family division of circuit court of the county where the offense is alleged to have been committed.”

MCL 712A.2(d), in turn, provides that the Family Division has concurrent jurisdiction with the court conducting the criminal proceedings concerning a 17 year old if one of several conditions exists. If the Family Division finds on the record that voluntary services have been exhausted or refused, the court has concurrent jurisdiction in proceedings concerning juveniles 17 years of age who are found within the county and meet any of the following requirements:

1. The juvenile is “[r]epeatedly addicted to the use of drugs or the intemperate use of alcoholic liquors.”

2. The juvenile “[r]epeatedly associat[es] with criminal, dissolute, or disorderly persons.”

3. The juvenile is “[f]ound of his or her own free will and knowledge in a house of prostitution, assignation, or ill-fame.”

4. The juvenile “[r]epeatedly associat[es] with thieves, prostitutes, pimps, or procurers.”
(5) The juvenile is “[w]ilfully disobedient to the reasonable and lawful commands of his or her parents, guardian, or other custodian and in danger of becoming morally depraved.” MCL 712A.2(d)(1)–(5).

See, generally, People v Sabo, 65 Mich App 573, 578–79 (1975), where the Court of Appeals discussed the interaction between these statutes.

Note: The “wayward minors” provisions of the jurisdiction statute are rarely, if ever, used by the trial courts in Michigan. Consequently, there will be no further discussion of these provisions in this benchbook. Note, however, that a case involving a “wayward minor” who is also Native American may be transferred to tribal court under certain circumstances. See Section 2.17, below.

2.5 Jurisdiction of Juvenile Delinquency Cases

MCL 712A.2(a)(1) sets forth the Family Division’s “exclusive original jurisdiction” over cases in which a juvenile is accused of violating a criminal law or ordinance. This statute also contains an exception allowing the prosecuting attorney to vest jurisdiction in the court of general criminal jurisdiction if a “specified juvenile violation” is alleged and the juvenile is at least 14 years of age.* MCL 712A.2(a)(1) states in part that the Family Division has the following jurisdiction:

“(a) Exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court in proceedings concerning a juvenile under 17 years of age who is found within the county if 1 or more of the following applies:

“(1) Except as otherwise provided in this sub-subdivision, the juvenile has violated any municipal ordinance or law of the state or of the United States. . . . The court has jurisdiction over a juvenile 14 years of age or older who is charged with a specified juvenile violation only if the prosecuting attorney files a petition in the court instead of authorizing a complaint and warrant.”

A juvenile is “found within the county” where the offense occurred or where the juvenile is physically present at the time a petition is filed. MCR 3.926(A).*

MCL 712A.11(4) states that “[i]f the juvenile attains his or her seventeenth birthday after the filing of the petition, the court’s jurisdiction shall continue beyond the juvenile’s seventeenth birthday and the court may hear and dispose of the petition under [the Juvenile Code].”
Section 2.6

Juveniles do not have a constitutional right to be treated differently than adult offenders when they are charged with committing what would be a criminal offense if committed by an adult. *People v Hana*, 443 Mich 202, 220 (1993), *People v Conat*, 238 Mich App 134, 159 (1999), and *People v Parrish*, 216 Mich App 178, 182 (1996). Thus, the Legislature has provided several procedural mechanisms whereby juveniles may be subjected to adult criminal procedures and penalties. These are discussed in the succeeding sections.

### 2.6 “Automatic Waiver” of Family Division Jurisdiction

Under MCL 712A.2(a)(1), the Family Division has jurisdiction over a juvenile 14 years of age or older who is charged with a “specified juvenile violation” only if the prosecuting attorney files a petition in the Family Division instead of authorizing a complaint and warrant and proceeding in district court.* MCL 600.606(1) states that “[t]he circuit court has jurisdiction to hear and determine a specified juvenile violation if committed by a juvenile 14 years of age or older and less than 17 years of age.”

**Note:** Although MCL 600.606(1) assigns jurisdiction to “circuit court” and the Family Division is within the circuit court, “automatic waiver” cases are heard in the Criminal Division of Circuit Court. See MCL 600.601(3) and 600.1021(1)(e), limiting the Family Division’s jurisdiction to cases under the Juvenile Code, MCL 712A.1 et seq.

**Specified juvenile violations.** MCL 712A.2(a)(1)(A)–(I), MCL 600.606(2)(a)–(i), and MCL 764.1f(2)(a)–(i) list the specified juvenile violations. The “specified juvenile violations” are as follows:

- burning a dwelling house, MCL 750.72;
- assault with intent to murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
• carjacking, MCL 750.529a;

• bank, safe, or vault robbery, MCL 750.531;

• assault with intent to do great bodily harm, MCL 750.84, if armed with a dangerous weapon;

• first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;

• escape or attempted escape from a medium- or high-security juvenile facility operated by the Family Independence Agency or a county juvenile agency, or a high-security facility operated by a private agency under contract with the Family Independence Agency or a county juvenile agency, MCL 750.186a;

• manufacture, sale, or delivery, MCL 333.7401(2)(a)(i), or possession, MCL 333.7403(2)(a)(i), of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine;*

• any attempt, MCL 750.92, to commit any of the above crimes;

• any solicitation, MCL 750.157b, to commit any of the above crimes;

• any conspiracy, MCL 750.157a, to commit any of the above crimes.

“Dangerous weapon,” as used in the context of a “specified juvenile violation,” means one of the following:

• a loaded or unloaded firearm, whether operable or inoperable;

• a knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon;

• an object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon; and

• an object or device that is used or fashioned in a manner to lead a person to believe the object or device is a weapon.

MCL 712A.2(a)(1)(B), MCL 600.606(2)(b), and MCL 764.1f(2)(b).
Section 2.6

*See Section 3.10 for discussion of pretrial detention of juveniles in “automatic waiver” cases.

Procedure. MCL 764.1f(1) sets forth the required procedure for divesting the Family Division of jurisdiction and vesting jurisdiction in the Criminal Division when a “specified juvenile violation” is alleged.* That provision states as follows:

“If the prosecuting attorney has reason to believe that a juvenile 14 years of age or older but less than 17 years of age has committed a specified juvenile violation, the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile.”

If a district court judge determines that probable cause exists that a “specified juvenile violation” was committed and that the juvenile committed it, the juvenile must be bound over to the Criminal Division, which then has jurisdiction over the juvenile. MCL 766.13. Note that the definition of “specified juvenile violation” includes:

- any attempt, solicitation, or conspiracy to commit one of the “specified juvenile violations”;
- any lesser-included offense arising out of the same transaction as a “specified juvenile violation” if the juvenile is also charged with a “specified juvenile violation”; and
- any other offense arising out of the same transaction if the juvenile is also charged with a “specified juvenile violation.”

MCL 712A.2(a)(1)(E)–(I), MCL 600.606(2)(e)–(i), and MCL 764.1f(2)(e)–(i).

Transfer of case “back” to Family Division. MCL 766.14(2) and MCR 6.911(B) require the magistrate to transfer the case “back” to the Family Division if, at the conclusion of the preliminary examination, the magistrate finds that a “specified juvenile violation” did not occur or that there is not probable cause to believe that the juvenile committed a “specified juvenile violation,” but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense.

As noted above, the definition of “specified juvenile violation” includes lesser-included offenses and other offenses arising out of the same transaction as a “specified juvenile violation” if the juvenile is charged with a “specified juvenile violation.” This suggests that the district court may bind the juvenile over for trial if it finds probable cause that the juvenile committed a lesser-included or other offense rather than the charged enumerated offense. However, the district court may not bind the juvenile over for trial on these other offenses unless it also finds probable cause that the juvenile committed an enumerated “specified juvenile violation.” See People v Veling, 443 Mich 23, 31, 42–43 (1993), where the Michigan Supreme Court held that the circuit court gains jurisdiction over non-
enumerated offenses only if the juvenile is also charged in circuit court with an enumerated offense, and the circuit court does not lose jurisdiction to sentence the juvenile if the juvenile is convicted of a lesser-included offense or other offense that is not an enumerated offense.

On the other hand, the district court may bind the juvenile over to circuit court if it finds probable cause that the juvenile committed a “specified juvenile violation” other than the offense charged in the district court complaint. For example, if the juvenile is charged with first-degree murder, and the district court finds probable cause that the juvenile committed second-degree murder, the juvenile could be bound over for trial since second-degree murder is also an enumerated “specified juvenile violation.”

MCR 3.939(A) states that the Family Division must hear and dispose of a case transferred pursuant to MCL 766.14 in the same manner as if the case had commenced in the Family Division. A petition that has been approved by the prosecuting attorney must be submitted to the court. Pursuant to MCR 3.939(B), the Family Division “may use the probable cause finding of the magistrate made at the preliminary examination to satisfy the probable cause requirement of MCR 3.935(D)(1).”

Transfer of the case to the Family Division does not prevent the Family Division from waiving jurisdiction using the “traditional waiver” procedures under MCL 712A.4. MCL 766.14(3).

2.7 “Traditional Waiver” of Family Division Jurisdiction

MCL 712A.4 sets forth the procedures for “traditional” or judicial waiver of the Family Division’s jurisdiction over juveniles who have committed offenses that if committed by adults would be felonies:

“If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense.”

MCL 712A.4(3)–(4) and MCR 3.950(D) explain that the waiver proceeding consists of two phases. A first-phase hearing must be held to determine whether there is probable cause that an offense has been committed that if committed by an adult would be a felony, and that there is probable cause that the juvenile who is 14 years of age or older committed the offense. MCL 712A.4(3) and MCR 3.950(D)(1).* The court may also find the requisite probable cause at a preliminary hearing, provided that only legally admissible evidence was used to establish probable cause. MCR
3.950(D)(1)(c)(i). If the court finds the requisite probable cause, or if the juvenile waives the first-phase hearing, a second-phase hearing must be held to determine whether the interests of the juvenile and the public would best be served by granting the prosecutor’s motion for waiver. MCL 712A.4(4) and MCR 3.950(D)(2).

However, MCR 3.950(D)(2) and MCL 712A.4(5) provide that if the juvenile has previously been subject to the jurisdiction of the circuit court under MCL 712A.4 (“traditional waiver”) or MCL 600.606 (“automatic waiver”), then the Family Division must waive jurisdiction to the court of general criminal jurisdiction without holding the second-phase hearing.*

### 2.8 Designated Cases in the Family Division

According to MCR 3.903(A)(6), a “designated proceeding” means a proceeding in which the prosecutor has designated, or has asked the court to designate, the case for trial in the Family Division in the same manner as an adult.* A juvenile tried “in the same manner as an adult” is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction. MCL 712A.2d(3) and MCR 3.903(D)(9). The court’s acceptance of a plea of guilty or nolo contendere or a verdict of guilty results in the entry of a judgment of conviction. The conviction has the same effect and creates the same liabilities as if it had been obtained in a court of general criminal jurisdiction. MCL 712A.2d(7).

MCR 3.903(D)(3) defines a designated case as either a prosecutor-designated case or a court-designated case. Only the prosecuting attorney may designate a case or amend a petition to designate a case in which the petition alleges a “specified juvenile violation,” and only the prosecuting attorney may request the court to designate a case in which the petition alleges an offense other than a “specified juvenile violation.” MCR 3.914(D). Thus, although the prosecuting attorney initiates both types of designated proceedings, the court decides whether to designate a case where an offense other than a “specified juvenile violation is alleged.” See also MCL 712A.2d(1) (amended petition may be filed only by leave of court).*

### A. Prosecutor-Designated Cases

In a “prosecutor-designated case,” the prosecuting attorney has endorsed a petition charging a juvenile with a “specified juvenile violation” with the designation that the juvenile is to be criminally tried in the Family Division in the same manner as an adult. MCR 3.903(D)(6), MCR 3.903(D)(8)(a)–(r), and MCL 712A.2d(9)(a)–(l).*
B. Court-Designated Cases

In a “court-designated case,” the court, pursuant to a request by the prosecutor, has decided according to factors set forth in MCL 712A.2d(2) and MCR 3.952(C)(3) that the juvenile is to be criminally tried in the Family Division in the same manner as an adult for an offense other than a specified juvenile violation. MCR 3.903(D)(2). The court may designate a case involving any criminal offense, felony or misdemeanor, for criminal trial. A “designation hearing”* must be held on the prosecutor’s request for case designation. MCR 3.903(D)(4) and MCL 712A.2d(2). MCL 712A.2d(2)(a)–(f) contain the standard to be used to determine whether to designate the case:

“The court may designate the case following a hearing if it determines that the best interests of the juvenile and the public would be served by the juvenile being tried in the same manner as an adult. In determining whether the best interests of the juvenile and the public would be served, the court shall consider all of the following factors, giving greater weight to the seriousness of the alleged offense and the juvenile’s prior delinquency record than to the other factors:

“(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

“(b) The juvenile’s culpability in committing the alleged offense, including, but not limited to, the level of the juvenile’s participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

“(c) The juvenile’s prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

“(d) The juvenile’s programming history, including, but not limited to, the juvenile’s past willingness to participate meaningfully in available programming.

“(e) The adequacy of the punishment or programming available in the juvenile justice system.

*See Sections 17.10–17.13 for the requirements for designation hearings.
Section 2.9

“(f) The dispositional options available for the juvenile.

MCR 3.952(C)(3)(a)–(f) contain the same factors.

2.9 Table Summarizing Courts With Jurisdiction of Law Violations by Juveniles

As noted above in Section 2.5, the Family Division has “exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court in proceedings concerning a juvenile under 17 years of age” who is charged with violating any municipal ordinance or state or federal law. MCL 712A.2(a)(1).* However, the Family Division may be divested of jurisdiction over a criminal offense through “automatic” or “traditional waiver” procedures. The Family Division may also conduct criminal proceedings concerning a juvenile whose case has been designated for criminal trial. The table below summarizes these various possibilities when a juvenile is charged with a law violation and provides cross-references to sections of this benchbook containing more detailed discussion.

<table>
<thead>
<tr>
<th>Type of Proceeding</th>
<th>Court With Jurisdiction</th>
<th>Offense Alleged</th>
<th>Initiation of Proceedings</th>
<th>Cross-References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delinquency Case</td>
<td>Family Division of Circuit Court</td>
<td>Violation of municipal ordinance or state or federal law</td>
<td>Prosecutor files petition in Family Division of Circuit Court</td>
<td>See Section 2.5 and Chapters 4–14</td>
</tr>
<tr>
<td>“Traditional Waiver”</td>
<td>Criminal Division of Circuit Court, after waiver by Family Division of Circuit Court</td>
<td>Felony by 14–16 year old</td>
<td>Prosecutor files motion for waiver in Family Division of Circuit Court</td>
<td>See Section 2.7 and Chapter 16</td>
</tr>
<tr>
<td>Designated Case Proceeding</td>
<td>Family Division of Circuit Court</td>
<td>Felony or misdemeanor by juvenile under 17 years old</td>
<td>Prosecutor may designate case if specified juvenile violation alleged; prosecutor must request designation if other offense alleged</td>
<td>See Section 2.8 and Chapters 17–19, 22, and 23</td>
</tr>
</tbody>
</table>

*For a discussion of jurisdiction and authority where a juvenile is cited for a civil infraction, see Section 2.11, below.
<table>
<thead>
<tr>
<th>Type of Proceeding</th>
<th>Court With Jurisdiction</th>
<th>Offense Alleged</th>
<th>Initiation of Proceedings</th>
<th>Cross-References</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Automatic Waiver”</td>
<td>Criminal Division of Circuit Court, after bindover from district court</td>
<td>Specified juvenile violation by 14–16 year old</td>
<td>Prosecutor files complaint and warrant in district court</td>
<td>See Section 2.6 and Chapters 20–23</td>
</tr>
</tbody>
</table>

### 2.10 Jurisdiction Over Juveniles Charged With Criminal Violations of the Michigan Vehicle Code

The Family Division has “exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court in proceedings concerning a juvenile under 17 years of age” who is charged with violating any municipal ordinance or state or federal law. MCL 712A.2(a)(1). Under MCR 3.903(B)(3), an “offense by a juvenile” includes an act that violates a criminal statute, a criminal ordinance, or a traffic law.

**Procedure.** The Juvenile Code provides special procedures that apply when a juvenile is charged with a violation of the Michigan Vehicle Code* or an ordinance substantially corresponding to such a violation. MCL 712A.2b states:

> “When a juvenile is accused of an act that constitutes a violation of the Michigan vehicle code, . . . or a provision of an ordinance substantially corresponding to any provision of [the Michigan Vehicle Code], the following procedure applies, *any other provision of this chapter notwithstanding*. . . .” (Emphasis added.)

The procedures listed in MCL 712A.2b(a)–(e) are to be used instead of the procedures contained in other provisions of the Juvenile Code when the juvenile is charged with a violation of the Michigan Vehicle Code or an ordinance substantially corresponding to a provision of the Michigan Vehicle Code. These procedures are as follows:

“(a) No petition shall be required, but the court may act upon a copy of the written notice to appear given the accused juvenile as required by [MCL 257.728].

“(b) The juvenile’s parent or parents, guardian, or custodian may be required to attend a hearing conducted under this section when notified by the court, without

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*Note that some “traffic offenses” are contained in Michigan’s Penal Code. Delinquency procedures apply to those offenses. For more detailed information on juvenile traffic offenses, see Miller, Juvenile Traffic Benchbook (MJI, 1999).
additional service of process or delay. However, the court may extend the time for that appearance.

“(c) If after hearing the case the court finds the accusation to be true, the court may dispose of the case under [MCL 712A.18].

“(d) Within 14 days after entry of a court order of disposition for a juvenile found to be within this chapter, the court shall prepare and forward an abstract of the record of the court for the case in accordance with [MCL 257.732].

“(e) This section does not limit the court’s discretion to restrict the driving privileges of a juvenile as a term or condition of probation.”

Several procedural protections afforded by the Juvenile Code to juveniles charged with offenses not contained in the Michigan Vehicle Code are omitted from the procedures listed above. For example, no provision is made for the appointment of counsel as required by MCL 712A.17c(1)–(3). Formal notice is not required as in MCL 712A.12 and 712A.13 and related court rules. The language of §2b(c) (“If after hearing the case the court finds the accusation to be true”) suggests that a “bench trial” will occur if the juvenile contests the charges, rather than a jury trial. Under MCL 712A.17(2), any “interested person” may demand a jury trial.

The court may place a case involving violation of the Michigan Vehicle Code on the consent calendar if it fulfills certain reporting requirements. In re Neubeck, 223 Mich App 568, 573–75 (1997).*

MCR 3.931(D)(1)–(2) deal with the failure of a juvenile to appear or respond to a citation or appearance ticket alleging a motor vehicle violation. Those provisions state as follows:

“If the juvenile is a Michigan resident and fails to appear or otherwise to respond to any matter pending relative to a motor vehicle violation, the court:

(1) must initiate the procedures required by MCL 257.321a for failure to answer a citation, and

(2) may issue an order to apprehend the juvenile after a sworn petition is filed with the court.”

*See Section 25.15 for discussion of these reporting requirements.*
2.11 Jurisdiction of Civil Infractions Committed by Juveniles

“Civil infraction’ means an act or omission that is prohibited by a law and is not a crime under that law or that is prohibited by an ordinance and is not a crime under that ordinance, and for which civil sanctions may be ordered.” MCL 600.113(1)(a). See also MCL 712A.1(1)(a) (the definition in MCL 600.113 applies to proceedings under the Juvenile Code). MCL 600.113(1)–(2) enumerate the different types of civil infractions.

The Family Division has “exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court in proceedings concerning a juvenile under 17 years of age” who is charged with violating any municipal ordinance or state or federal law. MCL 712A.2(a)(1). This provision supersedes provisions of the Revised Judicature Act that assign district courts and municipal courts jurisdiction of civil infraction actions, MCL 600.8301(2) and MCL 600.8703(2). On the other hand, provisions of the Michigan Vehicle Code, court rules governing procedure in “juvenile court,” and case law preclude the Family Division from exercising jurisdiction over a juvenile accused of a traffic civil infraction. MCL 257.741(5), in the Michigan Vehicle Code, states in part:

“If the person cited [for a civil infraction] is a minor, that individual shall be permitted to appear in court without the necessity of appointment of a guardian or next friend. The courts listed in subsection (2) shall have jurisdiction over the minor and may proceed in the same manner and in all respects as if that individual were an adult.”

MCL 257.741(2)(a)–(c) list district and municipal courts as having jurisdiction of civil infractions.

Under MCR 3.903(B)(3), an “offense by a juvenile” includes an act that violates a traffic law. Finally, in Welch v District Court, 215 Mich App 253, 256–57 (1996), the Court of Appeals held that the district or municipal court, not the “juvenile court,” has jurisdiction of traffic civil infractions committed by minors.

Jurisdiction of civil infraction actions may be determined by agreement between the Family Division and a district or municipal court. MCL 712A.2(a)(1) states in relevant part that “[i]f the court enters into an agreement under section 2e of this chapter, the court has jurisdiction over a juvenile who committed a civil infraction as provided in that section.” MCL 712A.2e(1)–(2), in turn, state as follows:

“(1) The court may enter into an agreement with any or all district courts or municipal courts within the court’s geographic jurisdiction to waive jurisdiction over any or all civil infractions alleged to have been committed by
juveniles within the geographic jurisdiction of the district court or municipal court. The agreement shall specify for which civil infractions the court waives jurisdiction.

“(2) For a civil infraction waived under subsection (1) committed by a juvenile on or after the effective date of the agreement, the district court or municipal court has jurisdiction over the juvenile in the same manner as if an adult had committed the civil infraction. The court has jurisdiction over juveniles who commit any other civil infraction.”

District court or municipal court judges may also be assigned to sit as Family Division judges to hear matters involving juveniles. MCL 600.1517, MCL 600.225, and MCR 8.110(C)(3)(g).

**Procedure.** However, in those Family Division courts that have jurisdiction of traffic civil infractions pursuant to an agreement under §2e of the Juvenile Code, it is unclear whether the general rules for civil infractions apply, or whether §2b of the Juvenile Code applies. The procedures listed in §2b of the Juvenile Code must be followed when a juvenile is charged with a violation of the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code. Most traffic civil infractions are contained in the Michigan Vehicle Code or a local ordinance corresponding to a provision of the Michigan Vehicle Code. Thus, it appears that the procedures in §2b of the Juvenile Code govern traffic civil infractions adjudicated in the Family Division pursuant to an agreement under §2e of the Juvenile Code.

### 2.12 Jurisdiction of Contempt Proceedings

**Authority.** The Family Division has “the power to punish for contempt of court under [MCL 600.1701 et seq.] any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce [the Juvenile Code].” MCL 712A.26. See also MCR 3.928(A) (“The court has the authority to hold persons in contempt of court as provided by MCL 600.1701 and 712A.26”). Courts have inherent authority to conduct contempt proceedings. *In re Huff*, 352 Mich 402, 415–16 (1958) (“Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it”), *In re Summerville*, 148 Mich App 334, 339–41 (1986) (the “juvenile court” had inherent authority to initiate contempt proceedings after the juvenile reached age 19 for violation of the court’s dispositional order).* and *In re GB*, 430 NE2d 1096, 1098-99 (Ill, 1981) (violation of “family court’s” order could be punished pursuant to its inherent contempt power rather than pursuant to the authority granted by the statutes governing juvenile proceedings). Although courts have inherent
authority to punish for contempt, the legislature has authority to prescribe penalties for such contempt. Cross Co v UAW Local No 155 (AFL-CIO), 377 Mich 202, 223 (1966) and In re Baker, 376 NE 2d 1005, 1006-07 (Ill, 1978) (legislature may provide alternative enforcement provisions in contempt cases involving minors).

**Procedure.** MCR 3.928(B) sets forth the procedural rules applicable to contempt proceedings in cases under the Juvenile Code:

“(B) **Procedure.** Contempt of court proceedings are governed by MCL 600.1711, 600.1715, and MCR 3.606. MCR 3.982–3.989 govern proceedings against a minor for contempt of a minor personal protection order.”*

**Penalties for contempt by a juvenile.** MCR 3.928(C) sets forth the penalties for contempt of court committed by a juvenile. That rule states:

“(C) **Contempt by Juvenile.** A juvenile under court jurisdiction who is convicted of criminal contempt of court, and who was at least 17 years of age when the contempt was committed, may be sentenced to up to 30 days in the county jail as a disposition for the contempt. Juveniles sentenced under this subrule need not be lodged separate and apart from adult prisoners. Younger juveniles found in contempt of court are subject to a juvenile disposition under these rules.”

**Parent’s failure to attend dispositional hearing.** A provision of the Juvenile Code, MCL 712A.6a, requires the parent or guardian of a juvenile who is within the court’s jurisdiction under MCL 712A.2(a)(1) (criminal offenses) to attend all hearings unless excused for good cause. Thus, under MCL 712A.6a, parents may be required to attend dispositional and review hearings.* MCL 712A.6a adds that “[a] parent or guardian who fails to attend the juvenile’s hearing without good cause may be held in contempt and subject to fines. Failure of a parent or guardian to attend a hearing is not grounds for an adjournment, continuance, or other delay of the proceeding and does not provide a basis for appellate or other relief.” MCL 600.1715 allows for a fine of not more than $250.00.

The Family Division may also enforce its reimbursement orders, MCL 712A.18(2) and (3), and orders assessing attorney costs, MCL 712A.17c(8), MCL 712A.18(5), and MCR 3.915(E), through its contempt powers. See, generally, *In re Reiswitz*, 236 Mich App 158, 172 (1999).

2.13 **Jurisdiction and Authority Over Adults**

MCL 712A.6 states as follows:
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“The court has jurisdiction over adults as provided in [the Juvenile Code] and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles.”

The authority to fashion remedies under MCL 712A.6 extends beyond MCL 712A.18, which provides dispositional alternatives for juveniles found to be within the court’s jurisdiction. In re Macomber, 436 Mich 386, 389–93, 398–400 (1990).

An order directed to a parent shall not be binding unless the parent has been given an opportunity for a hearing pursuant to the issuance of a summons or notice as provided in MCL 712A.12 and MCL 712A.13. MCL 712A.18(4). The order, bearing the seal of the court, must be served on the parent or other person as required by MCL 712A.13. MCL 712A.18(4).

2.14 Transfer of Jurisdiction to Family Division Because Offender Was Under 17 at Time of Offense

MCL 764.27 provides for the transfer of a pending criminal case to the Family Division when it is discovered that the accused is under 17 years of age. If an alleged criminal offense was committed prior to the juvenile’s 17th birthday but a complaint is not filed until after the juvenile’s 17th birthday, the issue arises as to which court has jurisdiction. MCL 712A.3 addresses that issue by providing that proper jurisdiction is determined by the age of the accused at the time of the offense. That statute states as follows:

“(1) If during the pendency of a criminal charge against a person in any other court it is ascertained that the person was under the age of 17 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the person resides.

“(2) The court making the transfer shall order the child to be taken promptly to the place of detention designated by the family division of the circuit court or to that court itself or release the juvenile in the custody of some suitable person to appear before the court at a time designated. The court shall hear and dispose of the case in the same manner as if it had been originally instituted in that court.”
Thus, if a juvenile is under 17 years of age when the offense is committed but 17 years of age when charged with the offense, the court of general criminal jurisdiction must transfer the case to the Family Division. MCL 712A.5 states that the Family Division “does not have jurisdiction over a juvenile after he or she attains the age of 18 years, except as provided in [MCL 712A.2a],” which governs continuing jurisdiction.* Where the juvenile is under age 17 at the time of the offense but 18 years old or older at the time of being charged, the Court of Appeals has held that the “juvenile court” has jurisdiction for the limited purpose of holding a waiver hearing pursuant to MCL 712A.4. If the Family Division declines to waive its jurisdiction, the case must be dismissed. People v Schneider, 119 Mich App 480, 484–87 (1982), and People v Kincaid, 136 Mich App 209, 213 (1984).

2.15 Transfer of Jurisdiction in Delinquency Cases From County Where Offense Occurred to County Where Juvenile Resides

Hearings on “traditional” waivers and prosecutions of designated cases must occur in the Family Division of the county in which the offense occurred. MCL 712A.4(1), MCL 712A.2(d), and MCR 3.926(G). In juvenile delinquency cases, if any juvenile is brought before the Family Division in a county other than the county in which he or she resides, the court may, before a hearing and with the consent of the Family Division judge of the juvenile’s county of residence, enter an order transferring jurisdiction over the matter to the court of the county of residence.* MCL 712A.2(d) adds that if the juvenile’s county of residence is a “county juvenile agency” and satisfactory proof of residency is furnished to the court in that county, consent to transfer the case is not required. In all cases, the order and a certified copy of the record of any proceedings in the case must be transferred to the court of the county or circuit of residence without charge. MCL 712A.2(d), MCR 3.926(F). MCR 3.926(B) adds that transfer must occur before trial.

Criteria to determine county of residence. MCR 3.926(B)(1)–(3) contain criteria to determine a juvenile’s county of residence. These rules state as follows:

“(1) If both parents reside in the same county, or if the child resides in the county with a parent who has been awarded legal custody, a guardian, a legal custodian, or the child’s sole legal parent, that county will be presumed to be the county of residence.

“(2) In circumstances other than those enumerated in subsection (1) of this section, the court shall consider the following factors in determining the child’s county of residence:
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(a) The county of residence of the parent or parents, guardian, or legal custodian.

(b) Whether the child has ever lived in the county, and, if so, for how long.

(c) Whether either parent has moved to another county since the inception of the case.

(d) Whether the child is subject to the prior continuing jurisdiction of another court.

(e) Whether a court has entered an order placing the child in the county for the purpose of adoption.

(f) Whether the child has expressed an intention to reside in the county.

(g) Any other factor the court considers relevant.

“(3) If the child has been placed in a county by court order, or by placement by a public or private agency, the child shall not be considered a resident of the county in which he or she has been placed, unless the child has been placed for purposes of adoption.”

“‘Legal Custodian’ means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state.” MCR 3.903(A)(13).

**Bifurcated proceedings.** In addition to transfer of a case before adjudication, MCR 3.926(E) provides for bifurcated proceedings, with adjudication occurring in one court and disposition occurring in another court. That rule states as follows:

“If the judge of the transferring court and the judge of the receiving court agree, the case may be bifurcated to permit adjudication in the transferring court and disposition in the receiving court. The case may be returned to the receiving court immediately after the transferring court enters its order of adjudication.”

In bifurcated cases, the court that enters an order of adjudication must send “any supplemented pleadings and records or certified copies of the supplemented pleadings and records to the court entering the disposition in the case.” MCR 3.926(F).
Costs. MCR 3.926(C) provides that when disposition is ordered by a Family Division other than the Family Division in a county where the juvenile resides, the court ordering disposition is responsible for any costs incurred in connection with the order unless:

- the court in the county where the juvenile resides agrees to pay such dispositional costs, or
- the juvenile is made a public ward and the county of residence withholds consent to transfer of the case.

2.16 Transfer of Designated Cases After Trial for Entry of a Juvenile Disposition

Except when there is a change of venue, designated cases must be tried in the county where the offense occurred. MCR 3.926(G).

Following conviction, however, the court that tried the case may transfer the case to the juvenile’s county of residence for entry of a juvenile disposition. If the juvenile is sentenced as an adult, imposition of the sentence (including delayed imposition of sentence) must be done in the county where the offense occurred. MCR 3.926(G) and MCL 712A.2(d).*

MCR 3.926(C) provides that when disposition is ordered by a Family Division other than the Family Division in a county where the juvenile resides, the court ordering disposition is responsible for any costs incurred in connection with the order unless:

- the court in the county where the juvenile resides agrees to pay such dispositional costs, or
- the juvenile is made a public ward and the county of residence withholds consent to transfer of the case.

2.17 Transfer of Jurisdiction in Status Offense and “Wayward Minor” Cases Involving Indian Children

MCR 3.935(B)(5) states that if the juvenile is charged as a status offender or a wayward minor, at a preliminary hearing “the court must inquire if the juvenile or a parent is a member of any American Indian tribe or band. If the juvenile is a member, or if a parent is a tribal member and the juvenile is eligible for membership in the tribe, the court must determine the identity of the tribe or band and follow the procedures set forth in MCR 3.980.”
MCR 3.980 helps to implement the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq. This federal act mandates that state courts adhere to certain minimum procedural requirements before removing Indian children from their homes. 25 USC 1902.*

A. Determining the Applicability of the Indian Child Welfare Act and MCR 3.980 in a Specific Case

If an “Indian child,” as defined in the Indian Child Welfare Act, is charged with a status offense or with being a “wayward minor,” the procedures in ICWA and MCR 3.980 must be used. MCR 3.980(A). “Indian child” is defined in 25 USC 1903(4) as any unmarried person who is under age 18 and is either a member of an Indian tribe or eligible for membership and is the biological child of a member of an Indian tribe. The tribe’s determination of its membership is conclusive. *Santa Clara Pueblo v Martinez, 436 US 49 (1978).*

Tribes set their own eligibility requirements, and there is no specific degree of Indian ancestry that qualifies a child for tribal membership. In *In re Elliott, 218 Mich App 196, 201–06 (1996)*, the Court of Appeals held that a Michigan court may not make an independent determination as to whether the child is being removed from an “existing Indian family” in deciding whether ICWA applies. The trial court ruled that the issue of the child’s membership or eligibility for membership in an Indian tribe need not be addressed since Native American culture was not a “consistent component” of the child’s or mother’s life. *Id.* at 200. The Court of Appeals reversed, holding that a judicially created “existing Indian family” exception to ICWA violated the plain terms of the federal statute and failed to adequately protect the interests of the Indian tribes in involuntary custody proceedings. *Id.* at 204–06. See also *In re Shawbose, 175 Mich App 637, 639–40 (1989)* (ICWA was inapplicable because respondent was not enrolled as a member of any tribe, and all tribes contacted declined to intervene).

B. Tribal Notification Requirements

MCR 3.935(B)(5) states that if the juvenile is charged as a status offender or a wayward minor, at a preliminary hearing “the court must inquire if the juvenile or a parent is a member of any American Indian tribe or band. If the juvenile is a member, or if a parent is a tribal members and the juvenile is eligible for membership in the tribe, the court must determine the identity of the tribe or band and follow the procedures set forth in MCR 3.980.” This requirement supersedes 25 USC 1912(a), which states that a court must know or have reason to know that an Indian child is involved in the proceeding before the notice requirements are applicable. See 25 USC 1921 (when applicable state law contains higher standards than ICWA, a court must apply those higher standards) and *In re Elliott, 218 Mich App 196, 208–09 (1996).*
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In *In re IEM*, 233 Mich App 438, 444–47 (1999), at a preliminary hearing in a child protective proceeding, the referee received inconclusive answers from the respondent-mother to his questions concerning respondent’s tribal membership. The referee then ordered the FIA to investigate the matter. On appeal, the respondent argued that the FIA failed to satisfy the notice requirements of ICWA and state law, and the Court of Appeals agreed. Respondent’s answers, though inconclusive, were sufficient to require the court to ensure that FIA provided proper notice. The FIA merely sent a request for a determination of the child’s Indian heritage to the Michigan Indian Child Welfare Agency and called one local tribe. The Court of Appeals noted the importance of the notice requirement in making a definitive determination of tribal membership. Only after the petitioner has complied with the notice requirements and no tribal membership has been established does the burden shift to the respondent to show that ICWA applies.

C. Mandatory Transfer of Case to Tribal Court

If the Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral, the matter must be transferred to the tribal court having jurisdiction. MCR 3.980(A)(1) and 25 USC 1911(a). Indian tribes have exclusive jurisdiction over proceedings involving an Indian child who resides or is domiciled within the reservation of the tribe. 25 USC 1911(a) and *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 43–53 (1989) (discussion of meaning of term “domicile” as used in ICWA).

If the child is a ward of a tribal court, the tribal court retains exclusive jurisdiction over the child notwithstanding the residence or domicile of the child. 25 USC 1911(a).

D. Notice of Proceedings to Parent and Tribe or Secretary of Interior

If the child does not reside on a reservation, the court must ensure that the petitioner has given notice* of the proceedings to the child’s tribe and the child’s parent or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior. MCR 3.980(A)(2) and 25 USC 1912(a). The required notice must be by registered mail with return receipt requested. 25 USC 1912(a).

E. Non-Mandatory Transfer of Case to Tribal Court

If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court must transfer the case to the tribal court unless either parent objects or the court finds good cause not to transfer the case to tribal court jurisdiction. MCR 3.980(A)(3) and 25 USC 1911(b). The perceived adequacy of the tribal court or tribal services shall not be good cause to refuse to transfer the case. MCR 3.980(A)(3).

*See SCAO Form JC 48.
The legislative history of ICWA suggests that the state court is the appropriate forum only when witnesses who will ensure protection of the rights of the child as an Indian, the rights of the parent as an Indian, and the rights of the tribe are more readily available than they would be in a tribal court proceeding. See HR Rep No 95-1386, at p 21, 95th Cong, 2d Sess, reprinted in 1978 US Code Cong & Ad News 7543–44.

2.18 Venue and Change of Venue in Delinquency Cases

In delinquency cases, venue is proper where the offense occurred or where the juvenile is physically present at the time a petition is filed. MCL 712A.2(a) and (d), and MCR 3.926(A).

MCR 3.926(D) states that venue may be changed upon motion of a party, and that all costs of the proceeding are to be borne by the Family Division that ordered the change of venue. Under MCR 3.926(D)(1)–(2), there are two circumstances allowing for change of venue:

“(1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case; or

“(2) when an impartial trial cannot be had where the case is pending.

“All costs of the proceeding in another county are to be borne by the court ordering the change of venue.”

As in a case that is transferred, the court ordering a change of venue shall send the original or certified copies of the record of the case to the receiving court without charge. MCR 3.926(F).

2.19 Procedures for Handling Cases When Juvenile Is Subject to Prior or Continuing Jurisdiction of Another Court in Michigan

Where a child is subject to a prior or continuing order of any other court of this state, notice must be filed in such other court of any order subsequently entered under the Juvenile Code. MCL 712A.3a.* Notice must also be served, personally or by registered-mail service, on the parents, guardians, or person in loco parentis and to the prosecuting attorney of the county where the other court is located. Such notices shall not disclose any allegations or findings of fact set forth in petitions or orders, or the actual person or institution to whom custody is changed. Id.

MCR 3.927 provides that the manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205.
waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court. MCR 3.205(A). See, generally, In re Brown, 171 Mich App 674, 676–77 (1988) (where custody of respondent’s children was previously awarded to respondent in a divorce proceeding, the Probate Court did not err in taking jurisdiction over respondent’s children, after giving the required notice to the Circuit Court, on grounds that their home was unfit), In re DeBaja, 191 Mich App 281, 288–91 (1991), and In re Foster, 226 Mich App 348, 353–57 (1997). The plaintiff or other initiating party must mail written notice of proceedings to:

(a) the clerk or register in the prior court, and
(b) the appropriate official of the prior court.

MCR 3.205(B)(2)(a)–(b).

The “appropriate official” means the friend of the court, juvenile officer, or prosecuting attorney, depending on the type of proceeding. MCR 3.205(B)(1).

Note: Although MCR 3.205(B) states that the plaintiff or other initiating party must mail the required notice, as a practical matter, the court often sends the notice. See Form MC 28. See also MCR 3.702(D)(2), which requires a court that is considering issuing a minor PPO to comply with MCR 3.205.

The notice must be mailed at least 21 days before the date set for hearing, except that if the fact of continuing jurisdiction is not then known, notice must be given immediately when it becomes known. MCR 3.205(B)(3). The notice requirement is not jurisdictional and does not preclude the subsequent court from entering interim orders before the 21-day period ends if it is in the best interests of the minor. MCR 3.205(B)(4). See also Krajewski v Krajewski, 420 Mich 729, 734 (1984) (subsequent court may enter temporary or permanent orders).

Upon receipt of notice, the appropriate official of the prior court:

(a) must provide the subsequent court with copies of all relevant orders then in effect and copies of relevant records and reports, and
(b) may appear in person at proceedings in the subsequent court, as the welfare of the minor and the interests of justice require.

MCR 3.205(D)(1)(a)–(b).

Upon request of the prior court, the appropriate official of the subsequent court:

(a) must notify the appropriate official of the prior court of all proceedings in the subsequent court, and
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(b) must send copies of all orders entered in the subsequent court to the attention of the clerk or register and the appropriate official of the prior court.

MCR 3.205(D)(2)(a)–(b).

Each provision of a prior order remains in effect until the provision is superseded, changed, or terminated by a subsequent order. MCR 3.205(C)(1). A subsequent order must give due consideration to prior continuing orders of other courts, and a court may not enter orders contrary to or inconsistent with such orders, except as provided by law. MCR 3.205(C)(2).

2.20 Procedures for Handling Cases Under the Interstate Compact on Juveniles

The Interstate Compact on Juveniles (ICOJ), MCL 3.701 et seq., allows for interstate placement and probation and parole supervision of juveniles; the return of runaways, absconders, and escapees to Michigan and other states; and the “extradition” of juveniles to and from Michigan to face criminal charges.* In Michigan, all requests for services in cases involving other states must be made to the Family Independence Agency, Office of Children’s Services, Interstate Services Unit. See FIA Services Manual, CFF 931. Court involvement in the return of runaways, absconders, and escapees to the requesting state, and in the “extradition” of juveniles to states in which a juvenile has allegedly committed a criminal offense is discussed in this section. Placement and supervision of juveniles in other states is discussed in Section 10.9(G).

The Family Division has jurisdiction of a case under the ICOJ. MCL 3.704. However, pursuant to MCL 3.704, the ICOJ does not apply in the following cases:

- when there is an action pending in Michigan for divorce or separate maintenance and the child is in the custody of a parent in another state;
- where the parents are divorced and there is a custody order issued by the circuit court that granted the divorce; or
- where the individual sought to be returned to Michigan is 18 years of age or older.

If a juvenile is returned to Michigan under the ICOJ, Michigan “is responsible for payment of the transportation costs of such return.” MCL 3.701, Article IV(b) and V(b).

*All 50 states are parties to the ICOJ. See the Historical and Statutory Notes to MCL 3.701 for citations to relevant legislation of other states.
A. Procedures for the Involuntary Return of Runaways, Absconders, and Escapees

1. Runaways Who Are Not Otherwise Subject to Court Proceedings

If a juvenile who is not under the jurisdiction of the Family Division has run away without the consent of a parent, guardian, person, or agency entitled to legal custody of the juvenile, that person or agency may petition the Family Division for the issuance of a requisition for the juvenile’s return. MCL 3.701, Article IV(a). The petition must include, if known, the location of the juvenile. Other petition and hearing requirements for such cases are contained in MCL 3.701, Article IV(a).

2. Taking a Runaway, Absconder, or Escapee Into Custody Without a Requisition

Any juvenile may be taken into custody without a requisition “[u]pon reasonable information that [he or she] has run away from another state [that is a party to the ICOJ] without the consent of a parent, guardian, person or agency entitled to his legal custody.” MCL 3.701, Article IV(a). MCL 3.701, Article V(a) contains a substantially similar provision for absconders and escapees. The juvenile must be brought “forthwith” before a judge of the appropriate court, who may appoint counsel. The judge must “determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for his own protection and welfare, for such a time not exceeding 90 days as will enable his return to another state . . . pursuant to a requisition for his return . . . .” MCL 3.701, Article IV(a). MCL 3.701, Article V(a) contains a substantially similar provision for absconders and escapees.

3. Issuing a Requisition for the Return of a Runaway When Court Proceedings Are Pending

If “a proceeding for the adjudication of the juvenile” is pending in a court when the juvenile runs away, that court may issue a requisition for the juvenile’s return on its own motion. MCL 3.701, Article IV(a) sets forth the requirements for issuing a requisition:

“In the event that a proceeding for the adjudication of the juvenile as a delinquent . . . is pending in the court at the time when such juvenile runs away, the court may issue a requisition for the return of such juvenile upon its own motion, regardless of the consent of the parent, guardian, person or agency entitled to legal custody, reciting therein the nature and circumstances of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of the requisition shall be filed with the
compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of such court.”

“Proceeding for the adjudication of the juvenile as a delinquent” means a proceeding under MCL 712A.2, “following the authorization of the filing of a petition by the court.” A copy of the requisition must be filed with the compact administrator in Michigan. MCL 3.701, Article IV(a).

4. Issuing a Requisition for the Return of an Absconder or Escapee

MCL 3.701, Article V, deals with the return of juveniles who have been adjudicated delinquent and who have absconded from probation or parole or escaped from an institution or residential care facility. At the time the ICOJ is invoked, a juvenile must be subject to the jurisdiction of the court that adjudicated the juvenile or to the jurisdiction or supervision of an agency or institution pursuant to an order of that court. MCL 3.701, Article III. In Michigan, a juvenile must have been found to come under the Family Division’s jurisdiction over criminal offenses, status offenses, and wayward minors. MCL 3.704. “[P]robation or parole” means any kind of conditional release of juveniles authorized under the laws of the states [that are parties to the ICOJ]. MCL 3.701, Article III. In Michigan, “parole” means the conditional release of juveniles who were committed to the FIA as public wards. See FIA Services Manual, CFF 931. “Parole” may also mean the conditional release of juveniles committed to the “county juvenile agency” in Wayne County.*

“[T]he appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody he has escaped” may present a written requisition to the appropriate court or executive agency of the state where the juvenile is allegedly located. MCL 3.701, Article V(a). The requirements for the requisition are as follows:

“Such requisition shall state the name and age of the delinquent juvenile, the particulars of his adjudication as a delinquent juvenile, the circumstances of the breach of the terms of his probation or parole or of his escape from an institution or agency vested with his legal custody or supervision, and the location of such delinquent juvenile, if known, at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects such delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned. Such further affidavits and other documents as may be deemed proper may be submitted with such requisition. One copy of the
requisition shall be filed with the compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of the appropriate court.” *Id.*

5. **Taking a Juvenile Into Custody Pursuant to a Requisition**

When a court receives a requisition for the return of a juvenile who has run away, absconded, or escaped, that court must issue an order to take the juvenile into custody and detain him or her. MCL 3.701, Article IV(a) and V(a). After being taken into custody, a juvenile “shall first be taken forthwith before a judge of a court in the state, who shall inform him of the demand made for his return, and who may appoint counsel or guardian ad litem for him.” MCL 3.701, Article IV(a). MCL 3.701, Article V(a) contains a substantially similar provision. If the judge finds that the requisition is “in order,” the judge may order the juvenile delivered to the authorities from the requesting state. MCL 3.701, Article IV(a) and V(a). “The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.” MCL 3.701, Article IV(a). MCL 3.701, Article V(a) contains a substantially similar provision.

If a court seeks the return of a juvenile who has run away, absconded, or escaped but who is subject to delinquency or criminal proceedings in the state where he is found, that court must await the outcome of the proceedings in the other state. MCL 3.701, Article IV(a), dealing with runaways, states in relevant part:

“If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein he is found any criminal charge, or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state, or if he is suspected of having committed within such state a criminal offense or act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other forms of proceeding, imprisonment, detention or supervision for such offense or juvenile delinquency.”

MCL 3.701, Article V(a), dealing with absconders and escapees, contains a substantially similar provision.

**B. Voluntary Consent to Return to Home State**

A juvenile who has run away, absconded, escaped, or committed a criminal offense in another state and who is taken into custody without a requisition may consent to be returned to the state from which he or she ran away, absconded, or escaped, or in which he or she committed a criminal offense. The consent must be given by the juvenile and his or her attorney or guardian ad litem, if any, in a writing made or executed in the presence of a
C. Mandatory Authorization of Return to Juvenile’s Home State

If a “minor” is brought before a court of a state other than a state in which the minor resides, and if the court of that state is willing to permit the return of the juvenile to his or her home state, the juvenile’s home state may be required to authorize the juvenile’s return. MCL 3.701, Article XVI(b) states as follows:

“When any child is brought before a court of a state of which such child is not a resident, and such state is willing to permit such child’s return to the home state of such child, such home state, upon being so advised by the state in which such proceeding is pending, shall immediately institute proceedings to determine the residence and jurisdictional facts as to such child in such home state, and upon finding that such child is in fact a resident of said state and subject to the jurisdiction of the court thereof, shall within five days authorize the return of such child to the home state, and to the parent or custodial agency legally authorized to accept such custody in such home state, and at the expense of such home state, to be paid from such funds as such home state may procure, designate, or provide, prompt action being of the essence.”

A “minor” is defined by reference to the law in the juvenile’s home state. MCL 3.701, Article XVI(a). MCR 3.903(A)(5) defines a minor as “a person under the age of 18, and may include a person of age 18 or older over whom the juvenile court has continuing jurisdiction pursuant to MCL 712A.2 . . . .”*

For purposes of MCL 3.701, Article XVI(b), “residence” means “a place at which a home or regular place of abode is maintained.” MCL 3.701, Article III.

D. “Extradition” of Juveniles Charged With Criminal Offenses

A provision of the ICOJ may require the return of juveniles alleged to have committed a criminal offense in another state to that state. In such cases, the requisition and hearing procedures for the voluntary or involuntary return of absconders and escapees apply. MCL 3.701, Article XVI(c).* This statutory provision states as follows:

“All provisions and procedures of Articles V and VI of the interstate compact on juveniles shall be construed to apply to any juvenile charged with being a delinquent
juvenile for the violation of any criminal law. Any juvenile charged with being a delinquent juvenile for violating any criminal law shall be returned to the requesting state upon a requisition to the state where the juvenile may be found. A petition in the case shall be filed in a court of competent jurisdiction in the requesting state where the violation of criminal law is alleged to have been committed. The petition may be filed regardless of whether the juvenile has left the state before or after the filing of the petition. The requisition in Article V of the compact shall be forwarded by the judge of the county in which the petition has been filed.”
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In this chapter . . .

This chapter discusses the required procedures immediately following the apprehension of a juvenile for a criminal or status offense. It deals with the custody, notification, and detention requirements prior to a preliminary hearing in a delinquency case or an arraignment in a criminal case. Detention of a juvenile following a preliminary hearing or arraignment is also discussed in this chapter. A table summarizing permitted places of detention of juveniles may be found at Section 3.12.

Detention is also discussed in other portions of this benchbook. See Section 5.12 (detention following preliminary hearings in delinquency proceedings), Section 10.10 (post-disposition detention pending return to
Section 3.1

placement), and Section 13.3 (detention pending a probation violation proceeding in delinquency cases). Custody and detention pending hearings in personal protection order (PPO) actions is discussed in Sections 15.18–15.19.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

3.1 Taking Temporary Custody of or “Lodging” a Juvenile Pending Preliminary Hearing

MCL 712A.14, MCR 3.933, and MCR 3.934 discuss the procedures to follow when taking a juvenile into temporary custody and when “lodging” or detaining a juvenile pending a preliminary hearing in the Family Division. The decision to detain a juvenile pending a preliminary hearing in a delinquency case is one only the court can make. See MCR 3.903(B)(1) (detention means court-ordered removal of a juvenile from parental custody pending a hearing or further order). These procedures apply whenever a juvenile has committed an “offense.” Under MCR 3.903(B)(3), “offense by a juvenile” includes a violation of a criminal law or ordinance, violation of a traffic law, or commission of a status offense.

3.2 The “Immediacy Rule”

The so-called “immediacy rule” is contained in MCL 764.27. That statute states in relevant part:

“Except as otherwise provided in [MCL 600.606], if a child less than 17 years of age is arrested, with or without a warrant, the child shall be taken immediately before the family division of circuit court of the county where the offense is alleged to have been committed, and the officer making the arrest shall immediately make and file, or cause to be made and filed, a petition against the child as provided in [the Juvenile Code].”
Unless the prosecuting attorney has decided to proceed under the “automatic waiver” statute, MCL 600.606, a police officer who arrests a child less than 17 years of age must immediately take that child before the Family Division of the county where the offense was allegedly committed and file or cause to be filed a delinquency petition. MCL 764.1f(1) states that “[i]f the prosecuting attorney has reason to believe”* that a juvenile between the ages of 14 and 17 has committed a “specified juvenile violation,” he or she may authorize the filing of a complaint and warrant with a magistrate concerning the juvenile. In the absence of an authorization from the prosecuting attorney, the juvenile must be brought to the Family Division or to a designated facility if the court is not open. People v Brooks, 184 Mich App 793, 797–98 (1990), People v Spearman, 195 Mich App 434, 443–45 (1992), overruled on other grounds 443 Mich 23 (1993), and MCR 3.933(A). Pursuant to MCR 3.934(B)(2), each Family Division must designate a person whom an officer may contact to obtain permission to temporarily detain a juvenile when the court is not open. That rule states:

“The court must designate a judge, referee or other person who may be contacted by the officer taking a juvenile into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the juvenile pending preliminary hearing.”

Often the juvenile who becomes the subject of the “automatic waiver” procedure is initially detained on a juvenile complaint, upon authorization to detain from a court representative (usually the referee on duty). Typically, when the juvenile is apprehended at night, the police present the complaint to the prosecutor the next morning, and the prosecutor then writes the criminal complaint and warrant rather than a juvenile petition. The juvenile is then arraigned in district court, and the juvenile case is “closed.”*

Police officers may stop at the police station to complete booking procedures, type a delinquency petition, and, as required by statute, fingerprint the juvenile. People v Hammond, 27 Mich App 490, 493–94 (1970), People v Coleman, 19 Mich App 250, 253–54 (1969), overruled on other grounds 41 Mich App 116 (1972), and People v Morris, 57 Mich App 573, 575–76 (1975). MCL 28.243(1) requires the police to take the fingerprints of a juvenile arrested for an offense that if committed by an adult would be a felony, criminal contempt of court, or a misdemeanor punishable by 93 days’ incarceration or more. See also MCR 3.923(C), which provides the Family Division discretion to permit fingerprinting or photographing, or both, of any minor concerning whom a petition has been filed.*

In People v Roberts, 3 Mich App 605, 613 (1966), the Court of Appeals noted that the right of law enforcement officers to question a juvenile is limited by the constitutional and statutory safeguards applicable to juveniles:
**3.3 Obtaining Custody of a Juvenile Without a Family Division Order**

**A. Obligations of Officer Immediately After a Juvenile Is Taken Into Custody**

MCL 712A.14(1) provides that a police officer, sheriff, deputy sheriff, county agent, or probation officer may, without a court order, take into custody any juvenile who is found violating any law or ordinance; whose surroundings are such as to endanger the juvenile’s health, morals, or welfare; or who is violating or has violated a PPO or valid foreign protection order. After apprehending the juvenile, the officer or agent must immediately attempt to notify the juvenile’s parent or parents, guardian, or custodian. While awaiting arrival of the parent or parents, guardian, or custodian, the juvenile must not be held in a detention facility unless the juvenile can be isolated so as to prevent any verbal, visual, or physical contact with any adult prisoner. Note that unlike criminal cases, a probable-cause determination need not be made prior to taking temporary custody of a child pending investigation and preliminary hearing. See *In re Albring*, 160 Mich App 750, 756–57 (1987).

MCR 3.933(D) mirrors the language contained in MCL 712A.14(1) on separation of juveniles from adult prisoners. That rule states:

> “While awaiting arrival of the parent, guardian, or legal custodian, appearance before the court, or otherwise, the juvenile must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact with an adult prisoner.”

> “‘Legal Custodian’ means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. MCR 3.903(A)(13). ‘Guardian’ means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or 700.5205, by a court of another state...
under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202.” MCR 3.903(A)(11).

The federal regulations implementing the Juvenile Justice & Delinquency Prevention Act, 42 USC 5601 et seq., provide useful definitions when determining what constitutes “any verbal, visual, or physical contact with an adult prisoner.” 28 CFR 31.303(d)(1)(i) states in relevant part:

“The term ‘contact’ includes any physical or sustained sight or sound contact between juvenile offenders in a secure custody status and incarcerated adults, including inmate trustees. A juvenile offender in a secure custody status is one who is physically detained or confined in a locked room or other area set aside or used for the specific purpose of securely detaining persons who are in law enforcement custody. Secure detention or confinement may result either from being placed in such a room or area and/or from being physically secured to a cuffing rail or other stationary object. Sight contact is defined as clear visual contact between incarcerated adults and juveniles within close proximity to each other. Sound contact is defined as direct oral communication between incarcerated adults and juvenile offenders.”

B. Obligations of Officer After Notification or Attempt to Notify Parent, Guardian, or Legal Custodian

MCR 3.933(A)(1)–(3) discuss in detail the procedures that must be followed by an officer following the notification or attempt to notify the juvenile’s parent, guardian, or legal custodian. These rules state in part:

“(A) Custody Without Court Order. When an officer apprehends a juvenile for an offense without a court order and does not warn and release the juvenile, does not refer the juvenile to a diversion program,* and does not have authorization from the prosecuting attorney to file a complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f, the officer may:

(1) issue a citation or ticket to appear at a date and time to be set by the court and release the juvenile;

(2) accept a written promise of the parent, guardian, or legal custodian to bring the juvenile to court, if requested, at a date and time to be set by the court, and release the juvenile to the parent, guardian, or legal custodian; or

*See Section 4.4 for a detailed explanation of the Juvenile Diversion Act.
(3) take the juvenile into custody and submit a petition . . . .”

“Officer” means a government official with the power to arrest or any other person designated and directed by the court to apprehend, detain, or place a minor. MCR 3.903(A)(16).

C. Factors to Consider When Deciding Whether Juvenile Should Be Released From Custody

MCR 3.933(A)(3)(a)–(b) set out the factors the officer should consider in deciding whether to maintain custody of the juvenile. The officer should take the juvenile into custody and submit a petition under MCR 3.933(A)(3) if either of the following circumstances exist:

“(a) the officer has reason to believe that because of the nature of the offense, the interest of the juvenile or the interest of the public would not be protected by release of the juvenile, or

“(b) a parent, guardian, or legal custodian cannot be located or has refused to take custody of the juvenile.”

MCL 712A.14(2) adds that if the juvenile is not released, the juvenile and his or her parents, guardian, or custodian must immediately be brought before the court for a preliminary hearing. At the conclusion of the preliminary hearing, the court will either authorize the petition to be filed or will dismiss the petition and release the juvenile.

D. Obligation to Notify Family Division If Juvenile Is Not Released From Custody

MCR 3.933(C)(1)–(3) require the officer or agent taking custody of the juvenile to immediately contact the court if:

“(1) the officer detains the juvenile,

“(2) the officer is unable to reach a parent, guardian, or legal custodian who will appear promptly to accept custody of the juvenile, or

“(3) the parent, guardian, or legal custodian will not agree to [sign a written promise to bring the juvenile to court].”
E. Additional Obligations of Officer If Juvenile Is Not Released

MCR 3.934(A)(1)–(4) set forth four obligations of an officer or agent when a juvenile is apprehended and not released and the prosecutor has not authorized the filing of a complaint and warrant charging the juvenile as an adult pursuant to the “automatic waiver” statute. The officer or agent must:

“(1) forthwith* take the juvenile

   (a) before the court for a preliminary hearing, or

   (b) to a place designated by the court pending the scheduling of a preliminary hearing;

“(2) ensure that the petition [or a complaint] is prepared and presented to the court;

“(3) notify the parent, guardian, or legal custodian of the detaining of the juvenile, and of the need for the presence of the parent, guardian, or legal custodian at the preliminary hearing;

“(4) prepare a custody statement* for submission to the court including:

   (a) the grounds for and the time and location of detention, and

   (b) the names of persons notified and the times of notification, or the reason for failure to notify.”

F. Obligations of Officer If Family Division Is Not Open

MCR 3.934(B)(1) states that when a juvenile is apprehended without a court order and the court is not open, the juvenile may be detained pending a preliminary hearing if no parent, guardian, or legal custodian can be located, or if the juvenile or the offense meets the criteria set forth in MCR 3.935(D)(1).

MCR 3.935(D)(1) allows for detention if one or more of the following circumstances are present:

“(a) the offense alleged is so serious that release would endanger the public safety;

“(b) the juvenile charged with an offense that would be a felony if committed by an adult will likely commit another offense pending trial, if released, and
(i) another petition is pending against the juvenile,

(ii) the juvenile is on probation, or

(iii) the juvenile has a prior adjudication, but is not under the court’s jurisdiction at the time of apprehension;

“(c) there is a substantial likelihood that if the juvenile is released to the parent, guardian, or legal custodian, with or without conditions, the juvenile will fail to appear at the next court proceeding;

“(d) the home conditions of the juvenile make detention necessary;

“(e) the juvenile has run away from home;*

“(f) the juvenile has failed to remain in a detention facility or nonsecure facility or placement in violation of a court order; or

“(g) pretrial detention is otherwise specifically authorized by law.”

Pretrial detention is specifically authorized by MCL 712A.15(2). Several of this statute’s provisions have been incorporated into MCR 3.935(D), but the following provisions have not and therefore also allow for detention pending a hearing:

“(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.

“(f) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation.”

In Schall v Martin, 467 US 253 (1984), the United States Supreme Court upheld the constitutionality of a state’s “preventive detention” statute, which allowed for pretrial detention if there was a serious risk of the juvenile committing another crime before the next court hearing.

Pursuant to MCR 3.934(B)(2), each Family Division must designate a person whom an officer may contact to obtain permission to temporarily detain a juvenile when the court is not open. That rule states:

“The court must designate a judge, referee, or other person who may be contacted by the officer taking a
juvenile into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the juvenile pending preliminary hearing.”

Note: “Court intake workers,” referees, or detention personnel often make the initial detention determination. Courts may wish to promulgate a local administrative order meeting the requirements of MCR 3.934(B)(2). A copy of the administrative order may then be given to each law enforcement agency in the court’s geographic jurisdiction.

G. Emergency Removal of Indian Children Charged With Status Offenses

MCR 3.980(B), dealing with emergency removal, provides that an Indian child who resides or is domiciled on a reservation but temporarily located off the reservation shall not be removed from a parent or Indian custodian unless the removal is to prevent imminent physical harm to the child. The emergency removal must be terminated when it is no longer necessary to prevent immediate physical damage or harm to the child. 25 USC 1922. An Indian child not residing or domiciled on a reservation may be temporarily removed if reasonable efforts have been made to prevent removal of the child, and continued placement with the parent or Indian custodian would be contrary to the welfare of the child. 25 USC 1922 and MCR 3.980(B).

3.4 Detention When Family Division Issues an Order to Apprehend a Juvenile

The Family Division may issue an order* to apprehend a juvenile in certain circumstances. Like an arrest warrant for an adult, the Family Division’s order may only issue upon probable cause and must specify the juvenile and the place where the juvenile may be found. MCL 712A.2c states as follows:

“The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is absent without leave from an institution or facility to which he or she was committed under [MCL 712A.18], has violated probation, has failed to appear for a hearing on a petition charging a violation of [MCL 712A.2], is alleged to have violated a personal protection order issued under [MCL 712A.2(h)], or is alleged to have violated a valid foreign protection order. The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes* with the lawful
attempt to execute an order issued under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both.”

MCR 3.933(B) specifies that the court may issue an order to apprehend a juvenile upon probable cause that he or she has committed an offense. That rule states as follows:

“(B) Custody With Court Order. When a petition is presented to the court, and probable cause exists to believe that a juvenile has committed an offense, the court may issue an order to apprehend the juvenile. The order may include authorization to:

(1) enter specified premises as required to bring the juvenile before the court, and

(2) detain the juvenile pending preliminary hearing.” MCR 3.933(B)(1)–(2).

Probable cause to issue an arrest warrant exists if the facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense. *Beck v Ohio,* 379 US 89, 91 (1964).

### 3.5 Time Requirements for Preliminary Hearings and Arraignments When Juvenile Is Detained

A preliminary hearing* in a juvenile delinquency case is the “functional equivalent” of an arraignment in a criminal case. *In the Matter of Sylvester Wilson,* 113 Mich App 113, 121 (1982). MCR 3.935(A)(1) states that a preliminary hearing “must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays, as defined in MCR 8.110(D)(2), or the juvenile must be released.”

Under MCR 3.935(A)(2)(a)–(b), the court may adjourn the preliminary hearing for up to 14 days:

“(a) to secure the attendance of the juvenile’s parent, guardian, or legal custodian or of a witness, or

“(b) for other good cause shown.”

In both prosecutor-designated and court-designated cases, if a juvenile is in custody or custody is requested, the arraignment must commence no later than 24 hours after the juvenile has been taken into court custody, excluding
Sundays and holidays as defined by MCR 8.110(D)(2), or the juvenile must be released. MCR 3.951(A)(1)(a) and 3.951(B)(1)(a).

If the prosecuting attorney has authorized the filing of a complaint and warrant under the “automatic waiver” procedure, a juvenile in custody must be taken before a magistrate for arraignment. MCR 6.907(A). The juvenile must be released if arraignment has not commenced:

“(1) within 24 hours of the arrest of the juvenile; or

“(2) within 24 hours after the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 3.935(A)(3), provided the juvenile is being detained in a juvenile facility.” MCR 6.907(A)(1)–(2).

3.6 Special Adjournments to Allow Prosecutor to Decide Whether to Proceed Under the “Automatic” Waiver Statute for “Specified Juvenile Violations”

The Family Division may grant special adjournments when a juvenile between 14 and 17 years of age is alleged to have committed a “specified juvenile violation.” MCR 3.935(A)(3).*

MCR 3.935(3)(a) states:

“On a request of a prosecuting attorney who has approved the submission of a petition with the court, conditioned on the opportunity to withdraw it within 5 days if the prosecuting attorney authorizes the filing of a complaint and warrant with a magistrate, the court shall comply with subrules (i) through (iii).”

If the prosecuting attorney has so requested, the court must adjourn the preliminary hearing for up to five days to give the prosecuting attorney an opportunity to determine whether to file a complaint and warrant pursuant to MCL 764.1f, or to unconditionally approve the filing of a petition in the Family Division. MCR 3.935(A)(3)(a)(i).

MCR 3.935(A)(3)(a)(ii)–(iii) add that during a special adjournment, the court must defer a decision regarding whether to authorize the filing of a petition and must release the juvenile pursuant to MCR 3.935(E) or detain the juvenile pursuant to MCR 3.935(D).*

MCR 3.935(A)(3)(b) sets forth the procedures when the prosecuting attorney has not authorized the filing of a complaint and warrant during a “special adjournment”: 
Section 3.7

“If, at the resumption of the preliminary hearing following special adjournment, the prosecuting attorney has not authorized the filing with a magistrate of a criminal complaint and warrant on the charge concerning the juvenile, approval of the petition by the prosecuting attorney shall no longer be deemed conditional and the court shall proceed with the preliminary hearing and decide whether to authorize the petition to be filed.”

MCR 3.935(A)(3)(c) adds that the prosecuting attorney’s use of the “special adjournment” procedure does not preclude the prosecuting attorney from filing a motion for “traditional” waiver under MCR 3.950. Presumably, the rule does not preclude the prosecuting attorney from designating the case under MCR 3.951(A)(3)(a).

If the prosecuting attorney files a complaint and warrant in district court, an arraignment must be held, and following the arraignment, the district court must set a date for the juvenile’s preliminary examination within the next 14 days. The period consumed by the special adjournment, up to three days, must be deducted from the 14 days allowed for conducting the preliminary examination following arraignment. MCR 6.907(C)(2).

3.7 Places of Detention for Alleged Juvenile Delinquents

As a general rule, a juvenile must be detained in the least restrictive environment that will meet the needs of the juvenile and the public, and that will conform to the statutory requirements of MCL 712A.15 and MCL 712A.16. MCR 3.935(D)(4). Following the filing of a complaint, petition, supplemental petition, petition for revocation of probation, or supplemental petition alleging a PPO violation, the court may detain a juvenile in a designated facility. MCL 712A.15(1). MCL 712A.14(3)(d) also allows the court to place a juvenile in “a suitable place of detention” if a petition is authorized following preliminary hearing. MCR 3.903(B)(1) broadly defines “detention” to include “court-ordered removal of a juvenile from the custody of a parent, guardian, or legal custodian. . . .” This definition allows for placement in a non-secure facility or foster home.

If a juvenile under the age of 17 is taken into custody or detained, “the juvenile shall not be confined in any police station, prison, jail, lock-up, or reformatory, or transported with, or compelled or permitted to associate or mingle with, criminal or dissolute persons.” MCL 712A.16(1).

However, except as provided for status offenders, a juvenile 15 years of age or older whose habits or conduct are considered a menace to other children, or who might not otherwise be safely detained, on order of the court, may be placed in a jail or other place of detention for adults, but in a room or ward separate from adults, and for a period not to exceed 30 days, unless longer detention is necessary for the service of process. MCL 764.27a(2) creates
the additional restriction that juveniles confined in a jail or other place of detention for adults must be placed in a room or ward out of sight and sound of adults.*

MCL 712A.16(2)(c) gives the court authority to place a 17 year old in a county jail if the juvenile is kept “in a room or ward separate and apart from adult criminals.”

**Note:** MCL 750.139(1) provides that a child under 16 years of age while under arrest, confinement, or conviction for any crime must not be:

- placed in any apartment or cell of any prison, or place of confinement with any adult under arrest, confinement, or conviction for a crime;
- permitted to remain in any court room during the trial of adults; or
- be transported with adults charged with or convicted of crime.

Any person who violates these provisions shall be guilty of a misdemeanor. MCL 750.139(3).

**Jailing juveniles for contempt of court.** MCR 3.928(C) states as follows:

“**(C) Contempt by Juvenile.** A juvenile under court jurisdiction who is convicted of criminal contempt of court, and who was at least 17 years of age when the contempt was committed, may be sentenced to up to 30 days in the county jail as a disposition for the contempt. Juveniles sentenced under this subrule need not be lodged separate and apart from adult prisoners. Younger juveniles found in contempt of court are subject to a juvenile disposition under these rules.”

### 3.8 Places of Detention for Alleged Status Offenders

MCL 712A.15(3) and (5) discuss places of detention for juveniles alleged to be status offenders (runaways, habitually disobedient, and/or truants).*

Pursuant to MCL 712A.15(3), a child taken into custody for being an alleged status offender and who is not under the court’s jurisdiction for a criminal offense must not be detained in any secure detention facility for juvenile offenders unless the court finds that the child willfully violated a court order and the court finds, after a hearing and on the record, that there is no less restrictive alternative more appropriate to the needs of the child.*
The court may make the requisite findings following a probation violation hearing or contempt hearing. MCL 712A.15(3) adds that it does not apply to a child over 17 years of age against whom a supplemental petition alleging a PPO violation has been filed. The subsection does apply, however, to a juvenile under age 17 who is taken into custody as an alleged status offender and against whom a supplemental petition alleging a PPO violation has been filed. Thus, if such a juvenile is found to have violated a PPO following contempt proceedings, he or she may be detained in a secure facility.*

A provision of the Juvenile Justice & Delinquency Prevention Act, 42 USC 5633(a)(12)(A), makes federal funds available to states where status offenders cannot be detained in secure facilities unless they have violated valid court order. Federal regulations explain in detail the requirements for determining whether a valid court order exists and hearing requirements for violations of valid court orders. In general, 28 CFR 31.303(f)(3) requires the hearing at which the order was entered and the hearing on violation of the order to meet basic due process requirements, and allows a court to temporarily detain a juvenile pending a hearing on violation of the order. The required standard of proof at a juvenile probation revocation proceeding is “preponderance of the evidence.” People v Belcher, 143 Mich App 68, 72 (1985). Criminal contempt must be proven “beyond a reasonable doubt.” In re Contempt of Papanos, 143 Mich App 483, 488–99 (1985).

A status offense proceeding may be “bootstrapped” into a juvenile delinquency proceeding through use of the “juvenile court’s” contempt power. See MCL 712A.26, In the Interest of Jane Doe, 26 P3d 562, 568, 571 (Hawai‘i, 2001) (“juvenile court” may adjudicate status offenders for criminal contempt and securely detain them if the juvenile had sufficient notice of the order and the court considers less restrictive alternatives), and In re GB, 430 NE2d 1096, 1098-99 (Ill, 1981) (violation of family court’s order could be punished pursuant to its inherent contempt power rather than pursuant to the authority granted by the statutes governing juvenile proceedings).

**Note:** Use of secure detention for a status offender who has repeatedly violated court orders may be necessary for the juvenile’s safety and well-being. However, a court should also consider the emotional impact of being placed in secure detention and its financial cost.

MCL 712A.15(5) prohibits the detention of a child taken into custody for a status offense from being placed in “a cell or other secure area of any secure facility designed to incarcerate adults” unless one of the following applies:

“(a) A child is under the jurisdiction of the court pursuant to [MCL 712A.2(a)(1), criminal offenses] for an offense which, if committed by an adult, would be a felony.
“(b) A child is not less than 17 years of age and is under the jurisdiction of the court pursuant to a supplemental petition under [MCL 712A.2(h), PPO actions].”

Juveniles taken into custody as status offenders who are under the court’s jurisdiction for a misdemeanor offense may be placed in secure detention if it is the least restrictive alternative available, but they may not be jailed.

### 3.9 Places of Detention for Juveniles Whose Felony Cases Have Been Designated for Criminal Trial in Family Division

A juvenile under 17 years of age may be held in the county jail pending trial if the case has been designated for criminal trial by the court pursuant to MCL 712A.2d. The court must determine that there is probable cause that a felony was committed and that the juvenile committed the felony. MCL 712A.2(g) and MCL 764.27a(3). This occurs at the preliminary examination held by a Family Division judge. MCR 3.903(D)(5). Prior approval of the county sheriff is required, and the juvenile must be held physically separate from adults. MCL 712A.2(g) and MCL 764.27a(3). The court rule governing confinement of the juvenile following a preliminary examination in designated cases, MCR 3.953(G), provides that if the juvenile is under 17 years of age, he or she must be separated from adult prisoners by sight and sound unless otherwise ordered by the court, which is a more difficult standard to meet.*

MCL 764.27a(4) provides that the court, upon motion of a juvenile or individual under 17 years of age who is subject to confinement in the county jail, may, upon good cause shown, order the juvenile or individual to be confined as otherwise provided by law.

### 3.10 Places of Detention for Juveniles Charged Under the “Automatic Waiver” Statute

MCR 6.907(B)(1)–(3) list the places at which a juvenile may be temporarily detained pending arraignment in an “automatic waiver” case. If the prosecutor has authorized the filing of a complaint and warrant alleging a “specified juvenile violation” instead of approving the filing of a petition in the Family Division, a juvenile may, following apprehension, be detained pending arraignment:

*See Section 3.3(A), above, for useful definitions of separation by “sight” and “sound.”*
Section 3.10

“(1) in a juvenile facility operated by the county;*

“(2) in a regional juvenile detention facility operated by the state; or

“(3) in a facility operated by the family division of the circuit court with the consent of the family division or an order of a [circuit court, other than the family division].”

The juvenile placed in a detention home operated by the Family Division pending a decision by the prosecuting attorney to authorize the filing of a complaint and warrant in district court may remain there, with the Family Division’s consent, even after the prosecuting attorney’s decision to proceed under the “automatic waiver” statute.* Under MCR 6.907(B)(3), however, if the Family Division does not consent, or if the Criminal Division does not order the juvenile to remain in the court-operated facility, the juvenile must be moved to a non-court-operated facility. See Staff Comment following Subchapter 6.900 (“H. Detention”). The Family Division must comply if the Criminal Division orders the juvenile to remain in the Family Division-operated facility pending trial. MCL 712A.2(f).

If no juvenile facility is reasonably available and if it is apparent that the juvenile may not otherwise be safely detained, the magistrate may, without a hearing, order that the juvenile be lodged pending arraignment in a facility used to incarcerate adults. The juvenile must be kept separate from adult prisoners as required by law. MCR 6.907(B).*

MCR 6.909(B)(1)–(4) deal with confinement after arraignment. These rules, which are similar to those applicable to pre-arraignment detention, state as follows:

“(1) Juvenile Facility. Except as provided in subrule (B)(2) and in MCR 6.907(B) [see above], a juvenile charged with a crime and not released must be placed in a juvenile facility while awaiting trial and, if necessary, sentencing, rather than being placed in a jail or similar facility designed and used to incarcerate adult prisoners.

“(2) Jailing of Juveniles; Restricted. On motion of a prosecuting attorney or a superintendent of a juvenile facility where the juvenile is detained, the magistrate or court may order the juvenile confined in a jail or similar facility designed and used to incarcerate adult prisoners upon a showing that

(a) the juvenile’s habits or conduct are considered a menace to other juveniles; or

(b) the juvenile may not otherwise be safely detained in a juvenile facility.

*See MCL 712A.16(2), which authorizes counties to establish detention facilities.

*See Sections 3.2 (“immediacy rule”) and 3.6, above (special adjourments in “automatic waiver” cases).

*See Section 3.3(A), above, for useful definitions of “sight” and “sound” separation of juveniles from adults.
“(3) Family Division Operated Facility. The juvenile shall not be placed in an institution operated by the family division of circuit court except with the consent of the family division or on order of a [circuit court, other than the family division].

“(4) Separate Custody of Juvenile. The juvenile in custody or detention must be maintained separately from the adult prisoners or adult accused as required by MCL 764.27a.”

MCL 764.27a(3) allows a juvenile or individual less than 17 years of age who is under the jurisdiction of the circuit court for committing a felony to be confined in a county jail pending trial. Prior approval of the county sheriff is required, and the juvenile must be held physically separate from adults. In addition, the court, upon motion of a juvenile or individual under 17 years of age who is subject to confinement, may, upon good cause shown, order the juvenile or individual to be confined as otherwise provided by law. MCL 764.27a(4).

3.11 Places of Detention for Juveniles Charged Under the “Traditional Waiver” Statute

Neither MCL 712A.4 nor MCR 3.950 provides distinct rules for detention of juveniles prior to waiver; thus, the rules applicable to felony delinquency cases apply.* See MCR 3.901(B)(2) (MCR 3.931–3.950 apply only to delinquency proceedings; both the pretrial detention rule, MCR 3.935, and the “traditional” waiver rule are included in these provisions). However, following the grant of a waiver motion in a “traditional” waiver case, the juvenile is transferred to the adult criminal justice system and is subject to the same procedures used for adult criminal defendants. Juveniles waived under the “traditional” waiver statute need not be kept separate and apart from adult prisoners. MCR 3.950(E)(2).

*See Section 3.7, above, for discussion of these rules.
### 3.12 Table Summarizing Places of Detention for Juveniles

<table>
<thead>
<tr>
<th>Type of Proceeding</th>
<th>Places Where Juvenile May Be Detained</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Status Offense Cases</strong></td>
<td>An alleged status offender may be detained in a secure juvenile detention facility only if the court finds that the juvenile has willfully violated a court order and, after a hearing on the record, the court finds that there is no less restrictive alternative appropriate to the juvenile’s needs. An alleged status offender must not be detained in a secure facility designed to incarcerate adults unless the juvenile is under the court’s jurisdiction for a felony, or the juvenile is over 17 years old and under the court’s jurisdiction for an alleged violation of a PPO.</td>
<td>MCL 712A.15(3) and (5) See Section 3.8</td>
</tr>
<tr>
<td><strong>Misdemeanor &amp; Felony Delinquency Cases</strong></td>
<td>A juvenile may be detained in a secure juvenile detention facility, but only if the court determines that such a facility is the least restrictive environment that will meet the needs of the juvenile and the public. A juvenile may be detained in a jail or adult detention facility if the juvenile is 15 years old or older and his or her habits or conduct are considered a menace to other children, or he or she might not otherwise be safely detained. The juvenile must be placed in a room or ward separate from adults, and for a period not to exceed 30 days, unless longer detention is necessary for service of process. The juvenile must be separated by sight and sound from adult prisoners.</td>
<td>MCR 3.935(D)(4), MCL 712A.15, and MCL 712A.16. See Section 3.7 MCL 712A.16(1) and MCL 764.27a(2) See Section 3.7</td>
</tr>
<tr>
<td>Type of Proceeding</td>
<td>Places Where Juvenile May Be Detained</td>
<td>Authority</td>
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<tr>
<td>Designated Case</td>
<td>Prior to a preliminary examination, see the rules for felony and misdemeanor delinquency cases, above.</td>
<td>MCL 712A.2(g), MCL 764.27a(3), and MCR 3.953(G).</td>
</tr>
<tr>
<td></td>
<td>After a preliminary examination, a juvenile may be detained in the county jail if the court finds that there is probable cause that a felony was committed and that the juvenile committed it. Prior approval of the sheriff is required. MCL 764.27a(3) requires the juvenile to be held physically separate from adults. MCR 3.953(G) provides that juveniles placed in jail must be separated by sight and sound from adult prisoners.</td>
<td>See Section 3.9</td>
</tr>
<tr>
<td>“Automatic Waiver” Cases</td>
<td>Prior to arraignment, a juvenile may be detained in a county or regional juvenile facility, or in a Family Division-operated facility with the consent of the Family Division or pursuant to an order of the Criminal Division. If no juvenile facility is available or if the juvenile may not otherwise be safely detained, the court may order a juvenile detained in an adult facility. The juvenile must then be kept physically separate from adults. Following arraignment, the juvenile must be detained in a juvenile facility, unless the juvenile was placed in an adult facility before arraignment pursuant to the rules above, or unless upon motion of the prosecutor or superintendent of a juvenile facility housing the juvenile, the court finds that the juvenile’s habits or conduct are considered a menace to other children, or the juvenile might not otherwise be safely detained. The juvenile must then be kept physically separate from adults.</td>
<td>MCR 6.907(B)(1)–(3) and MCL 712A.2(f)</td>
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<td>See Section 3.10</td>
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<td></td>
<td></td>
<td>MCR 6.909(B)(1)–(4) and MCL 764.27a(3)</td>
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<td></td>
<td></td>
<td>See Section 3.10</td>
</tr>
<tr>
<td>“Traditional Waiver” Cases</td>
<td>Prior to waiver, see the rules for felony delinquency cases, above. Following waiver, the juvenile may be detained in the same manner as an adult criminal defendant and is not required to be kept separate from adult prisoners.</td>
<td>MCR 3.950(E)(2).</td>
</tr>
<tr>
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<td></td>
<td>See Section 3.11</td>
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</tbody>
</table>
**3.13 Requirements of the Crime Victim’s Rights Act**

MCL 780.782 requires the law enforcement agency investigating a juvenile offense* to provide a victim with an opportunity to request notice of the juvenile’s arrest, subsequent release, or both. If the victim requests such notice, the law enforcement agency must promptly provide it. In addition, the victim must be provided with notice of the availability of pretrial release for the juvenile and the telephone number of the appropriate detention facility so that the victim may call to find out if the juvenile has been released.

If a juvenile is placed in a juvenile facility following the preliminary hearing in a juvenile delinquency case, the prosecuting attorney or court must provide the victim with the telephone number of the juvenile facility in which the juvenile is detained. The victim of a juvenile offense may contact the juvenile facility to determine whether the juvenile has been released. Moreover, if the victim has requested, the law enforcement agency must notify the victim of the juvenile’s arrest, pretrial release, or both. The relevant provision states:

“If the juvenile has been placed in a juvenile facility, not later than 48 hours after the preliminary hearing of that juvenile for a juvenile offense, the prosecuting attorney or, pursuant to an agreement under [MCL 780.798a], the court shall give to the victim the telephone number of the juvenile facility and notice that the victim may contact the juvenile facility to determine whether the juvenile has been released from custody. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the juvenile, or both, if the victim requests or has requested that information. If the juvenile is released from custody by the sheriff or juvenile facility, the sheriff or juvenile facility shall notify the law enforcement agency having responsibility for investigating the crime.” MCL 780.785(1).

**Note:** In juvenile delinquency cases, MCL 780.798a authorizes the prosecuting attorney to enter a written agreement that the court will perform many of the prosecutor’s notification duties if the court performed those functions before May 1, 1994. Currently, the court in five Michigan counties (Ionia, Marquette, Oceana, Saginaw, and Monroe) performs these duties.
This chapter discusses two informal procedures that a law enforcement agency or the Family Division may use when a juvenile is apprehended for an offense or a complaint or petition is presented to the court but custody is not requested. The procedures discussed in this chapter do not involve removal of a juvenile from parental custody. The informal procedures discussed in this chapter are diversion and the consent calendar. A law enforcement officer or the Family Division may divert a juvenile from formal court procedures and refer him or her to a public or private agency. In addition, with the consent of the juvenile and his or her parent, guardian, or legal custodian, the Family Division may place a case on its consent calendar. Use of these informal procedures is subject to restrictions imposed by the Crime Victim’s Rights Act and the Juvenile Diversion Act, and those restrictions are discussed in this chapter.

Another informal procedure involves adjourning the case and, if no new petitions are filed against the juvenile, dismissing the case. The requirements for adjourning a case are discussed in Section 7.11. The Family Division may also take a plea under advisement in a juvenile delinquency case. This procedure is discussed in Section 8.7.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver”
proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).

4.1 Family Division Options When a Complaint or Petition Is Filed

Under the Juvenile Code and related court rules, the Family Division of Circuit Court has several procedural options when a petition (including a citation or appearance ticket for non-felony offenses) or complaint is filed in a delinquency proceeding. Subject to procedural requirements imposed under the Crime Victim’s Rights Act,* MCR 3.932(A)(1)–(5) (preliminary inquiries) and MCR 3.935(B)(3) (preliminary hearings) allow a court to choose one of the following procedural avenues that will best serve the interests of the juvenile and the public:

- deny authorization of the petition or dismiss the petition;
- before authorizing the petition, refer the matter to a public or private agency pursuant to the Juvenile Diversion Act;*
- direct that the parent, guardian, or legal custodian and juvenile appear so that the matter can be handled through further informal inquiry;
- without authorizing the filing of the petition, proceed on the consent calendar;* or
- after authorizing the filing of the petition, proceed on the formal calendar.*

4.2 Preliminary Inquiries

MCR 3.903(A)(22) defines “preliminary inquiry” as an informal review by the court to determine appropriate action on a petition. Preliminary inquiries may be based on complaints signed and submitted by parents of a juvenile, school officials, or police officers, rather than on petitions signed and filed by the prosecuting attorney. A wide variety of practices exist among courts as to the use of preliminary inquiries. Courts may not accept complaints from citizens or may utilize preliminary inquiries exclusively for less serious criminal offenses where no formal court jurisdiction will be requested or for cases in which the juvenile does not contest the charges.
MCL 712A.11(1) provides the court with authority to conduct a preliminary inquiry when a person gives information to the court that a juvenile is a “status offender” or “wayward minor.”* That provision states as follows:

“Except as provided in subsection (2), if a person gives information to the court that a juvenile is within [MCL 712A.2(a)(2)–(6) (status offenses) or (d) (“wayward minor” provision)], a preliminary inquiry may be made to determine whether the interests of the public or the juvenile require that further action be taken. If the court determines that formal jurisdiction should be acquired, the court shall authorize a petition to be filed.”

MCL 712A.11(2) provides that only a prosecuting attorney may file a petition with the court when a violation of a criminal law or ordinance is alleged.

Authority for the Family Division to conduct a preliminary inquiry when a status offense, violation of the “wayward minor” provision, or criminal violation is alleged is contained in MCR 3.932(A). This court rule provides that when a petition is not accompanied by a request for detention of the juvenile, the court may conduct a preliminary inquiry. At a preliminary inquiry, the court examines the best interest of the juvenile and public to determine whether further action is required, or whether the case may be treated informally or formally. Id.

The court may assign a referee to conduct a preliminary inquiry. MCR 3.913(A)(1). MCR 3.913(A)(2) and MCL 712A.10 do not require referees who conduct preliminary inquiries to be licensed attorneys.

Because a preliminary inquiry is not a hearing or proceeding on the formal calendar, no record of a preliminary inquiry is required to be made. MCR 3.925(B). There is no requirement that the judge or referee take testimony or examine evidence. The judge or referee is merely required to examine the petition and make his or her determination in accordance with MCR 3.932(A).

However, a preliminary inquiry must be conducted on the record if an offense enumerated in MCL 780.786b(1) of the Crime Victim’s Rights Act is alleged. MCR 3.932(A).

4.3 Requirements of the Crime Victim’s Rights Act

Crime victims’ rights to be treated with fairness and respect for their dignity, and to confer with the prosecuting attorney, are preserved by the Michigan Constitution. Const 1963, art 1, § 24, states in relevant part:
“(1) Crime victims, as defined by law, shall have the following rights, as provided by law:

“The right to be treated with fairness and respect for their dignity . . . throughout the criminal justice process.

. . . .

“The right to confer with the prosecution.”

A. Definition of “Victim”

The definition of “victim” in the Crime Victim’s Rights Act (CVRA) includes persons who suffered direct or threatened harm from the offense, relatives of deceased victims, and persons who may exercise the rights of incapacitated victims. MCL 780.781(1)(i) defines “victim” to include the following individuals or entities:

• A person* who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an enumerated offense.

• If the victim is deceased, one of the following (other than the juvenile offender) in descending order of priority:

  — the spouse of the deceased victim (if any),

  — a child of the deceased victim if the child is 18 years old or older (if any),

  — a parent of the deceased victim (if any),

  — the guardian or custodian of a child of the deceased victim if the child is less than 18 years of age (if any),

  — a sibling of the deceased victim (if any),

  — a grandparent of the deceased victim (if any).

• A parent, guardian, or custodian of a victim who is less than 18 years old if the parent, guardian, or custodian so chooses and is neither the defendant nor incarcerated.

• A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if the parent, guardian, or custodian is neither the defendant nor incarcerated.

Under MCL 780.781(2), if the primary victim “is physically or emotionally unable to exercise the privileges and rights under [the CVRA],” the victim
may designate one of the following persons “to act in his or her place while the physical or emotional disability continues”:

- the victim’s spouse;
- a child of the victim who is 18 years of age or older;
- the victim’s parent, sibling, or grandparent; or
- any other person who is at least 18 years old and who is neither the defendant nor incarcerated.*

The primary victim must tell the prosecuting attorney who is to act in the primary victim’s place, and notices required under the CVRA must still be sent only to the primary victim. *Id.*

**What constitutes “direct or threatened” harm depends upon the facts of the case.** The general definition of “victim” contained in the CVRA includes persons who suffer “direct or threatened physical, financial, or emotional harm” as a result of an offense. No Michigan case has determined how direct the harm or threat must be for the person to qualify as a victim under this definition. See, however, *People v Day*, 169 Mich App 516, 517 (1988) (victims are not limited to “those from whom the defendant takes property”; therefore, each person in a bank during a robbery constitutes a victim), and MCL 780.794(4)(d) (a court must order restitution for the cost of psychological services incurred by a victim).

**Individuals charged with offenses arising out of the same transaction as the charge against the juvenile arose do not qualify as “victims.”** The definition of “victim” excludes individuals charged with offenses arising out of the same transaction as the charge against the juvenile. MCL 780.781(3).

**B. The Court Must “Accept” Certain Petitions**

A provision of the CVRA requires the court to “accept” a petition if it alleges that the juvenile has committed a criminal offense that falls under Article 2 of the CVRA. MCL 780.786(1) states as follows:

“The court shall accept a petition submitted by a prosecuting attorney that seeks to invoke the court’s jurisdiction for a juvenile offense, unless the court finds on the record that the petitioner’s allegations are insufficient to support a claim of jurisdiction under section 2(a)(1) of [the Juvenile Code].”

Section 2(a)(1) of the Juvenile Code, MCL 712A.2(a)(1), gives the court jurisdiction over juveniles charged with offenses that are criminal offenses when committed by adults. Thus, if a petition is well-pleaded and contains sufficient allegations that if proven at a trial would bring a juvenile within
the court’s jurisdiction over criminal offenses, and if that offense is a “juvenile offense” under the CVRA, MCL 780.786(1) requires the court to “accept” the petition. “Accept” does not mean “authorize the petition for filing.” See MCR 3.903(A)(20) (a petition is “authorized for filing” when the court gives written permission to file the petition).

Although the court must “accept” a well-pleaded petition alleging a juvenile offense, the court retains discretion to utilize informal or formal procedures in a juvenile delinquency case. Although juvenile delinquency proceedings are not criminal proceedings, MCL 712A.1(2), the Court of Appeals has stated that “the procedures for invoking juvenile court jurisdiction in cases where a child is alleged to have committed a criminal act are closely analogous to the adversary criminal process.” In the Matter of Sylvester Wilson, 113 Mich App 113, 121 (1982). Under MCL 712A.11(2), only the prosecuting attorney may file a petition alleging that a juvenile has committed a criminal offense. Nonetheless, that statutory provision also assigns to the court the authority to determine whether to authorize a petition and utilize formal procedures to handle a juvenile delinquency case. See also Oklahoma v Juvenile Division, Tulsa County District Court, 560 P2d 974, 975–76 (Okla Crim App, 1977) (the intake function is neither wholly judicial nor wholly prosecutorial in nature, and the Legislature could properly assign the function to the judiciary which is better trained to balance the interests of society and the child).

C. Offenses to Which the CVRA Applies

For purposes of ordering restitution, “offense” means any criminal offense. MCL 780.794(1)(a). For purposes other than ordering restitution, the CVRA applies to an “offense” committed by a juvenile. An “offense” is one of the following:

• an offense punishable by imprisonment for more than one year, or an offense expressly designated by law as a felony, or
• a “serious misdemeanor.” MCL 780.781(1)(f).

Serious misdemeanors are:

• assault and battery, MCL 750.81;
• aggravated assault, MCL 750.81a;
• illegal entry, MCL 750.115;
• fourth-degree child abuse, MCL 750.136b;
• enticing a child for an immoral purpose, MCL 750.145a;
• discharge of a firearm intentionally aimed at a person, MCL 750.234;
• discharge of a firearm intentionally aimed at a person resulting in injury, MCL 750.235;
• indecent exposure, MCL 750.335a;
• stalking, MCL 750.411h;
• leaving the scene of a personal-injury accident, MCL 257.617a, if the offense results in damage to another individual’s property or physical injury or death to another individual;
• operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual’s property or physical injury or death to another individual;
• selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;
• operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or (3), if the violation involves an accident resulting in damage to another individual’s property or physical injury or death to any individual;
• a violation of a local ordinance substantially corresponding to a violation listed above; and
• a charged felony or serious misdemeanor that is subsequently reduced or pled to a misdemeanor.

D. Required Procedures Before Removing a Case From the Adjudicative Process

If a felony or “serious misdemeanor” is alleged, MCR 3.932(B) requires the court to follow procedures set forth in the CVRA before removing a case from the adjudicative process. This rule states as follows:

“(B) Offenses Listed in the Crime Victim’s Rights Act. A case involving the alleged commission of an offense listed in the Crime Victim’s Rights Act, MCL 780.781(1)(f), may only be removed from the adjudicative process upon compliance with the procedures set forth in that act. See MCL 780.786b.”

The CVRA requires the court to notify the prosecuting attorney and, in some cases, conduct a hearing before utilizing informal procedures that remove the case from the adjudicative process. MCL 780.786b(1) states as follows:
“Except for a dismissal based upon a judicial finding on the record that the petition and the facts supporting it are insufficient to support a claim of jurisdiction under section 2(a)(1) of [the Juvenile Code], a case involving the alleged commission of [a juvenile offense] . . . shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court’s intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process. Before any formal or informal action is taken, the prosecutor shall give the victim notice of the time and place of the hearing on the proposed removal of the case from the adjudicative process. The victim has the right to attend the hearing and to address the court at the hearing. As part of any other order removing any case from the adjudicative process, the court shall order the juvenile or the juvenile’s parents to provide full restitution as provided in [MCL 780.794].”

If a well-pleaded petition alleges that the juvenile committed a criminal offense that brings the case under the juvenile article of the CVRA, the court must give written notice to the prosecuting attorney and allow him or her to address the court on the issue before removing the case from the adjudicative process. The prosecuting attorney, in turn, must notify the victim of the time and place of a hearing on the issue. Neither formal nor informal procedures may be used until the prosecutor notifies the victim. The victim has the right to attend a hearing and address the court on the issue.* If the requirements of MCL 780.794 are met, the court must order restitution in conjunction with the use of any informal procedure. Note that restitution must be ordered for any offense that would be a criminal offense if committed by an adult. MCL 780.794(1)(a). Thus, if the alleged offense is not a felony or serious misdemeanor, the court must order restitution in conjunction with an informal procedure even though the court is not otherwise required to comply with MCL 780.786b(1). Restitution is discussed in detail in Chapter 10.

These procedures are required when the court intends to utilize juvenile diversion, the consent calendar, or “any other prepetition or preadjudication procedure that removes the case from the adjudicative process . . . .” MCL 780.786b(1). The court may “take a plea of admission or no contest under advisement” pursuant to MCR 3.941(D) and later dismiss the case if the juvenile complies with the court’s directives. See, for example, In the Matter of Raphael Hastie, unpublished opinion of the Court of Appeals, decided March 28, 2000 (Docket No. 213880) (a plea taken under advisement in a first-degree criminal sexual conduct case was later properly
accepted by the court where the juvenile did not successfully complete therapy) and In re JS & SM, 231 Mich App 92, 95 (1998), overruled on other grounds 462 Mich 341, 353 (2000).

E. The Victim’s Right to Consult With the Prosecuting Attorney Prior to a Plea Agreement or Informal Disposition

The CVRA gives victims of juvenile offenses certain rights to consult with the prosecuting attorney prior to reducing the original charge. MCL 780.786(4) states:

“If the juvenile has not already entered a plea of admission or no contest to the original charge at the preliminary hearing, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim’s views about the disposition of the offense, including the victim’s views about dismissal, waiver, and pretrial diversion programs, before finalizing any agreement to reduce the original charge.”

As indicated in this statute, if the juvenile does not enter a plea to the offense charged at the preliminary hearing, the prosecuting attorney must offer the victim an opportunity to consult with him or her “before finalizing any agreement to reduce the original charge.”

MCL 780.786b(2) provides a similar right of consultation prior to disposition of the case through an informal procedure. That section states:

“Before finalizing any informal disposition, preadjudication, or expedited procedure, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about that manner of disposing of the case.”

4.4 Requirements of the Juvenile Diversion Act

Under MCL 712A.2(e), the Family Division has the authority to establish or assist in developing a program or programs within the county to prevent delinquency and provide services to act upon reports submitted to the court relative to juveniles who do not require formal court jurisdiction but otherwise fall within the jurisdictional requirements of MCL 712A.2(a). Such services can be used only if they are voluntarily accepted by the juvenile and his or her parents, guardian, or custodian. The requirements of the Juvenile Diversion Act must be complied with if the court utilizes such services. MCL 712A.11(7).
The purpose of the Juvenile Diversion Act is to permit certain minors to be diverted from the court system having jurisdiction over minors, to establish procedures for diversion from formal court procedures, and to require that certain records be kept in connection with diversion. The recordkeeping requirements help ensure that diversion procedures are not abused by the juveniles taking part in them. House Legislative Analysis, HB 4597, December 10, 1987. A juvenile who does not comply with the terms of a diversion agreement may be subject to court jurisdiction. MCL 722.825(5).

For purposes of the act, a minor is an individual less than 17 years of age. MCL 722.822(e).

“Diversion” is defined as the placement that occurs when a formally recorded apprehension is made by a law enforcement agency for an act by a minor which, if a petition were filed with the court, would bring the minor within the formal jurisdiction of the court under MCL 712A.2(a). MCL 722.822(c). Instead of a petition being filed or authorized, however, either of the following occurs:

“(i) the minor is released into the custody of his or her parent, guardian, or custodian and the investigation is discontinued, or

“(ii) the minor and the minor’s parent, guardian, or custodian agree to work with a person or public or private organization or agency that will assist the minor and the minor’s family in resolving the problem that initiated the investigation.” MCL 722.822(c)(i)–(ii) and MCL 722.823(1)(a)–(b).

The Juvenile Diversion Act may be used by law enforcement officials and court intake workers prior to the filing of a petition or before the court authorizes a petition. MCL 722.823(1), MCR 3.932(A)(2), and MCR 3.935(B)(3). However, once a petition is authorized, the act may no longer be used; the case must be placed on the formal calendar.

A. Offenses Precluding the Use of Diversion

Juveniles accused of or charged with any of the following “assaultive offenses” shall not be diverted:

- felonious assault, violation in weapon-free school zone, MCL 750.82;
- assault with intent to murder, MCL 750.83;
- assault with intent to do great bodily harm less than murder, MCL 750.84;
- assault with intent to maim, MCL 750.86;
• assault with intent to commit a felony, MCL 750.87;
• assault with intent to rob while unarmed, MCL 750.88;
• assault with intent to rob while armed, MCL 750.89;
• first-degree murder, MCL 750.316;
• second-degree murder, MCL 750.317;
• manslaughter, MCL 750.321;
• kidnapping, MCL 750.349;
• prisoner taking another prisoner as hostage, MCL 750.349a;
• kidnapping, child under 14, MCL 750.350;
• mayhem, MCL 750.397;
• first-degree criminal sexual conduct, MCL 750.520b;
• second-degree criminal sexual conduct, MCL 750.520c;
• third-degree criminal sexual conduct, MCL 750.520d;
• fourth-degree criminal sexual conduct, MCL 750.520e;
• assault with intent to commit criminal sexual conduct, MCL 750.520g;
• armed robbery, MCL 750.529;
• carjacking, MCL 750.529a; and
• unarmed robbery, MCL 750.530.

MCL 722.823(3) and MCL 722.822(a).

B. Factors to Determine Whether to Divert a Juvenile

Before a minor is diverted, all of the following factors must be evaluated:

“(a) The nature of the alleged offense.

“(b) The minor’s age.

“(c) The nature of the problem that led to the alleged offense.

“(d) The minor’s character and conduct.

“(e) The minor’s behavior in school, family, and group settings.

“(f) Any prior diversion decisions made concerning the minor and the nature of the minor’s compliance with the diversion agreement.” MCL 722.824(a)–(f).
C. Diversion Conference

If the decision is made to divert the minor with a referral to a person or private or public organization or agency, a conference must first be held with the minor and the minor’s parent, guardian, or custodian to consider alternatives to the filing of a petition with the court or to the authorization of a petition. MCL 722.825(1). The law enforcement official or court intake worker—depending upon who is holding the conference—must notify the minor and the minor’s parent, guardian, or custodian of the time and place of the proposed conference and:

“(a) That participation in the conference or resulting referral plan is voluntary.

“(b) That an attorney may accompany the minor and the minor’s parent, guardian, or custodian at the conference.

“(c) The alternative referral programs available and the criteria utilized to determine whether to file a petition with the court or to dispose of the petition with a referral.

“(d) That if diversion is agreed to and the minor complies with the terms of the diversion agreement and the referral plan, a petition cannot be filed with the court, or if a petition has been filed, the petition cannot be authorized.” MCL 722.825(1)(a)–(d).

This conference may not be held until after the questioning, if any, of the minor has been completed or after an investigation has been made concerning the alleged offense. Mention of, or promises concerning, diversion shall not be made by a law enforcement official or court intake worker in the presence of the minor or the minor’s parent, guardian, or custodian during any questioning of the minor. Information divulged by the minor during the conference or after the diversion is agreed to, but before a petition is filed with or authorized by the court, cannot be used against the minor. MCL 722.825(2).

D. Diversion Agreement

If a diversion agreement is reached that imposes conditions on the minor, the terms of the agreement must be set forth in writing, dated, and signed by the law enforcement official or court intake worker, the minor, and the minor’s parent, guardian, or custodian. MCL 722.825(3).

If a conference is held but an agreement is not reached, a petition may be filed with the court as provided by law and a petition may be authorized as provided by law. If the law enforcement official or court intake worker
decides to file a petition, it must be filed no later than 30 days after the conference. MCL 722.825(4).

E. Revocation of Diversion Agreement

If the minor complies with the terms of the diversion agreement and the referral plan, a petition cannot be filed with the court, or if a petition has been filed, the petition cannot be authorized by the court. MCL 722.825(1)(d).

However, “[i]f the minor fails to comply with the terms of the diversion agreement and the referral plan, the law enforcement official or court intake worker may revoke the diversion agreement. If the diversion agreement is revoked, a petition may be filed with the court as provided by law and a petition may be authorized by the court as provided by law.” MCL 722.825(5).

F. Required Information

Whenever a law enforcement official or court intake worker diverts a minor, the following information must be filed with the Family Division in the county in which the minor resides or is found:*

“(a) The minor’s name, address, and date of birth.

“(b) The act or offense for which the minor was apprehended.

“(c) The date and place of the act or offense for which the minor was apprehended.

“(d) The diversion decision made, whether referred or released.

“(e) The nature of the minor’s compliance with the diversion agreement.” MCL 722.826(1)(a)–(e).

If a diversion agreement is revoked, the law enforcement official or court intake worker must file with the court in which the information described above is filed the fact of and reasons for the revocation. MCL 722.826(2).

4.5 Consent Calendar

The term “consent calendar” is not defined in MCR 3.903, the court rule which contains the definitions applicable to juvenile proceedings. It is a procedural mechanism provided by court rule that allows for informal treatment of appropriate cases. If the court, juvenile, and the juvenile’s
parent, guardian, or legal custodian agree to place the case on the court’s consent calendar, the juvenile waives certain rights, including:

- formal notice of charges;
- the right to an appointment of an attorney at public expense;
- the right to jury trial;
- the right to a trial before a judge;
- the presumption of innocence;
- the presentation of proof beyond a reasonable doubt;
- the right to testify on the juvenile’s own behalf;
- the privilege against self-incrimination (and the right to remain silent);
- the right to present witnesses;
- the right to confront and cross-examine the juvenile’s accusers; and
- the right to use the subpoena power of the court to compel attendance of witnesses.

See MCR 3.932(C)(1), 3.935(B)(4)(a)–(c), and 3.942(C), for a list of rights of a juvenile when his or her case is placed on the formal calendar.

MCR 3.932(C) provides the rules governing the consent calendar. That rule states:

“(C) Consent Calendar. If the court receives a petition, citation, or appearance ticket and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian agrees to have the case placed on the consent calendar. The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.

(1) Notice. Formal notice is not required for cases placed on the consent calendar except as required by article 2 of the Crime Victim’s Rights Act, MCL 780.781 et seq.*
(2) **Plea; Adjudication.** No formal plea may be entered in a consent calendar case, and the court must not enter an adjudication.

(3) **Conference.** The court shall conduct a consent calendar conference with the juvenile and parent, guardian, or legal custodian to discuss the allegations. The victim may, but need not, be present.

(4) **Case Plan.** If it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court may issue a written consent calendar case plan.

(5) **Custody.** A consent calendar case plan must not contain a provision removing the juvenile from the custody of the parent, guardian, or legal custodian.

(6) **Disposition.** No order of disposition may be entered by the court in a case placed on the consent calendar.

(7) **Closure.** Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar.*

(8) **Transfer to Formal Calendar.** If it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition, citation, or appearance ticket. Statements made by the juvenile during the proceeding on the consent calendar may not be used against the juvenile at a trial on the formal calendar on the same charge.”

If the case is transferred to the formal calendar, however, the court must inform the juvenile of his or her right to an attorney, to trial by judge or jury, and that any statement made by the juvenile may be used against him or her. See *In re Chapel*, 134 Mich App 308, 312–13 (1984) (full panoply of rights under court rules vests when case is placed on formal calendar). Statements made by the juvenile during consent calendar proceedings may not be used
at a trial on the formal calendar that is based on the same charge. MCR 3.932(C)(8).

### 4.6 Formal Calendar

MCR 3.903(A)(10) defines formal calendar as “judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding . . . .”

The court may authorize a petition to be filed and docketed on the formal calendar if it appears that formal court action is in the best interest of the juvenile and the public. MCR 3.932(D). The court shall not authorize a delinquency petition, however, unless the prosecuting attorney has approved submitting the petition to the court. MCR 3.932(D) and MCL 712A.11(2). The juvenile must be advised of his right to counsel when the court is proceeding on the formal calendar. MCL 712A.17c(2) and MCR 3.915(A)(1).*

“At any time before disposition, the court may transfer the matter to the consent calendar.” MCR 3.932(D).

*See Section 5.7 for a more detailed discussion of a juvenile’s right to counsel.*
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Appendix: Bond Matrix
In this chapter.

This chapter deals with required procedures for delinquency and status offense cases in which the juvenile is in custody or custody has been requested. A petition must be filed and a preliminary hearing held if a juvenile is in custody or custody is requested. In contrast to the procedures described in Chapter 4, the procedures described in this chapter are required if the case will be treated formally—if a plea will be taken or a trial held. This chapter also discusses appointment of counsel, participation of a prosecuting attorney in delinquency proceedings, and selected requirements of the Crime Victim’s Rights Act. The appendix contains a “bond matrix” that may be used to determine an appropriate amount of bail for a juvenile.*

A juvenile’s right to appointed counsel in designated case and “automatic waiver” proceedings is discussed in Sections 17.3 and 20.4, respectively. Funding placement costs is discussed in Chapter 11.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

5.1 Petitions to Commence Proceedings in the Family Division

A petition* is “a complaint or other written allegation, verified in the manner provided in MCR 2.114(A), . . . that a juvenile has committed an offense.” MCR 3.903(A)(19). The requirements for verification of pleadings are contained in MCR 2.114(B). A petition may be verified by an oath or affirmation of a party or other person having knowledge of the facts stated, or by a signed and dated declaration. MCR 2.114(B)(2).

“Any request for court action against a juvenile must be by written petition.” MCR 3.931(A). MCR 3.931(C) qualifies this by providing that a citation or appearance ticket may be used to initiate proceedings involving certain charges. MCR 3.931(C) states as follows:

“(1) A citation or appearance ticket may be used to initiate a delinquency proceeding if the charges against the juvenile are limited to:
(a) violations of the Michigan Vehicle Code, or of a provision of an ordinance substantially corresponding to any provision of that law, as provided by MCL 712A.2b.

(b) offenses that, if committed by an adult, would be appropriate for use of an appearance ticket under MCL 764.9c.”

“(2) The citation or appearance ticket shall be treated by the court as if it were a petition, except that it may not serve as a basis for pretrial detention.”

Under MCL 712A.11(2) and MCR 3.914(B)(1), only the prosecuting attorney may file a petition requesting the court to take jurisdiction of a juvenile for having committed an offense that if committed by an adult would be a criminal offense. In contrast, any person may provide information to the court indicating that a juvenile has committed a status offense. MCL 712A.11(1).

Before the court may acquire formal jurisdiction of a case, the court must authorize a petition to be filed. MCL 712A.11(1) and (2). A “petition authorized to be filed” refers to written permission given by the court to file a petition containing allegations against the juvenile with the clerk of the court. MCR 3.903(A)(20). An authorized petition is deemed filed when it is delivered to, and accepted by, the clerk of the court. MCR 3.903(A)(9).

“If the juvenile obtains his or her seventeenth birthday after the filing of the petition, the court’s jurisdiction shall continue beyond the juvenile’s 17th birthday and the court may hear and dispose of the petition under [the Juvenile Code].” MCL 712A.11(4).

Traffic citations. MCL 712A.2b(a) states that “[n]o petition shall be required, but the court may act upon the written notice to appear given the accused juvenile as required by [MCL 257.728].” Citation means “a complaint or notice upon which a police officer shall record an occurrence involving 1 or more vehicle law violations by the person cited.” MCL 257.727c(1). The Michigan Uniform Traffic Citation, issued by the Michigan State Police, has four parts:

- The original, or court copy, which is filed with the court.
- The police copy, which the citing officer retains.
- The misdemeanor copy, which is given to the offender if the charged offense is a misdemeanor.
- The civil infraction copy, which is given to the offender if the charged offense is a civil infraction. MCL 257.727c(1)(a)–(d).
Section 5.2

MCR 3.933(A)(1) provides that the date and time for the juvenile’s appearance will be set by the court. This will occur after the court receives the original copy of the citation.

5.2 Required Contents of Petitions

A petition must be verified, must set forth plainly the facts that bring the juvenile within the Juvenile Code, and may be upon information and belief. MCL 712A.11(3).* The petition must contain the following information, if known, or if not known to the petitioner, be stated as unknown. MCL 712A.11(4) and MCR 3.931(B). MCR 3.931(B)(1)–(8) require a petition to contain the following information:

“(1) the juvenile’s name, address, and date of birth, if known;

“(2) the names and addresses, if known, of

(a) the juvenile’s mother and father;

(b) the guardian, legal custodian* or person having custody of the juvenile, if other than a mother or father;

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

(d) any court with prior continuing jurisdiction;*

“(3) sufficient allegations that, if true, would constitute an offense by the juvenile;

“(4) a citation to the section of the Juvenile Code relied upon for jurisdiction;

“(5) a citation to the federal, state, or local law or ordinance allegedly violated by the juvenile;

“(6) the court action requested;

“(7) if applicable, the notice required by MCL 257.732(7), and the juvenile’s Michigan driver’s license number;* and

“(8) information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending.”*

*See also MCR 5.113, which governs the general form of pleadings and papers filed in delinquency cases. MCR 3.901(A)(1).

*See Section 6.2 for the definitions of parent, “guardian” and “legal custodian.”

*See Section 2.19 for the required procedures when a juvenile is subject to the prior continuing jurisdiction of another court.

*See Section 5.3, below.

*See Section 5.4, below.
The petition has two principal functions: to allow a court to determine if a statutory basis for jurisdiction exists, and to provide the juvenile notice of the charges against him or her. *In re Hatcher*, 443 Mich 426, 434, n 7 (1993). “Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must ‘set forth the alleged misconduct with particularity.’” *In re Gault*, 387 US 1, 33 (1967) (citation omitted).

In *In re Weiss*, 224 Mich App 37, 41–42 (1997), the petition alleged that the juvenile misbehaved at school and violated criminal statutes and requested jurisdiction under the “incorrigibility” provision of the Juvenile Code, MCL 712A.2(a)(3). The Court of Appeals held that the petition provided the juvenile with sufficient notice of the charge to allow him to prepare a defense. Because disobedience to parental commands encompasses school misbehavior and illegal acts, the juvenile was on notice that such conduct might be considered at trial.

In *In re Lovell*, 226 Mich App 84 (1997), the prosecutor filed a petition charging a 16-year-old girl with assaulting her mother under MCL 750.81(2). The probate court refused to issue the petition, holding that the statute did not apply to assaults by children against parents. The prosecutor appealed to the circuit court, which also affirmed. The Court of Appeals reversed the lower courts’ decision, holding that:

> “When a statute is clear and unambiguous, judicial interpretation is precluded. . . . Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. . . . [The statute] applies to offenders who resided in a household with the victim at or before the time of the assault . . . regardless of the victim’s relationship with the offender.” *Lovell*, *supra* at 87.

In so holding, the Court expressed no opinion as to whether its holding would permit application of the statute to assaultive behavior between college roommates who were not romantically involved. The dissenting judge on the *Lovell* panel would have required residence in the household plus a romantic involvement to trigger coverage under MCL 750.81(2).

In *In re Hawley*, 238 Mich App 509 (2000), the 15-year-old male respondent was charged with first-degree criminal sexual conduct under MCL 750.520b(1)(a) (sexual penetration of a person under 13 years old). The respondent allegedly engaged in consensual intercourse with a 12-year-old female, but the female was not charged with third-degree criminal sexual conduct under MCL 750.520d(1)(a) (sexual penetration with a person between 13 and 15 years old). The Court of Appeals set forth the test to determine whether a prosecution violates equal protection guarantees:
“First, it must be shown that the defendants were ‘singled’ out for prosecution while others similarly situated were not prosecuted for the same conduct. Second, it must be established that this discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right.” Hawley, supra at 513. (Citation omitted.)

The Court held that respondent’s prosecution did not violate equal protection guarantees because it was not impermissibly based on gender. Respondent and the minor female were not similarly situated regarding their ages: although nobody under age 16 may consent to sexual intercourse, their situations are nevertheless distinguishable because persons under 13 years of age cannot consent to mere sexual contact. Id. at 513–14. The Court also found that respondent failed to support his assertion that the prosecuting attorney’s decision to prosecute only him was based on gender. Id. at 514.

Successive charging of “minor in possession of alcohol” and possession of marijuana does not violate double jeopardy prohibitions because the laws at issue are intended to prevent substantially different societal harms. In re Stark, 250 Mich App 78, 80 (2002).

### 5.3 Required Notice When a Juvenile Is Charged With a Felony in Which a Motor Vehicle Was Used

MCR 3.931(B)(7) requires a petition to contain the notice provision contained in MCL 257.732(7), if applicable. MCL 257.732(7) states that when “a juvenile is accused of an act, the nature of which constitutes a felony in which a motor vehicle was used, other than [certain felonies listed below], the prosecuting attorney or family division of circuit court shall include the following statement on the petition filed in the court:

> “You are accused of an act the nature of which constitutes a felony in which a motor vehicle was used. If the accusation is found to be true and the judge or referee finds that the nature of the act constitutes a felony in which a motor vehicle was used, as defined in [MCL 257.319], your driver’s license shall be suspended by the secretary of state.”

> “Felony in which a motor vehicle was used” is defined as a felony during which the juvenile operated a motor vehicle, and while operating the vehicle presented real or potential harm to persons or property, and one or more of the following circumstances existed:

> “(i) The vehicle was used as an instrument of the felony.”
“(ii) The vehicle was used to transport a victim of the felony.

“(iii) The vehicle was used to flee the scene of the felony.

“(iv) The vehicle was necessary for the commission of the felony.” MCL 257.319(e)(i)–(iv).

Under MCL 257.732(7), the following felonies or attempts to commit these felonies are excluded from the definition of “felony in which a motor vehicle was used”:

- taking possession of and driving away a motor vehicle, MCL 750.413;
- use of a motor vehicle without authority but without intent to steal, MCL 750.414;
- failure to obey a police or conservation officer’s direction to stop, MCL 750.479a(2) or (3) and MCL 257.602a(2) or (3);
- felonious driving, MCL 752.191;
- negligent homicide with a motor vehicle, MCL 750.324;
- manslaughter with a motor vehicle, MCL 750.321;
- murder with a motor vehicle, MCL 750.316 (first-degree murder) and MCL 750.317 (second-degree murder);
- minor in possession, MCL 436.1703;
- fraudulently altering or forging documents pertaining to motor vehicles, MCL 257.257;
- perjury or false certification to Secretary of State, MCL 257.903;
- malicious destruction of trees, grass, shrubs, etc., with a motor vehicle, MCL 750.382(1)(c) or (d);
- failing to stop and disclose identity at the scene of an accident resulting in death or serious injury, MCL 257.617;
- certain “drunk driving” offenses; and
- a controlled substance violation under MCL 333.7401–333.7461, or 333.17766a, for which the defendant receives a minimum sentence of less than one year.

See MCL 257.732(4) and MCL 257.319 for the statutory sections that list these offenses. These offenses are excluded from the notice requirement of MCL 257.732(7) because the penalties for all of these listed offenses already require mandatory license suspension upon conviction.
5.4 Required Information About Other Court Matters Involving Members of the Same Family

A petition must identify whether a Family Division matter involving members of the same family is or was pending and contain the information required by MCR 3.206(A)(4). MCR 3.931(B)(8).

MCR 3.206(A)(4)(a)–(b) requires the petition to contain one of the two following statements:

“(a) There is no other pending or resolved action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition.

“(b) An action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition has been previously filed in [this court]/[ ____ Court], where it was given docket number ____ and was assigned to Judge ____. The action [remains]/[is no longer] pending.”

Whenever practicable, two or more matters within the Family Division’s jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023(1).

If a juvenile is subject to a prior or continuing order of any other court of this state, notice must be filed in such other court of any order subsequently entered under the Juvenile Code. MCL 712A.3a. MCR 3.927 provides that the manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205.*

5.5 Amending a Petition

A petition may be amended at any stage of the proceedings as the ends of justice require. MCL 712A.11(6).

Requirements for amending a petition to designate a case for criminal trial. “[A] referee licensed to practice law in Michigan may preside at a hearing . . . to amend a petition to designate a case and to make recommended findings and conclusions.” MCR 3.913(A)(2)(c).*
MCR 3.951(A)(3)(a)–(b) set forth the following time requirements for amending a petition to designate a case for criminal trial when a “specified juvenile violation” is alleged. These rules state as follows:

“If a petition submitted by the prosecuting attorney alleging a specified juvenile violation did not include a designation of the case for trial as an adult:

(a) The prosecuting attorney may, by right, amend the petition to designate the case during the preliminary hearing.

(b) The prosecuting attorney may request leave of the court to amend the petition to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to designate the case as the interests of justice require.”

MCR 3.951(B)(3)(a)–(b) set forth time requirements for amending a petition to designate a case for criminal trial when an offense other than a “specified juvenile violation” is alleged. These rules state as follows:

“If a petition submitted by the prosecuting attorney alleging an offense other than a specified juvenile violation did not include a request that the court designate the case for trial as an adult:

(a) The prosecuting attorney may, by right, amend the petition to request the court to designate the case during the preliminary hearing.

(b) The prosecuting attorney may request leave of the court to amend the petition to request the court to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to request the court to designate the case as the interests of justice require.”
5.6 Preliminary Hearings

“A preliminary hearing is the formal review of the petition when the judge or referee considers authorizing the petition and placing the case on the formal calendar.” In re Hatcher, 443 Mich 426, 434 (1993).*

The court must hold a preliminary hearing if a juvenile is in custody or the petition requests detention. MCL 712A.14(2) and MCR 3.932(A). If a juvenile is apprehended and not released, a preliminary hearing must commence within 24 hours, and this hearing may be held at the place where the juvenile is being temporarily detained or “lodged.”* If a juvenile is not in custody but custody is requested, a preliminary hearing may be conducted at any time. The preliminary hearing is considered the functional equivalent of the initial arraignment in adult criminal proceedings. In re Wilson, 113 Mich App 113, 121–22 (1982).

The court may assign a referee to conduct a preliminary hearing and to make recommended findings and conclusions. MCR 3.913(A)(1). MCR 3.913(A)(2)(a) and MCL 712A.10 do not require that referees who conduct preliminary hearings be licensed attorneys.

5.7 A Juvenile’s Right to Counsel

A. Constitutional and Statutory Rights to Counsel

In In re Gault, 387 US 1, 41 (1967), the United States Supreme Court established a juvenile’s right to counsel in delinquency proceedings:

“We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”

See also People v Daoust, 228 Mich App 1, 18–19 (1998), citing Scott v Illinois, 440 US 367, 373–74 (1979) (“we conclude that a juvenile is not deprived of his constitutional right to counsel in cases where the juvenile adjudication does not ultimately result in a deprivation of the juvenile’s physical liberty by way of incarceration”).

The constitutional right to counsel in delinquency proceedings extends to proceedings that occur after adjudication if the juvenile may face commitment to an institution. Walls v Director of Institutional Services, Maxey Boy’s Training School, 84 Mich App 355, 359 (1978). A juvenile...
also has a constitutional right to counsel during judicial or “traditional waiver” proceedings. *Kent v United States*, 383 US 541 (1966) and *People v McGilmer*, 95 Mich App 577, 580 (1980).

In addition to constitutional requirements, MCL 712A.17c(2)(a)–(e) state that the court must appoint an attorney for a juvenile if one or more of the following circumstances is present:

“(a) The child’s parent refuses or fails to appear and participate in the proceedings.

“(b) The child’s parent is the complainant or victim.

“(c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.

“(d) Those responsible for the child’s support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.

“(e) The court determines that the best interests of the child or the public require appointment.”

MCR 3.915(A)(2)(a)–(e) contain substantially similar criteria for the appointment of counsel.

**B. When Counsel Must Be Appointed**

If a juvenile charged with an offense that would be a criminal offense if committed by an adult or a status offense is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). MCR 3.915(A)(1) states that this advice is required “at each stage of the proceedings on the formal calendar, including trial, plea of admission, and disposition.” (Emphasis added.) The apparent discrepancy between the statute and court rule is explained by reference to the court rule governing preliminary hearings. MCR 3.935(B)(4) states that “if the hearing is to continue,” i.e., if a judge or referee at the preliminary hearing is considering placing the case on the formal calendar, then the juvenile must be advised of the right to an attorney.*

Appointment of counsel before a preliminary hearing may be required because:

- a juvenile may waive the probable cause phase of a detention determination at a preliminary hearing only if the juvenile is represented by an attorney. MCR 3.935(D)(2);
• a “preliminary hearing may be conducted without a parent present provided a guardian ad litem or attorney appears with the juvenile.” MCR 3.935(B)(1).

Appointment of counsel before a preliminary hearing also avoids adjourning the preliminary hearing to appoint an attorney and allows the attorney to facilitate an informal disposition of the case.

The appearance of defense counsel is governed by MCR 2.117(B). MCR 3.915(C). An attorney appointed by the court must serve until discharged by the court. MCL 712A.17c(9) and MCR 3.915(D). “An attorney retained by a party may withdraw only on order of the court.” MCR 3.915(D).

C. Requirements for a Valid Waiver of Counsel

MCL 712A.17c(3) and MCR 3.915(A)(3) set forth the required procedures for a juvenile to waive his or her right to counsel. MCL 712A.17c(3) states as follows:

“Except as otherwise provided in this subsection, in a proceeding under [MCL 712A.2(a) or (d) (criminal violations, status offenses, and violation of the “wayward minor” provisions]) the child may waive his or her right to an attorney. The waiver by a child shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child’s parent or guardian ad litem objects or if the appointment is made under [MCL 712A.17c(2)(e)].”

MCR 3.915(A)(3) states:

“Waiver of Attorney. The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on [MCR 3.915(A)(2)(e)]. The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made.”

See also In re Bennett, 135 Mich App 559, 565 (1984) (as a best practice, the court should require the juvenile and parent, guardian, or custodian to sign a waiver of counsel form).*
D. Reimbursement of Attorney Costs

MCL 712A.17c(8) allows a court to enter an order assessing attorney costs.* That provision states as follows:

“If an attorney . . . is appointed for a party under this act, after a determination of ability to pay the court may enter an order assessing attorney costs against the party or the person responsible for that party’s support, or against the money allocated from marriage license fees for family counseling services under . . . MCL 551.103. An order assessing attorney costs may be enforced through contempt proceedings.”

See also MCR 3.915(E), which is substantially similar to MCL 712A.17c(8), and MCL 712A.18(5) (reimbursement as part of order of disposition).

E. Appointment of a Guardian Ad Litem

The court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it. MCR 3.916(A). See also MCL 712A.17c(10) (a court may appoint a guardian ad litem to assist it in determining a child’s best interests). For rules governing the appearance and rights of guardians ad litem, and the responsibility for the costs of guardian ad litems, see MCR 3.916(B)–(D).

The relative importance of the guardian ad litem has declined as a result of the requirement that most juveniles must be represented by attorneys. Traditionally, a guardian ad litem’s responsibility is to protect the best interests of the juvenile. Because in most instances the juvenile’s attorney will fulfill this traditional function, a guardian ad litem should be appointed only if it appears to the court that the juvenile’s attorney may not be able to protect the juvenile’s best interests (for example, if the juvenile has severe mental health problems). A guardian ad litem may also be appointed whenever a juvenile appears without a parent. Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), §5.993, p 807.

5.8 Appearance of a Prosecuting Attorney

MCL 712A.11(2) and MCR 3.914(B)(1) provide that only the prosecuting attorney may file a petition requesting the court to take jurisdiction of a juvenile allegedly within MCL 712A.2(a)(1) (criminal offenses). MCR 3.914(A) and 3.914(B)(2), and MCL 712A.17(4) provide that when a criminal offense is alleged, the prosecuting attorney must appear for the people if the proceeding requires a hearing and the taking of testimony. If the court requests, the prosecutor shall review petitions alleging non-
criminal offenses for legal sufficiency and appear for the people at a hearing. MCR 3.914(A).

The prosecuting attorney may be a county prosecuting attorney, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or, if an ordinance violation is alleged, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based. MCR 3.903(B)(4).

5.9 **Time Requirements for Preliminary Hearings**

MCR 3.935(A)(1) states that a “preliminary hearing must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays, as defined by MCR 8.110(D)(2), or the juvenile must be released.”* If a juvenile is not in custody but custody is requested, a preliminary hearing may be conducted at any time.

MCR 3.935(A)(2)(a)–(b) allows the court to adjourn the hearing for up to 14 days:

“(a) to secure the attendance of the juvenile’s parent, guardian, or legal custodian or of a witness, or

“(b) for other good cause shown.”

The Family Division may grant special adjournments when a juvenile is 14 years old or older and is alleged to have committed a “specified juvenile violation.” See MCR 3.935(A)(3), which is discussed in detail in Section 3.6.

5.10 **Notice Requirements for Preliminary Hearings**

Notice of a preliminary hearing must be given to the juvenile and his or her parent as soon as the hearing is scheduled, and the notice may be in person, in writing, on the record, or by telephone. MCR 3.920(C)(2)(a).*

The court must also direct that a guardian ad litem (if appointed) and a retained or appointed attorney for a juvenile be notified of each hearing, MCR 3.921(A)(1)(d) and (e). “The petitioner must be notified of the first hearing on the petition.” MCR 3.921(A)(2). The prosecuting attorney must also be notified of a preliminary hearing. MCR 3.921(A)(1)(f).
5.11 Procedures at Preliminary Hearings

MCR 3.935(B)(1)–(7) outline the procedures to be followed at a preliminary hearing.

**Presence of parent.** “The court shall determine whether the parent has been notified and is present. The preliminary hearing may be conducted without a parent present provided a guardian ad litem or attorney appears with the juvenile.” MCR 3.935(B)(1).

**Reading the allegations in the petition.** “The court shall read the allegations in the petition.” MCR 3.935(B)(2). Although the rule does not authorize waiver of the reading of the allegations as often occurs in criminal proceedings, the reading is usually waived by counsel for the juvenile.

**Deciding to continue with the hearing.** Before taking testimony, the court must determine whether the petition should be dismissed, whether the matter should be diverted from formal court processes, whether the matter should be heard on the consent calendar, or whether the court should continue with the preliminary hearing. MCR 3.935(B)(3).*

If the court determines that it will remove the case from the adjudicative process (i.e., dismiss the petition, divert the case, or place the case on the consent calendar), the court must comply with the requirements of the Crime Victim’s Rights Act.*

If the preliminary hearing is to continue, the court must advise the juvenile, in plain language and on the record, of:

“(a) the right to an attorney pursuant to MCR 3.915(A)(1);*

“(b) the right to trial by judge or jury on the allegations in the petition and that a referee may be assigned to hear the case unless demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912;* and

“(c) the privilege against self-incrimination, and that any statement by the juvenile may be used against the juvenile.” MCR 3.935(B)(4)(a)–(c).

**Opportunity to deny or plead to the allegations.** “The juvenile must be allowed an opportunity to deny or otherwise plead to the allegations.” MCR 3.935(B)(6).*

**Authorizing the filing of the petition.** Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition. MCR 3.935(B)(7). The standard to determine whether a petition should be authorized for filing is contained in MCR 3.932(D), which states in part:
“The court may authorize a petition to be filed and docketed on the formal calendar if it appears to the court that formal court action is in the best interest of the juvenile and the public.”

When a judge or referee gives written permission to file a petition containing allegations against the juvenile, the petition is “authorized to be filed.” MCR 3.903(A)(20).

If it authorizes the filing of the petition, the court must “determine if the juvenile should be released, with or without conditions, or detained, as provided in [MCR 3.935(C)–(F)].” MCR 3.935(B)(7)(b).

Determining whether the juvenile has been fingerprinted. MCR 3.935(B)(7)(a) and 3.936(B) provide that at the time the court authorizes the filing of a petition alleging a juvenile offense, the court must examine the confidential files and verify that the juvenile has been fingerprinted.

If the juvenile has not been fingerprinted, the judge or referee must order the juvenile to submit to the appropriate agency for fingerprinting. MCR 3.936(B)(1).

Detention pending resumption of preliminary hearing. MCR 3.935(B)(8) states that “[a] juvenile may be detained pending the completion of the preliminary hearing if the conditions for detention under [MCR 3.935(D)] are established.”

5.12 Detaining a Juvenile Pending Further Order or Trial

MCR 3.935(C)(1) lists factors that the court must consider to determine whether a juvenile is to be released, with or without conditions, or detained. Those factors are:

“(i) the juvenile’s family ties and relationships,

“(ii) the juvenile’s prior delinquency record,

“(iii) the juvenile’s record of appearance or nonappearance at court proceedings,

“(iv) the violent nature of the alleged offense,

“(v) the juvenile’s prior history of committing acts that resulted in bodily injury to others,

“(vi) the juvenile’s character and mental condition,
“(vii) the court’s ability to supervise the juvenile if placed with a parent or relative, and

“(viii) any other factor indicating the juvenile’s ties to the community, the risk of nonappearance, and the danger to the juvenile or the public if the juvenile is released.”

MCR 3.935(C)(1)(a)–(h).

The court need not make findings concerning these factors. MCR 3.935(C)(2).

MCR 3.935(D)(1) contains the requirements for detaining a juvenile.

“(1) **Conditions for Detention.** A juvenile may be ordered detained or continued in detention if the court finds probable cause to believe the juvenile committed the offense, and that one or more of the following circumstances are present:

(a) the offense alleged is so serious that release would endanger the public safety;

(b) the juvenile charged with an offense that would be a felony if committed by an adult will likely commit another offense pending trial, if released, and

(i) another petition is pending against the juvenile,

(ii) the juvenile is on probation, or

(iii) the juvenile has a prior adjudication, but is not under the court’s jurisdiction at the time of apprehension;

(c) there is a substantial likelihood that if the juvenile is released to the parent, guardian, or legal custodian, with or without conditions, the juvenile will fail to appear at the next court proceeding;

(d) the home conditions of the juvenile make detention necessary;

(e) the juvenile has run away from home;*

(f) the juvenile has failed to remain in a detention facility or nonsecure facility or placement in violation of a court order; or

*But see Section 3.8, for limitations on detention of status offenders.*
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(g) pretrial detention is otherwise specifically authorized by law.”

Pretrial detention is specifically authorized by MCL 712A.15(2). Several of this statute’s provisions have been incorporated into MCR 3.935(D), but the following provisions have not and therefore also allow for detention pending a hearing:

“(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.

“(f) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation.”

In *Schall v Martin*, 467 US 253 (1984), the United States Supreme Court upheld the constitutionality of a state’s “preventive detention” statute, which allowed for pretrial detention if there was a serious risk of the juvenile committing another crime before the next court hearing. The Court concluded that the statutory scheme served the legitimate state objectives of protecting the community from crime and protecting a juvenile’s welfare, and that the procedural protections satisfied due process requirements. *Id.* at 256–57, 264–66. The procedures required under the statutory scheme were notice, a hearing, a statement of facts and reasons for the detention, and a formal probable-cause hearing held within a short period of the detention determination. *Id.* at 277.

A. Evidence and Witnesses Needed to Establish Probable Cause

“The juvenile may contest the sufficiency of evidence by cross-examination of witnesses, presentation of defense witnesses, or by other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses.” MCR 3.935(D)(3).

“The Michigan Rules of Evidence do not apply, other than those with respect to privileges.” *Id.*

B. Waiver of Probable Cause Phase of Detention Determination

“A juvenile may waive the probable cause determination required by [MCR 3.935(D)(1)] only if the juvenile is represented by an attorney.” MCR 3.935(D)(2).

C. Required Findings

MCR 3.935(C)(2) requires the court to state the reasons for its decision to grant or deny release on the record or in a written memorandum.
D. Use of Probable Cause Finding in “Automatic Waiver” Proceeding

MCL 766.14(2) and MCR 6.911(B) require the magistrate to transfer the case “back” to the Family Division if, at the conclusion of the preliminary examination, the magistrate finds that a “specified juvenile violation” did not occur or that there is not probable cause to believe that the juvenile committed a “specified juvenile violation,” but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense.

MCR 3.939(A) states that the Family Division must hear and dispose of a case transferred pursuant to MCL 766.14 in the same manner as if the case had commenced in the Family Division. A petition that has been approved by the prosecuting attorney must be submitted to the court. Pursuant to MCR 3.939(B), the Family Division “may use the probable cause finding of the magistrate made at the preliminary examination to satisfy the probable cause requirement of MCR 3.935(D)(1).”

E. Use of Probable Cause Finding in “Traditional Waiver” Proceeding

The court need not conduct the first phase of a “traditional waiver” hearing if the court has found the requisite probable cause during the pretrial detention determination at a preliminary hearing under MCR 3.935(D)(1), provided that at the earlier hearing only legally admissible evidence was used to establish probable cause that the offense was committed and probable cause that the juvenile committed the offense. MCR 3.950(D)(1)(c)(i).

5.13 Conditional Release of a Juvenile Pending Resumption of a Preliminary Hearing, Further Order, or Trial

MCR 3.935(E)(1) states as follows:

“(1) The court may release a juvenile to a parent pending resumption of the preliminary hearing, pending trial, or until further order without conditions, or, if the court determines that release with conditions is necessary to reasonably ensure the appearance of the juvenile as required or to reasonably ensure the safety of the public, the court may, in its discretion, order that the release of the juvenile be on the condition or combination of conditions that the court determines to be appropriate, including, but not limited to:
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(a) that the juvenile will not commit any offense while released,

(b) that the juvenile will not use alcohol or any controlled substance or tobacco product,

(c) that the juvenile will participate in a substance abuse assessment, testing, or treatment program,

(d) that the juvenile will participate in a treatment program for a physical or mental condition,

(e) that the juvenile will comply with restrictions on personal associations or place or residence,

(f) that the juvenile will comply with a specified curfew,

(g) that the juvenile will maintain appropriate behavior and attendance at an educational program, and

(h) that the juvenile’s driver’s license or passport will be surrendered.” MCR 3.935(E)(1)(a)–(h).

A. Violations of Conditions of Release

If a juvenile allegedly violates a condition of release, the court may order the juvenile to be apprehended and detained immediately. MCR 3.935(E)(2). After providing the juvenile with an opportunity to be heard regarding the alleged violation, the court may modify the juvenile’s conditions of release or revoke the juvenile’s release. Id.

B. Bail

Right to post bail. MCR 3.935(F) states that “[i]n addition to any other conditions of release, the court may require a parent, guardian, or legal custodian to post bail.” MCL 712A.17(3) provides that a parent, guardian, or custodian has a right to give bond or other security for a juvenile’s appearance at trial.

Cash or surety bond. MCR 3.935(F)(1) gives a parent, guardian, or legal custodian the option of posting a surety bond or cash bail. That rule states as follows:

“The court may require a parent, guardian, or legal custodian to post a surety bond or cash in the full amount of the bail, at the option the parent, guardian, or legal custodian. A surety bond must be written by a person or company licensed to write surety bonds and who is
approved by the court. Except as otherwise provided by this rule, MCR 3.604 applies to bonds posted under this rule.”

Unless the court requires a surety bond or cash in the full amount of bail as provided in MCR 3.935(F)(1), the court must advise the parent, guardian, or legal custodian of the option to satisfy the monetary requirement of bail by:

“(a) posting either cash or a surety bond in the full amount of bail set by the court or a surety bond written by a person or company licensed to write surety bonds in Michigan, or

“(b) depositing with the register, clerk, or cashier of the court currency equal to 10 percent of the bail, but at least $10.” MCR 3.935(F)(2)(a)–(b).

Revocation or modification of bail. “The court may modify or revoke the bail for good cause after providing the parties notice and an opportunity to be heard.” MCR 3.935(F)(3).

Return or forfeiture of money bail. MCR 3.935(F)(4)–(5) deal with the return or forfeiture of money bail. Those rules state as follows:

“(4) Return of Bail. If the conditions of bail are met, the court shall discharge any surety.

(a) If disposition imposes reimbursement or costs, the bail money posted by the parent must first be applied to the amount of reimbursement and costs, and the balance, if any, returned.

(b) If the juvenile is discharged from all obligations in the case, the court shall return the cash posted, or return 90 percent and retain 10 percent if the amount posted represented 10 percent of the bail.

“(5) Forfeiture. If the conditions of bail are not met, the court may issue a writ for the apprehension of the juvenile and enter an order declaring the bail money, if any, forfeited.

(a) The court must immediately mail notice of the forfeiture order to the parent at the last known address and to any surety.

(b) If the juvenile does not appear and surrender to the court within 28 days from the forfeiture date, or does not within the period satisfy the
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court that the juvenile is not at fault, the court may enter judgment against the parent and surety, if any, for the entire amount of the bail and, when allowed, costs of the court proceedings.”

5.14 Permitted Placements Following Preliminary Hearing

MCR 3.935(D)(4) provides that a detained juvenile must be placed in the least restrictive environment that will meet the needs of the juvenile and the public, and that will conform to the statutory requirements of MCL 712A.15 and MCL 712A.16.*

Counties may establish their own homes or facilities. MCL 712A.16(2) allows a county or counties contracting together to “provide for the diagnosis, treatment, care, training, and detention of juveniles in a child care home or facility conducted as an agency of the county if the home or facility meets the licensing standards [in MCL 722.111–722.128].”

MCL 712A.16(2)(a)–(c) also state that a court or court-approved agency may “arrange for the boarding of juveniles” in the following homes or facilities:

“(a) If a juvenile is within the court’s jurisdiction under [MCL 712A.2(a), criminal and status offenses], a suitable foster care home subject to the court’s supervision. . . .

“(b) A child caring institution or child placing agency licensed by the department of consumer and industry services to receive for care juveniles within the court’s jurisdiction.*

“(c) If in a room or ward separate and apart from adult criminals, the county jail for juveniles over 17 years of age within the court’s jurisdiction.”

MCL 712A.14(3) adds that if a complaint is authorized following a preliminary hearing, a juvenile may be placed in any of the following “pending investigation and hearing”:

“(a) In the home of the child’s parent, guardian, or custodian.

“(b) If a child is within the court’s jurisdiction under [MCL 712A.2(a), criminal and status offenses], in a suitable foster care home subject to the court’s supervision. . . .

*See Sections 3.7–3.8 for further discussion of the requirements of MCL 712A.15 and MCL 712A.16.

*For a statewide list of licensed institutions and agencies, go to www.cis.state.mi.us/brs.
“(c) In a child care institution or child placing agency licensed by the state department of social services to receive for care children within the jurisdiction of the court.

“(d) In a suitable place of detention.” MCL 712A.14(3)(a)–(d).

5.15 Required Procedures for Placement of Indian Children in Status Offense and “Wayward Minor” Cases

“A removal hearing must be completed within 28 days of removal from the parent or Indian custodian.” MCR 3.980(C). MCR 3.980(C)(1) contains the evidentiary requirements that must be met before an Indian child is removed from his or her home. That rule states:

“(a) An Indian child must not be removed from a parent or Indian custodian without clear and convincing evidence that services designed to prevent the break up of the Indian family have been furnished to the family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.

“(b) Evidence at the removal hearing must include the testimony or expert witnesses who have knowledge about the child-rearing practices of the Indian child’s tribe.”

Evidentiary requirements. Except for cases of emergency removal, an Indian child shall not be removed from the home unless there is clear and convincing evidence, including testimony by qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. MCR 3.980(C)(1) and 25 USC 1912(e).

In addition, the petitioner must 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. 25 USC 1912(d). See In re Kreft, 148 Mich App 682, 693–95 (1986) (requirements met by provision of parenting assistance, infant nutrition information, and housing assistance).

For purposes of the Indian Child Welfare Act (ICWA), “expert witness” means:
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- a member of the tribe recognized by the tribal community as knowledgeable in tribal customs related to family organizations and child-rearing practices;
- a lay expert with substantial experience with delivery of services to Indian families and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the tribe; or
- a professional with substantial education and experience in his or her field.

*In re Elliott,* 218 Mich App 196, 206–08 (1996), citing *In re Kreft,* 148 Mich App 682, 689–93 (1986). If cultural bias is not implicated in the case, the expert witness need not have special knowledge of Indian culture, but the witness must have more specialized knowledge than the normal social worker. *Elliott, supra* at 207.

**Preferred placements.** Unless the child’s tribe has established a different order of preference, the Indian child, if removed from his or her home, shall be placed, in descending order of preference, with:

“(a) a member of the child’s extended family,

“(b) a foster home licensed, approved, or specified by the child’s tribe,

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

“(d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child’s needs.” MCR 3.980(C)(2)(a)–(d)

25 USC 1915(b)(i)–(iv) contain substantially similar preferences. In addition, the court may order another placement for good cause shown. MCR 3.980(C).

“Extended family” is defined by law or custom of the child’s tribe or, if there is no applicable law or custom, as a person 18 years of age or older who is the child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 USC 1903(2).

If the child’s tribe has established a different order of preference by resolution, the court or agency making the placement must follow that order of preference if the resulting placement is the least restrictive setting appropriate to the needs of the child. 25 USC 1915(c).
The agency or court may consider the preference of the parent or custodian when appropriate, and the agency or court must give weight to the parent’s or custodian’s desire for anonymity when applying either the statutory or tribal preferences. 25 USC 1915(c).

The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family maintains social and cultural ties must be applied when meeting the preference requirements. 25 USC 1915(d).

5.16 Records of Proceedings at Preliminary Hearings

MCR 3.925(B) states that “[a] record of all hearings must be made.”

5.17 Requirements of the Crime Victim’s Rights Act

The Crime Victim’s Rights Act generally places responsibility on the investigating agency and prosecuting attorney for providing certain notices to the victim and for certain other duties. Some responsibilities, however, remain with courts, including:

- ensuring a victim has an opportunity to be heard before the court removes a case from the adjudicative process;*
- notifying a victim of the right to make a statement at disposition and identifying the writer of the disposition report;*
- ensuring a victim has an opportunity to make a victim impact statement;*
- notifying parents of their responsibility for victim restitution;*
- reporting a juvenile’s noncompliance with a restitution order to the prosecutor;*
- providing the victim with a certified copy of the order of adjudication;*
- notifying the victim of a juvenile’s escape from custody or detention for committing a subsequent offense; and*
- notifying the victim when the juvenile is dismissed from court jurisdiction.*

In addition, under MCL 780.798a, the court may perform notification functions delegated to the prosecuting attorney if:
• the prosecuting attorney allows the court to do so pursuant to a written agreement, and
• the court performed those functions before May 1, 1994.

A. Requirements for Charging Documents

For any offense falling under the juvenile article of the CVRA, the law enforcement agency must file with the charging document a separate list of the names, addresses, and telephone numbers of each victim. This separate list is not a matter of public record. MCL 780.784. See also MCR 3.903(A)(3)(a)(ii) (the definition of “confidential files” includes this separate statement of victims).

Pursuant to MCL 780.783a, if the complaint, petition, appearance ticket, traffic citation, or other charging instrument charges one of several listed offenses, or a violation of a local ordinance substantially corresponding to one of these offenses, the law enforcement officer or prosecutor must state on the charging instrument “that the offense resulted in damage to another individual’s property or physical injury or death to another individual.” This statement must be included in the charging document because the juvenile article of the CVRA only applies to these listed offenses when property damage, physical injury, or death results.

MCL 780.781(1)(f)(iii)–(v) contain the offenses to which this requirement applies when the case falls under the juvenile article of the CVRA. The juvenile offenses are:

• leaving the scene of a personal-injury accident, MCL 257.617a;
• operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 257.625;
• selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701;* and
• operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or (3).

B. Victim Notification Requirements

The prosecuting attorney or court must provide information on court procedures and legal rights to each victim “[w]ithin 72 hours after the prosecuting attorney . . . submits a petition” to the court. This information must be written in plain English. MCL 780.786(2). The prosecuting attorney must give each victim the following:
“(a) A brief statement of the procedural steps in processing a juvenile case, including the fact that a juvenile may be tried in the same manner as an adult in a designated case or waived to the court of general criminal jurisdiction.

“(b) A specific list of the rights and procedures under this article.

“(c) A convenient means for the victim to notify the prosecuting attorney that the victim chooses to exercise his or her rights under this article.

“(d) Details and eligibility requirements [for crime victim compensation].

“(e) Suggested procedures if the victim is subjected to threats or intimidation.

“(f) The person to contact for further information.” MCL 780.786(2)(a)–(f).

If the victim requests, the prosecuting attorney or court must give notice to the victim of any scheduled court proceedings and any changes in the schedule of court proceedings. MCL 780.786(3). This requirement encompasses all court proceedings, including pretrial conferences, pre- and post-trial motion hearings, adjournments and continuances, and all schedule changes.

C. Revocation of Release

The prosecuting attorney must notify the victim of suggested procedures to follow if threatened or intimidated by or at the direction of the juvenile. MCL 780.786(2)(e). The prosecutor must provide this notice within 72 hours after the prosecuting attorney files or submits a petition. MCL 780.786(2). Typically, victims are advised to immediately contact the police, prosecuting attorney, or “victim-witness assistant” if threatened or intimidated. Victims may also be advised to seek a personal protection order (PPO).

The CVRA allows for revocation of the alleged offender’s release based on threats or violence against the victim or the victim’s immediate family. MCL 780.785(2) states:

“Based upon any credible evidence of acts or threats of physical violence or intimidation by the juvenile or at the juvenile’s direction against the victim or the victim’s immediate family, the prosecuting attorney may move
that the bond or personal recognizance of a juvenile be revoked."

Victim and witness intimidation may be case-specific (intended to dissuade a victim or witness from testifying in a particular case) or community-wide. In the latter case, acts by youth gangs or drug-selling groups create a general atmosphere of fear within a neighborhood or community. Healy, *Victim and Witness Intimidation: New Developments and Emerging Responses* (Washington, DC: National Institute of Justice, 1995), p 1. Victims and witnesses may be deterred from testifying even though no overt threat is made. *Id.* at 3. Threats may be indirect, such as when gang or group members park outside the victim’s or witness’ house, issue vague verbal warnings, use threatening hand gestures, or “pack the courtroom” with gang or group members. *Id.* at 4. The provisions of the CVRA discussed above allow revocation of release based upon the victim’s reasonable apprehension of threat or intimidation, and the reasonableness of the victim’s apprehension may be interpreted in light of the prevailing atmosphere in a neighborhood or community.
Chapter 6: Notice and Time Requirements in Delinquency Proceedings

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In this chapter...

This chapter discusses the general requirements for issuing and serving summonses and notices of hearings in juvenile delinquency proceedings. The chapter also contains a table that outlines time and notice requirements for specified hearings in delinquency proceedings.

For time and notice requirements in other proceedings involving juveniles, see Section 15.24 (minor personal protection order proceedings), Section 17.23 (designated case proceedings), and Section 20.10 (“automatic waiver” proceedings).

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).
Section 6.1

6.1 General Rules in Delinquency Proceedings

A summons is required for trials, and it must be personally served on the juvenile and parent or parents, guardian, or legal custodian having physical custody of the juvenile. MCR 3.920(B)(2)(a). Substituted service is appropriate in limited circumstances where personal service is impracticable or cannot be achieved. MCR 3.920(B)(4)(b)–(c).

A notice of hearing may be used to notify parties of all other proceedings. MCR 3.920(A)(1). After a party’s first appearance before the court, subsequent notices of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party. MCR 3.920(F).

“Judgments and orders may be served on a person by first class mail to the person’s last known address.” MCR 3.925(C).

6.2 Definitions of Parent, Guardian, and Legal Custodian

“Parent” means a minor’s mother, father, or both. MCR 3.903(A)(17).

“‘Legal Custodian’ means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. MCR 3.903(A)(13).

“Guardian’ means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202.” MCR 3.903(A)(11).

Definition of “father.” For purposes of delinquency proceedings, a “father” is a man:

- Married to the mother at any time from a minor’s conception to the minor’s birth unless a court has determined after notice and a hearing that the child was conceived or born during a marriage but is not the issue of that marriage. MCR 3.903(A)(7)(a) and In re Montgomery, 185 Mich App 341, 343 (1990);
- Who legally adopts the minor. MCR 3.903(A)(7)(b);
• Who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor, MCR 3.920(A)(7)(c);

• Who is judicially determined to have parental rights. MCR 3.903(A)(7)(d); or

• Whose paternity is established by the completion and filing of an acknowledgement of parentage in accordance with the provisions of the Acknowledgement of Parentage Act, MCL 722.1001 et seq., or a previously applicable procedure. For an acknowledgement under the Acknowledgement of Parentage Act, the man and mother must each sign the acknowledgement of parentage before a notary public appointed in this state. The acknowledgement shall be filed at either the time of birth or another time during the child’s lifetime with the state registrar, MCR 3.903(A)(7)(e).

Establishing paternity. MCR 3.921(C) states that “[i]f, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in this subrule.” Form JC 04 (Petition) contains a check box to identify a person as a putative father. Under MCR 3.921(C), the court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court must direct that notice be served on that person “in any manner reasonably calculated to provide notice to the putative father, including publication if his whereabouts remain unknown after diligent inquiry. Any notice by publication must not include the name of the putative father. If the court finds that the identity of the natural father is unknown, the court shall direct that the unknown father be given notice by publication”. MCR 3.921(C)(1). See, generally, In re Mayfield, 198 Mich App 226 (1993).

The required notice* must include the following information:

“(a) if known, the name of the child, the name of the child’s mother, and the date and place of birth of the child;

“(b) that a petition has been filed with the court;

“(c) the time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor; and

“(d) a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in

*See SCAO Form JC 53, which includes this required notice.
Section 6.2

termination of any parental rights.” MCR 3.921(C)(1)(a)–(d).

After notice to the putative father, the court may conduct a hearing to determine whether appropriate notice has been given, and whether the putative father is the natural father of the child. MCR 3.921(C)(2).

The court may determine that a preponderance of the evidence establishes that the putative father is the natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR 3.903(A)(7). The court may extend the 14-day period for good cause shown. MCR 3.921(C)(2)(b).

If the court determines that there is probable cause to believe that another identifiable person is the natural father of the minor, the court must proceed in accordance with MCR 3.921(C). MCR 3.921(C)(2)(c).

If, after diligent inquiry, the identity of the natural father cannot be determined, the court may proceed without further notice and without appointing an attorney for the unidentified person. MCR 3.921(C)(2)(d).

MCR 3.921(C)(3) states that “[t]he court may find that the natural father waives all rights to further notice, including the right to notice of termination of parental rights, and the right to an attorney if:

“(a) he fails to appear after proper notice, or

(b) he appears, but fails to establish paternity within the time set by the court.”

In re CAW, ___ Mich App ___ (2002), lv gtd ___ Mich ___ (2002), involved a married couple, Deborah Weber and Robert Rivard, and their children. One of the children, CAW, was conceived and born during the marriage, but the identity of CAW’s natural father was unknown. Both Weber and Rivard testified that CAW may not be the biological child of Rivard and that a man outside of the marriage, the appellant, may be CAW’s father. After the parental rights of both Weber and Rivard were terminated, appellant filed a motion to intervene based upon his belief that he was CAW’s biological father. The trial court denied the motion indicating that appellant had no standing to intervene.

The Court of Appeals held that although appellant would not have standing to pursue paternity under the Paternity Act, MCL 722.714 et seq., he did have standing to seek to establish paternity during the pendency of a child protective proceeding, pursuant to MCR 5.903(A)(1). The Court stated:

“The definition of ‘child born out of wedlock’ in MCR 5.903(A)(1) is less restrictive than that under the Paternity Act or the probate code. Our courts have
established that under the Paternity Act, there must have been a prior determination that a child was not the issue of a marriage for a putative father to have standing to establish paternity. *Girard v Wagenmaker*, 437 Mich 231, 242-243 (1991). However, MCR 5.903(A)(1) uses the language, ‘a child determined by judicial notice or otherwise.’ Although the difference is subtle, we find it distinct. MCR 5.921 allows the court to determine the identity of a putative father during the pendency of a protective proceeding if the court at any time during the pendency of the proceedings determines that the child has no father as defined by the court rules. Reading MCR 5.921 in conjunction with MCR 5.903 under the authority of *Montgomery, supra*, we find that during child protective proceedings, the court can determine the child to be born out of wedlock and then take appropriate steps to determine the identity and rights of the biological father.”

The Court of Appeals reversed the trial court, concluding that appellant has standing to intervene in this case and should be given the opportunity to establish his paternity. *Id.* at ___. However, the Court cautioned “this should not be interpreted to mean that appellant is entitled to any rights over the child. We find only that appellant should be given the opportunity to establish his paternity. If appellant establishes that he is the child’s biological father, his fitness must then be tested.” *Id.* at ___.

### 6.3 Persons Entitled to Notice in Delinquency Proceedings

MCR 3.921(A)(1) contains a list of the persons who must be notified of each hearing in a delinquency proceeding. This provision states as follows:

“(1) General. In a delinquency proceeding, the court shall direct that the following persons be notified of each hearing except as provided in subrule (A)(3):

(a) the juvenile,

(b) the custodial parents, guardian, or legal custodian of the juvenile,

(c) the noncustodial parent who has requested notice at a hearing or in writing,

(d) the guardian ad litem or lawyer-guardian ad litem of a juvenile appointed pursuant to these rules,
(e) the attorney retained or appointed to represent the juvenile, and

(f) the prosecuting attorney.”

MCR 3.921(A)(2) requires the petitioner to be notified of the first hearing on the petition. However, if the petitioner is the prosecuting attorney, he or she must be notified of each hearing pursuant to MCR 3.921(A)(1)(f).

A parent without physical custody of the juvenile and whose parental rights have not been terminated must be notified of the first hearing on the formal calendar, unless that parent’s whereabouts are unknown. MCR 3.921(A)(3). MCR 3.903(A)(10) defines formal calendar as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding.

6.4 Special Notice Provisions for Noncustodial Parents

MCL 712A.12 allows a court to issue a summons requiring a person with custody of a juvenile to bring the juvenile before the court for a hearing. This statute also states that “[i]f the person so summoned shall be other than the parent or guardian of the child, then the parents or guardian, or both, shall also be notified of the petition and of the time and place appointed for the hearing thereon, by personal service before the hearing . . . .” A noncustodial parent must be personally served with notice of the hearing and a copy of the petition. See In re Miller, 182 Mich App 70, 73 (1990).

Under MCR 3.920(B)(2)(a), a noncustodial parent must be notified as provided in MCR 3.920(C), unless that parent’s whereabouts remain unknown after a diligent search. MCR 3.920(C) requires a notice of hearing to be given in writing or on the record at least seven days before the hearing. If a juvenile is detained, notice of a preliminary hearing must be given as soon as the hearing is scheduled, and the notice may be in person, in writing, on the record, or by telephone. MCR 3.920(C)(2)(a).

6.5 Issuance and Service of Summons

MCL 712A.12 states in relevant part as follows:

“After a petition shall have been filed and after such further investigation as the court may direct, . . . the court may dismiss said petition or may issue a summons reciting briefly the substance of the petition, and requiring the person or persons who have the custody or control of the child, or with whom the child may be, to appear personally and bring the child before the court at a time and place stated . . . . If the person so summoned
shall be other than the parent or guardian of the child, then the parents or guardian, or both, shall also be notified of the petition and of the time and place appointed for the hearing thereon, by personal service before the hearing, except as hereinafter provided. Summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.

"Any interested party who shall voluntarily appear in said proceedings, may, by writing, waive service of process or notice of hearing."*

The statutory requirements for issuance and service of summonses to parents with custody, or notice of the petition and the time and place of a hearing to a noncustodial parent, are jurisdictional, which means that if they are not fulfilled, an appellate court may declare all proceedings in a case void. *In re Brown, 149 Mich App 529, 534–42 (1986). See also *In re Andeson, 155 Mich App 615, 618–19 (1986) (proceedings were not void, where parent was properly served with summons prior to adjudicative hearing, the hearing was adjourned, and parent was later mailed a notice of hearing but failed to appear).

A summons may be issued and served on a party (petitioner and juvenile) before any proceeding in juvenile court. MCR 3.920(B)(1). The court shall direct the service of a summons in the following circumstances:

“(a) In a delinquency proceeding, a summons must be served on the parent or parents, guardian, or legal custodian having physical custody of the juvenile, directing such person to appear with the juvenile for trial. The juvenile must also be served with a summons to appear for trial. . . .”

A. Contents of Summons

MCR 3.920(B)(3)(a), (b), and (d) require* a summons to direct the person to whom it is addressed to appear with the minor at a time and place specified by the court and to:

• identify the nature of the hearing;
• explain the right to an attorney and to a trial by a judge or jury; and
• have a copy of the petition attached to it.

*See Section 6.8, below, for the requirements to waive service of process or notice of hearing.

*SCAO Form JC 20 may be used to meet these requirements.
B. Manner of Service of Summons

MCL 712A.13 states in relevant part:

“Service of summons may be made anywhere in the state personally by the delivery of true copies thereof to the persons summoned: Provided, That if the judge is satisfied that it is impracticable to serve personally such summons or the notice provided for in [MCL 712A.12], he may order service by registered mail addressed to their last known addresses, or by publication thereof, or both, as he may direct. It shall be sufficient to confer jurisdiction if (1) personal service is effected at least 72 hours before the date of hearing; (2) registered mail is mailed at least 5 days before the date of hearing if within the state or 14 days if outside of the state; (3) publication is made once in some newspaper printed and circulated in the county in which said court is located at least 1 week before the time fixed in the summons or notice for the hearing.

“Service of summons, notices or orders required by this chapter may be made by any peace officer or by any other suitable person designated by the judge. The judge may, in his discretion, authorize the payment of necessary traveling expenses incurred by any person summoned or otherwise required to appear at the time of hearing of any case coming within the provisions of this chapter, and such expenses and the expenses of making service as above provided, when approved by the judge, shall be paid by the county treasurer from the general fund of the county.

“If any person so summoned, as herein provided, shall fail without reasonable cause to appear before said court, he may be proceeded against for contempt of court and punished accordingly.”

In In re Mayfield, 198 Mich App 226, 230–31 (1993), the Court of Appeals noted that violations of statutory notice provisions constitute jurisdictional defects, while violation of court-rule requirements do not, as the jurisdiction of the “juvenile court” may be established by reference to statute and may not be expanded by court rule. The record in Mayfield, which involved a child protective proceeding, established that the trial court mailed notice of the adjudicative hearing and a copy of the petition, and notice of the dispositional hearing, to the putative father’s last-known address. Although these notices were returned marked “no such address,” the Court of Appeals held that the trial court satisfied requirements for substituted service under MCL 712A.13. The court had subject matter jurisdiction of the proceeding.
and jurisdiction over the respondent mother (who had been personally served with a summons prior to trial). Therefore, the trial court’s orders were not void. See also In re Adair, 191 Mich App 710, 713–15 (1991) (court failed to determine that reasonable efforts were made by petitioner to locate parent before using alternative method of service), and Krueger v Williams, 410 Mich 144 (1981) (motions for substituted service must show that personal service of process can not reasonably be made, that the substituted method of service is the best method available to provide notice, and should contain sufficient facts to allow the court to determine what specific efforts were made to serve process and why the substituted method should be used).

MCR 3.920(B)(4)(a)–(c) also discuss the manner of service:

“(a) Except as provided in subrule (B)(4)(b), a summons required under subrule (B)(2) shall be served by delivering the summons to the party personally.

“(b) If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.

“(c) If personal service of a summons is not required, the court may direct that it be served in a manner reasonably calculated to provide notice.”

SCAO Forms JC 12A and 12B may be used to establish proof of service or non-service. SCAO Forms 46 and 47 may be used to request and order substitute service.

C. Time Requirements for Service of Summons

MCR 3.920(B)(5)(a)–(c) provide that:

- a summons must be personally served no later than seven days before trial or three days before a hearing;
- if the summons is served by registered mail, it must be mailed at least 14 days before trial or 10 days before hearing when the party to be served resides in Michigan, and at least 21 days before the trial and 17 days before the hearing if the party resides outside of Michigan; and
- if service is by publication, the published notice, which does not require publication of the petition itself, shall appear in a
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newspaper in the county where the party resides if known, and if not, in the county where the action is pending, one or more times 14 days before trial or 7 days before a hearing.

MCL 712A.13 also contains certain time requirements for service of process, which differ from those contained in the court rule:

- personal service must be effected at least 72 hours before the date of a hearing;
- registered mail must be mailed at least five days before the date of hearing if the recipient is in-state and 14 days before the hearing if out-of-state; and
- publication must be made once in some newspaper printed and circulated in the county where the court is located at least one week before the time fixed in the summons or notice for the hearing.


D. Subsequent Notices After a Failure to Appear

When persons whose whereabouts are unknown fail to appear in response to notice by publication or otherwise, the court need not give further notice by publication of subsequent hearings in delinquency proceedings. MCR 3.921(D).

6.6 Requirements for Valid Orders Directed to a Parent or Other Person

An order directed to a parent or other person shall not be binding unless the parent or other person has been given an opportunity for a hearing pursuant to the issuance and service of a summons or notice as provided in sections 12 and 13 of the Juvenile Code. MCL 712A.18(4). This rule is significant for purposes of collecting reimbursement of the costs of out-of-home care, and for other orders affecting adults pursuant to MCL 712A.6 and MCL 712A.6b.*

6.7 Notices of Hearings

MCR 3.920(C)(1) requires notices of hearings to be given in writing or on the record at least 7 days prior to the hearing. However, when a juvenile is detained, notice of preliminary hearing must be given to the juvenile and to the parent of the juvenile as soon as the hearing is scheduled, and the notice
may be in person, in writing, on the record, or by telephone. MCR 3.920(C)(2)(a).

When a party fails to appear in response to a notice of hearing, the court may order the party’s appearance by summons or subpoena. MCR 3.920(C)(4).

6.8 Waiver of Notice of Hearing or Service of Process

If a party appears without having been properly served, that party may waive notice of hearing or service of process.* A waiver may also be obtained when service of process was untimely. MCR 3.920(E) provides that the waiver must be in writing and the party must be advised as set forth in MCR 3.920(B)(3) of:

- the nature of the hearing;
- the right to counsel, retained or appointed; and
- the right to trial by judge or jury.

MCR 3.920(G) allows for waiver of defects in service by the appearance of a party and the party’s participation in the proceedings. This rule states:

“(G) Notice Defects. The appearance and participation of a party at a hearing is a waiver by that party of defects in service with respect to that hearing unless objections regarding the specific defect are placed on the record. If a party appears or participates without an attorney, the court shall advise the party that the appearance and participation waives notice defects, and of the party’s right to seek an attorney.”

6.9 Subpoenas

MCR 3.920(D)(1)–(3) state that:

“(1) The attorney for a party or the court on its own motion may cause a subpoena to be served upon a person whose testimony or appearance is desired.

“(2) It is not necessary to tender advance fees to the person served a subpoena in order to compel attendance.

“(3) Except as otherwise stated in this subrule, service of a subpoena is to be as provided by MCR 2.506.”
6.10 Subsequent Notices After First Appearance in Family Division

After a party's first appearance before the court, subsequent notices of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party. Also, a summons must be served before trial. MCR 3.920(F).

6.11 Proof of Service

MCR 3.920(H) provides for proof of service of a summons and other papers. That rules states:

“(1) Summons. Proof of service of a summons must be made in the manner provided in MCR 2.104(A).

“(2) Other Papers. Proof of service of other papers permitted or required to be served under these rules must be made in the manner provided in MCR 2.107(D).

“(3) Publication. If the manner of service used involves publication, proof of service must be made in the manner provided in MCR 2.106(G)(1), and (G)(3) if the publication is accompanied by a mailing.

“(4) Content. The proof of service must identify the papers served.

“(5) Failure to File. Failure to file proof of service does not affect the validity of the service.”

6.12 Table of Time and Notice Requirements in Delinquency Cases

The following table contains time and notice requirements, with cross-references to the relevant authorities and appropriate sections of this benchbook for more complete discussion. For waiver of notice
requirements, see Section 6.8, above. To compute time periods, see MCR 1.108. For court holidays, see MCR 8.110(D).

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<tr>
<td>Preliminary Inquiry</td>
<td>May be conducted at any time. Except as stated below, no notice to parties is required. If the alleged offense falls under the Crime Victim’s Rights Act, the court must give written notice to the prosecuting attorney of the court’s intent to remove the case from the adjudicative process. The prosecuting attorney must notify victim(s).</td>
<td>MCL 712A.11(1) and MCR 3.932(A). See Section 4.2</td>
</tr>
<tr>
<td>Diversion Conference</td>
<td>The Juvenile Diversion Act may be used prior to the authorization of a petition. Law enforcement official or court intake worker must notify minor and his or her parent, guardian, or custodian of the time and place of a proposed diversion conference. If no diversion agreement is reached during the conference, a petition may be filed within 30 days of the conference. If the alleged offense falls under the Crime Victim’s Rights Act, the court must give written notice to the prosecuting attorney of the court’s intent to remove the case from the adjudicative process. The prosecuting attorney must notify victim(s).</td>
<td>MCL 722.823(1) and MCL 722.825(1) and (4). See Section 4.4</td>
</tr>
<tr>
<td>Consent Calendar Proceeding</td>
<td>With the consent of the juvenile and parent, guardian, or legal custodian, the consent calendar may be used following receipt of a citation or petition. No formal notice to the parties is required. If the alleged offense falls under the Crime Victim’s Rights Act, the court must give written notice to the prosecuting attorney of the court’s intent to remove the case from the adjudicative process. The prosecuting attorney must notify victim(s).</td>
<td>MCR 3.932(C). See Section 4.5</td>
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MCL 780.786b. See Section 4.3
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<tr>
<td>Preliminary Hearing (When Juvenile Is in Custody)</td>
<td>If juvenile is in custody, hearing must be held within 24 hours, excluding Sundays and holidays. As soon as hearing is scheduled, notice must be given in person, on record, or by phone to juvenile and his or her parent. Hearing may be adjourned for up to 14 days to secure attendance of juvenile’s parent or witnesses, or for other good cause shown. Hearing may be adjourned up to 5 days if juvenile is charged with a specified juvenile violation.</td>
<td>MCR 3.935(A)(1) and 3.920(C)(2)(a). See Section 5.9</td>
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<td>MCR 3.935(A)(2). See Section 5.9</td>
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<td>MCR 3.935(A)(3). See Section 3.6</td>
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<tr>
<td>Preliminary Hearing (When Juvenile Is Not in Custody)</td>
<td>If juvenile is not in custody, there is no time requirement. However, at least 7 days’ notice in writing or on record must be given to juvenile, custodial parent, guardian, legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner.</td>
<td>MCR 3.920(C)(1) and 3.921(A)(1). See Sections 5.9, 6.3 and 6.7</td>
</tr>
<tr>
<td>Motion to Amend Petition to Designate Case or Request Court to Designate Case for Criminal Trial in Family Division</td>
<td>Prosecutor may amend the petition by right during the preliminary hearing, or by leave of court no later than a pretrial hearing. If no pretrial hearing is held, prosecutor may request leave to amend no later than 21 days before trial, absent good cause for further delay. Court may allow amendment in interest of justice. If a hearing is required, 7 days’ written or record notice to juvenile, custodial parent, guardian, legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner.</td>
<td>MCR 3.951(A)(3) and 3.951(B)(3). See Section 5.5</td>
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<td>MCR 3.920(C)(1) and 3.921(A)(1). See Sections 6.3 and 6.7</td>
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| Designation Hearings | Hearing must be commenced within 14 days after arraignment, unless adjourned for good cause.  
7 days’ notice of the time, date, and place of hearing may be given orally on record to juvenile and his or her parent, guardian, or legal custodian, the juvenile’s attorney, and the prosecutor, or in writing, served on each individual by mail or other manner reasonably calculated to provide notice.  
The petition, or a copy of the petition, and a separate request for court designation must be personally served on juvenile, and if address or whereabouts known or discoverable by due diligence, parent, guardian, or legal custodian. | MCR 3.952(A).  
See Section 17.10(B)  
MCR 3.952(B)(2) and 3.920(C)(1).  
See Section 17.10(B)  
MCR 3.952(B)(1).  
See Section 17.10(B) |
| Motion for “Traditional” Waiver | Motion must be filed within 14 days after petition is authorized to be filed. Absent timely motion or good cause shown, juvenile is no longer subject to waiver on the charges.  
A copy of motion must be personally served on the juvenile and his or her parent, if their addresses or whereabouts are known or can be determined by the exercise of due diligence. | MCR 3.950(C)(1).  
See Section 16.4  
MCR 3.950(C)(2).  
See Section 16.5 |
| First Phase of “Traditional” Waiver Hearing | Hearing must be commenced within 28 days after petition is filed unless adjourned for good cause.  
7 days’ notice of the time, date, and place of hearing must be given. Notice may be given on the record directly to the juvenile or to the juvenile’s attorney, the prosecuting attorney, and all other parties, or in writing, served on each individual. | MCR 3.950(D)(1)(a).  
See Section 16.11  
MCR 3.950(D) and 3.920(C)(1).  
See Sections 16.8 and 6.7 |
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<td>Second Phase of “Traditional” Waiver Hearing</td>
<td>Hearing must be commenced within 28 days after conclusion of first phase, or 35 days after petition is filed if no first-phase hearing was held, unless adjourned for good cause. 7 days’ notice of the time, date, and place of hearing must be given. Notice may be given on the record directly to the juvenile or to the juvenile’s attorney, the prosecuting attorney, and all other parties, or in writing, served on each individual.</td>
<td>MCR 3.950(D)(2)(b). See Section 16.15 MCR 3.950(D) and 3.920(C)(1). See Section 6.7</td>
</tr>
<tr>
<td>Trial After Motion for “Traditional” Waiver Denied</td>
<td>If trial has not started within 28 days after motion for waiver is denied and the delay is not attributable to the defense, juvenile must be released unless he or she is being detained on another matter.</td>
<td>MCR 3.950(F). See Section 16.21</td>
</tr>
<tr>
<td>Demand for Jury Trial</td>
<td>Written demand for jury trial shall be filed within 14 days after court gives notice of the right to jury trial or 14 days after the filing of an appearance by an attorney, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice.</td>
<td>MCR 3.911(B). See Section 7.10</td>
</tr>
<tr>
<td>Demand for Trial by Judge (Rather Than Referee)</td>
<td>Written demand for trial by judge rather than referee shall be filed within 14 days after court gives notice of the right to trial by a judge or 14 days after the filing of an appearance by an attorney, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice.</td>
<td>MCR 3.912(B). See Section 7.10</td>
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<td>Notice of Alibi or Insanity Defenses</td>
<td>Written notice of juvenile’s intent to rely on defense must be given to the court and prosecutor within 21 days after notice of the trial date has been given to juvenile, but no later than 7 days before trial.</td>
<td>MCR 3.922(B)(1). See Section 7.9</td>
</tr>
<tr>
<td>and Notice of Rebuttal by Prosecuting</td>
<td>Written notice of the prosecutor’s intent to rebut defense must be given to the court and juvenile within 7 days after receipt of notice of defense, but no later than 2 days before trial.</td>
<td>MCR 3.922(B)(2). See Section 7.9</td>
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<td>Attorney</td>
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<tr>
<td>Motions to Suppress Evidence</td>
<td>Personal service of motion must be made at least 7 days before hearing, and of the response at least 3 days before hearing. If service is by mail, add 2 days to these deadlines. For good cause, court may set different periods for filing and serving motions.</td>
<td>MCR 3.922(C), 3.920(C)(1), and 2.119(C). See Sections 6.7 and 7.3</td>
</tr>
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<td>If a hearing is held, at least 7 days’ notice in writing or on record must be given to juvenile, custodial parent, guardian, legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner.</td>
<td>MCR 3.920(C)(1) and 3.921(A)(1). See Sections 6.3 and 6.7</td>
</tr>
<tr>
<td>Trials</td>
<td>In all cases, trial must be held within 6 months after filing of the petition, unless adjourned for good cause. If juvenile is detained, trial has not commenced within 63 days after juvenile was taken into custody, and the delay is not attributable to the defense, juvenile must be released without bail pending trial unless he or she is being held on another matter.</td>
<td>MCR 3.942(A). See Section 7.11</td>
</tr>
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<td>At least 7 days’ notice in writing or on record must be given to juvenile, custodial parent or guardian, legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner.</td>
<td>MCR 3.920(C)(1) and 3.921(A)(1). See Sections 6.3 and 6.7</td>
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<td>Trials, cont.</td>
<td>The court must direct service of summons on juvenile and his or her parent or the person with whom juvenile resides.</td>
<td>MCL 712A.12 and 3.920(B)(4)(a). See Section 6.5</td>
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<td>Personal service is required at least 7 days before trial. If the court finds that personal service is impracticable or cannot be achieved, the court may direct service in any manner reasonably calculated to give notice of the proceedings and opportunity to be heard, including publication, sent at least 14 days before trial, or 21 days if the person is not a Michigan resident.</td>
<td>MCR 3.920(B)(4) and 3.920(B)(5). See Section 6.5</td>
</tr>
<tr>
<td>Rehearings or Motions for New Trial</td>
<td>Written motion must be filed within 21 days after the date of the order resulting from the hearing or trial. Court may entertain untimely motion for good cause shown. Written response must be filed with the court and parties within 7 days of motion.</td>
<td>MCR 3.992(A) and (C). See Sections 9.15(B)</td>
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<td>At least 7 days’ notice in writing or on record must be given to juvenile, custodial parent, guardian, or legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner.</td>
<td>MCR 3.920(C)(1) and 3.921(A)(1). See Sections 6.3 and 6.7</td>
</tr>
<tr>
<td>Dispositions</td>
<td>The time between adjudication or plea and disposition is within the court’s discretion. However, if juvenile is detained, disposition hearing must be held within 35 days after plea or trial, unless adjourned for good cause.</td>
<td>MCR 3.943(B). See Section 10.2</td>
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<td>At least 7 days’ notice in writing or on record must be given to juvenile, custodial parent, guardian, or legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner.</td>
<td>MCR 3.920(C)(1) and 3.921(A)(1). See Sections 6.3 and 6.7</td>
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<td>Review of Referee's Recommended Findings and Conclusions</td>
<td>Request for review must be filed within 7 days after the inquiry or hearing or 7 days after issuance of referees’ recommendations, whichever is later, and served on interested parties, and a response may be filed within 7 days after the filing of the request for review. Absent good cause for delay, the judge must consider the request within 21 days after it is filed if juvenile is in placement or detention.</td>
<td>MCR 3.991(B)(3), 3.991(B)(4), and 3.991(C). See Section 12.7</td>
</tr>
<tr>
<td>Dispositional Review Hearings When Juvenile Is in Out-of-Home Care</td>
<td>If juvenile is in out-of-home care, hearing must be held within 182 days after entry of the initial disposition order, and within every 182 days thereafter. 7 days’ written notice to agency, foster parent or custodian, parent, guardian, guardian ad litem, elected Indian tribe leader (if applicable), attorney, juvenile (if older than age 11), prosecutor, and other persons as court directs.</td>
<td>MCL 712A.19(2) and MCR 3.945(A)(2)(a). See Section 14.5(A) MCL 712A.19(5). See Section 14.5(A)</td>
</tr>
<tr>
<td>Annual Reviews for Juveniles Committed to Public Institutions or Agencies</td>
<td>Court must conduct an annual review of the services provided to the juvenile, the juvenile’s placement, and the juvenile’s progress in the placement.</td>
<td>MCL 712A.18c(3). See Section 14.7</td>
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<tr>
<td>Commitment Review Hearings for Juveniles Committed to Public Institutions or Agencies</td>
<td>Court must schedule and hold a hearing as near as possible to but before juvenile’s 19th birthday, unless adjourned for good cause. If the court extends jurisdiction and the juvenile is placed outside the home, court must hold a dispositional review hearing every 182 days thereafter. Hearing may be held at any time on motion of institution, agency, or facility to which juvenile has been committed. Notice must be given to the prosecutor, agency or superintendent of institution or facility to which juvenile has been committed, juvenile, and juvenile’s parent, guardian, or legal custodian (if address or whereabouts are known) at least 14 days prior to the hearing.</td>
<td>MCR 3.945(B)(1)(a) and 3.945(C)(1). See Section 14.8(B)</td>
</tr>
<tr>
<td>Post-Disposition Detention Hearing Pending Return to Placement</td>
<td>If no new petition or probation violation petition is filed, court must hold a detention hearing within 48 hours after the juvenile is taken into custody, excluding Sundays and holidays. Notice of the hearing may be given to juvenile and his or her parent as soon as the hearing is scheduled, in person, in writing, on record, or by phone.</td>
<td>MCR 3.946(B). See Section 10.10</td>
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Chapter 6

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<td>Probation Violation Hearings</td>
<td>If juvenile denies the allegations, court must schedule hearing within 42 days after a detention hearing. If hearing is not commenced within 42 days and the delay is not attributable to the juvenile, juvenile must be released without bail.</td>
<td>MCR 3.944(B)(5)(b). See Section 13.6</td>
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<td>If the juvenile is not in custody, at least 7 days’ notice in writing or on record must be given to juvenile, custodial parent or guardian, legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner. A copy of the probation violation petition and notice of juvenile’s rights must be provided.</td>
<td>MCR 3.944(A)(1)(a), 3.920(C)(1) and 3.921(A)(1). See Sections 13.2, 6.3, and 6.7</td>
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<td>If the juvenile is detained, notice of the hearing may be given to juvenile and his or her parent as soon as the hearing is scheduled, in person, in writing, on record, or by phone. If the juvenile is detained, notice may be given to the custodial parent, guardian, or legal custodian.</td>
<td>MCR 3.944(A)(2)(b). See Section 13.2</td>
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Chapter 7: Pretrial Proceedings in Delinquency Cases

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In this chapter...

This chapter contains information on common pretrial issues in juvenile delinquency cases, including motion practice, determining the admissibility of evidence gathered by police, jury trial demands, and procedures to protect witnesses. The following issues are discussed:

- What information and evidence must the parties provide one another before trial, and what information and evidence may the parties obtain after filing a motion?

- What are the technical rules for filing written motions in a delinquency case, and when is a court required to conduct an evidentiary hearing?
Section 7.1

- What are the constitutional, statutory, and court-rule requirements for the admissibility of identification testimony, juvenile confessions, and evidence seized by police?

- What are the requirements to determine a juvenile’s competence to “stand trial”?

- What are the requirements to raise an alibi or insanity defense?

- When are the parties entitled to a jury trial?

- When may the court close delinquency proceedings, order special protections for a witness, or order a change of venue?

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

7.1 Pretrial Conferences

MCR 3.922(D) allows the court to direct the parties to appear at a pretrial conference to settle all pretrial matters. Except as otherwise provided in or unless inconsistent with the rules of Subchapter 3.900, the scope and effect of a pretrial conference are governed by MCR 2.401.

A pretrial conference may be held at any time after the commencement of the action. The court must give reasonable notice of the scheduling of the conference. MCR 2.401(A).

In People v Grove, 455 Mich 439, 464–65 (1997), the Court found no abuse of the trial court’s discretion in refusing to accept the defendant’s guilty pleas, made pursuant to a plea agreement, where the pleas were tendered after the “plea cutoff date” in a pretrial scheduling order. The trial judge may refuse to accept the defendant’s plea “pursuant to the rules,” which was interpreted to include MCR 2.401(B)(1)(b), governing pretrial scheduling orders.
7.2 Discovery

A. As of Right

MCR 3.922(A)(1) lists materials that are discoverable as of right in juvenile delinquency proceedings. MCR 3.922(A)(1)(a)–(h) state:

“(1) The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:

(a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;

(b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports;

(c) the names of prospective witnesses;

(d) a list of all prospective exhibits;

(e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;

(f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, which are relevant to the subject matter of the petition;

(g) the results of any lineups or showups, including written reports or lineup sheets; and

(h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories.”

B. By Motion

MCR 3.922(A)(2) states as follows:
“On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery.”*

“Depositions may only be taken as authorized by the court.” MCR 3.922(A)(3).

MCR 3.922(A)(4) provides that a failure to comply with MCR 3.922(A)(1) or (2) may result in sanctions set forth in MCR 2.313.

7.3 Motion Practice

Motion practice in delinquency cases is governed by MCR 2.119. MCR 3.922(C).

**Time requirements for written motions under MCR 2.119.** Unless the court sets a different time period, written motions must be filed at least seven days before the hearing on the motion, and any response must be filed at least three days before the hearing. MCR 2.119(C)(4). Unless a different period is provided by rule or set by the court for good cause, written motions and accompanying papers (other than ex-parte motions) must be served on the opposing party at least nine days before the time set for hearing if service is by mail. MCR 2.119(C)(1)(a). Service by mail is complete at the time of mailing. MCR 2.107(C)(3). If service is by delivery as defined in MCR 2.107(C)(1) and (2), the motion must be served on the opposing party at least seven days before the time set for hearing. MCR 2.119(C)(1)(b).

Unless a different period is provided by rule or set by the court for good cause, any response to a motion must be served at least five days before the hearing if service is by mail, or at least three days before the hearing if service is by delivery. MCR 2.119(C)(2)(a)–(b).

If the court sets a different time period for serving a motion or response, the court’s authorization must be in writing on the notice of hearing or in a separate order. MCR 2.119(C)(3).

In criminal proceedings, a trial court has discretion to entertain a motion to suppress evidence at trial. In *People v Ferguson*, 376 Mich 90, 94 (1965), the Michigan Supreme Court stated that “except under special circumstances the trial court may, within its sound discretion, entertain at trial a motion to suppress.” The Court declined in that case to define the circumstances under which a trial court may exercise its discretion to entertain a motion to suppress evidence at trial but gave as an example a case
in which facts concerning an allegedly illegal seizure are not known sufficiently in advance of trial. \textit{Id.} at 94–96. In \textit{Ferguson}, the Court found no abuse of discretion in the trial court’s refusal to entertain a motion to suppress evidence (a gun) that was allegedly the fruit of an illegal search and seizure. The defendant did not claim that he was unaware of the factual circumstances surrounding the allegedly illegal seizure prior to trial. Moreover, the defendant was identified at the preliminary examination as having wielded the gun, and the warrant and information referred to the gun. See also \textit{People v Davis}, 52 Mich App 59, 60 (1974) (trial court did not err in refusing to conduct an evidentiary hearing during trial because defendants and defense counsel knew well before trial that a weapon had been seized during defendants’ arrest), and \textit{People v Williams}, 23 Mich App 129, 130–31 (1970) (where defendant was aware of all facts surrounding his arrest and the challenged search and seizure, defendant waived the issue of the legality of the search and seizure by failing to move to suppress the evidence before trial). Defendants have the responsibility to inform defense counsel of facts surrounding the acquisition of evidence. \textit{People v Soltis}, 104 Mich App 53, 55–58 (1981), modified on other grounds 411 Mich 1037 (1981) (defendant had the responsibility to inform defense counsel that he had given a written statement to police).

Hearings on the admissibility of confessions must be conducted out of the hearing of the jury. MRE 104(c). Hearings on other preliminary matters must be conducted outside the jury’s presence where the interests of justice require or, when the accused is a witness, if he or she so requests. \textit{Id.}

**Required form of written motions.** Unless made during a hearing or trial, a motion must be in writing, must state with particularity the grounds and authority on which it is based, must state the relief or order sought, and must be signed by the attorney or party filing the motion. MCR 2.119(A).

A court may, in its discretion, dispense with or limit oral arguments on motions and may require the parties to file briefs in support of and in opposition to a contested motion. MCR 2.119(E)(3). MCR 2.119(A)(2) requires a motion or response that presents an issue of law to be accompanied by a brief citing the authority on which it is based.

The formal requirements of motions and accompanying briefs are contained in MCR 2.119(A)(2).* That rule states, in part:

> “Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge’s copy must

*Many jurisdictions have local court rules governing the form of motions.*
be clearly marked JUDGE’S COPY on the cover sheet; that notation may be handwritten.”

Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. *People v Leonard*, 224 Mich App 569, 578–79 (1997).

**Requirements for supporting affidavits.** Unless specifically required by rule or statute, a pretrial motion need not be verified or accompanied by an affidavit. MCR 2.114(B)(1). However, when a motion is based on facts not appearing on the record, the trial court has discretion to require affidavits. MCR 2.119(E)(2). Affidavits must conform to the requirements of MCR 2.113(A) (an affidavit must be verified by oath or affirmation) and MCR 2.119(B). Pursuant to MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

“(a) be made on personal knowledge;

“(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

“(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.”


**When evidentiary hearings must be conducted.** In *People v Wiejecha*, 14 Mich App 486, 488 (1968), the Court of Appeals stated:

“The right to a separate evidentiary hearing when an attack on the admissibility of evidence is made on constitutional grounds was pronounced by the United States Supreme Court in *Jackson v Denno*, [378 US 368 (1964)] . . . .

“The defendant has a right to have an evidentiary hearing on his motion [to suppress evidence]. The defendant has this right in every case, jury and non-jury, if such a hearing is requested.”

However, in *People v Reynolds*, 93 Mich App 516, 519 (1979), where the constitutionality of an identification procedure was challenged, the Court of Appeals concluded that an evidentiary hearing must be conducted whenever
a defendant challenges the admissibility of evidence on constitutional grounds and there is any factual dispute regarding the issue. In *People v Johnson*, 202 Mich App 281, 285–87 (1993), the Court of Appeals ruled that there is no right to an evidentiary hearing on the issue of the constitutionality of an identification procedure if there is no factual support for the challenge. Therefore, a judge need not hold an evidentiary hearing if no factual dispute exists. See also *Bielawski v Bielawski*, 137 Mich App 587, 592 (1984) (trial court should first determine whether contested factual questions exist before conducting an evidentiary hearing in a child custody case).

The parties have the right to a judge at an evidentiary hearing. See MCR 3.912(B) (parties have the right to a judge at a hearing on the formal calendar) and MCR 3.903(A)(10) (“formal calendar” means judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or preliminary hearing).

**Motions for rehearing or reconsideration.** Except as provided in MCR 2.604(A), a motion for rehearing or reconsideration of the decision on a motion must be filed and served within 14 days of the entry of the order disposing of the motion. MCR 2.119(F)(1). Under MCR 2.604(A), an order is “subject to revision before entry of final judgment.” “[T]he 14-day time limit on motions for reconsideration contained in MCR 2.119(F)(1) should not deter a trial court from correcting its interim orders whenever legally appropriate.” Dean & Longhofer, *Michigan Court Rules Practice* (4th ed), §2604.2, p 351. No response to the motion may be filed and no oral argument is allowed unless the court directs otherwise. MCR 2.119(F)(2). The standard for granting or denying motions for rehearing or reconsideration is set forth in MCR 2.119(F)(3), which states as follows:

“Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.”

In *People v Turner*, 181 Mich App 680, 683 (1989), the Court of Appeals stated that the rehearing procedure contained in MCR 2.119(F) “allows a court to correct mistakes which would otherwise be subject to correction on appeal, though at much greater expense to the parties.”
7.4 Identification Procedures

A. Fingerprinting and Photographing

A request to fingerprint or photograph a juvenile may be made when police are conducting investigations of other matters and are seeking to link the juvenile, who is in court custody, to or exclude the juvenile from commission of other offenses. MCR 3.923(C) states that “[t]he court may permit fingerprinting or photographing, or both, of a minor concerning whom a petition has been filed. Fingerprints and photographs must be placed in the confidential file, capable of being located and destroyed on court order.” This rule should not be confused with the fingerprinting requirements contained in MCL 28.243 and MCR 3.936(B), which make it mandatory for the police to take fingerprints of all juveniles who are arrested or taken into custody for certain offenses.*

B. Court-Ordered Lineups or Showups

If a complaint or petition is filed with the Family Division against a juvenile alleging violation of a criminal law or ordinance, the court may, at the request of the person submitting the petition or complaint, order the juvenile to appear at a place and time designated by the court for identification by another person, including a corporeal lineup. MCL 712A.32(1) and MCR 3.923(D).*

If the court orders the juvenile to appear for such an identification proceeding, the court must notify the juvenile and the juvenile’s parent, guardian, or legal custodian:

- that the juvenile has the right to consult with an attorney and have an attorney present during the identification proceeding, and
- that if the juvenile and the juvenile’s parent, guardian, or legal custodian cannot afford an attorney, the court will appoint an attorney for the juvenile if requested on the record or in writing by the juvenile or the juvenile’s parent, guardian, or legal custodian. MCL 712A.32(2) and MCR 3.923(D).

If the juvenile and his or her parent, guardian, or legal custodian fail to appear in response to a court order, contempt proceedings may be instituted. The court may issue a bench warrant for the juvenile’s apprehension. MCR 3.606(A)(2).

C. Constitutional Requirements

Right to counsel. There is a federal constitutional right to counsel at a corporeal lineup. United States v Wade, 388 US 218, 237 (1967) and Gilbert
v California, 388 US 263 (1967). The general rule in Michigan is that the right to counsel applies to both corporeal and photographic identification procedures and that the right attaches when the accused is taken into custody. People v Anderson, 389 Mich 155, 169, 188 (1973) and People v Kurylczyk, 443 Mich 289, 301–02 (1993). See also In re Jackson, 46 Mich App 764, 769–70 (1973) (juvenile’s constitutional right to counsel was not violated where a showup was conducted before counsel was retained but with “standby” appointed counsel present).

There are three exceptions to the right to counsel at identification procedures:

- the “intelligent” waiver of counsel by an accused;
- emergency situations requiring immediate identification; and
- prompt on-the-scene corporeal identifications within minutes of the crime. Anderson, supra at 187, n 23.

The police may conduct on-the-scene identifications without the presence of counsel unless the police have strong evidence that the person they stopped committed the crime. Strong evidence exists where the accused has confessed or presented the police with highly distinctive evidence of the crime, a highly distinctive personal appearance, or close proximity in place and time to the scene of the crime. People v Turner, 120 Mich App 23, 36–37 (1982). But see People v Winters, 225 Mich App 718, 726–28 (1997) (“strong evidence” standard from Turner, supra is too difficult for police officers to apply; on-the-scene confrontations are generally permissible).

Counsel is required at a photographic showup when the accused is in custody, but not when police have not yet arrested the accused or focused their investigation on the accused alone. Kurylczyk, supra at 301–02.

**Burden of proof.** A criminal defendant has the burden of establishing that his or her right to counsel was violated. People v Morton, 77 Mich App 240, 244 (1977). The prosecuting attorney has the burden of showing that the defendant waived his or her right to counsel. Wade, supra 388 US at 237 (an intelligent waiver of the right to counsel must be shown), and People v Daniels, 39 Mich App 94, 96–97 (1972) (prosecutor proved by clear and convincing evidence that the defendant voluntarily, knowingly, and intelligently waived his right to assistance of counsel at a lineup). If counsel was not present, the prosecutor must establish that the procedure was not unduly suggestive. If counsel was present, the defendant has the burden of proving that the procedure was unduly suggestive. People v Young, 21 Mich App 684, 693–94 (1970).

If the court finds a violation of the right to counsel or that a pretrial identification procedure was unduly suggestive, in-court identification of the defendant at trial is inadmissible as the fruit of the illegal procedure unless the prosecution establishes by clear and convincing evidence that the

**Impermissible suggestiveness and due-process limitations.** Substantive evidence concerning any “pre-indictment” identification procedure is inadmissible if the procedure is so unnecessarily suggestive and conducive to irreparable misidentification that it amounts to a denial of due process. *Stovall v Denno*, 388 US 293, 302 (1967), *Anderson, supra* at 168–69, *Kurylczyk, supra* at 302–11 (photographic identifications).

Physical differences among a suspect and other lineup participants do not alone establish impermissible suggestiveness. *People v Benson*, 180 Mich App 433, 438 (1989), rev’d on other grounds 434 Mich 903 (1990). Such differences are significant only when apparent to the witness and when they serve to substantially distinguish the accused from the other participants. *People v James*, 184 Mich App 457, 466 (1990), vacated on other grounds 437 Mich 988 (1991). See also *Kurylczyk, supra* at 304–05, 311–14 (appearance of the accused in a lineup wearing the same clothes as allegedly worn during the commission of the offense does not automatically render a procedure impermissibly suggestive).

Where the witness has failed to identify the accused in a pretrial identification procedure, a later confrontation during a preliminary examination will not be held to be impermissibly suggestive per se. *People v Barclay*, 208 Mich App 670, 675–76 (1995) and *People v Whitfield*, 214 Mich App 348, 351 (1995) (confrontation during “traditional waiver” hearing).

The suggestiveness of an identification procedure is determined by considering the totality of the circumstances surrounding the procedure. *Stovall, supra* 388 US at 301–02 and *People v Lee*, 391 Mich 618, 626 (1974). In ascertaining whether a pretrial identification procedure is impermissibly suggestive, a court must look to the totality of the circumstances, especially the time between the criminal act and the procedure, and the duration of the witness’s contact with the perpetrator during commission of the offense. *People v Johnson*, 58 Mich App 347, 352–55 (1975), and *Neil v Biggers*, 409 US 188, 199 (1972).

**Consequences of violation.** If the pretrial identification procedures are impermissibly suggestive or conducive to irreparable misidentification, testimony as to the out-of-court identification must be excluded. *Gilbert, supra*, 388 US at 273. In-court identification is only permissible if the prosecuting attorney shows by clear and convincing evidence that the in-court identification has a basis independent of the illegal lineup. *Wade, supra*, 388 US at 240, *Manson v Braithwaite*, 432 US 98 (1977), and *Anderson, supra* at 167.
These factors must be considered when determining whether an in-court identification has an independent basis:

- prior relationship with or knowledge of the defendant;
- the opportunity to observe the offense, including such factors as the length of time of the observation, lighting, noise, or other factors affecting sensory perception and proximity to the alleged criminal act;
- length of time between the offense and the disputed identification;
- accuracy or discrepancies in the pre-lineup or showup description and defendant’s actual description;
- any previous proper identification or failure to identify the offender;
- any identification prior to the lineup or showup of another person as defendant;
- the nature of the alleged offense and the physical and psychological state of the witness, including such factors as fatigue, nervous exhaustion, intoxication, age, and intelligence of the witness; and

7.5 Admissibility of Confessions Made by Juveniles

A. Violations of the “Immediacy Rule” and Their Effect on Voluntariness

Following a warrantless arrest for a felony, the peace officer must take an adult accused before a magistrate for arraignment “without unnecessary delay.” MCL 764.13 and MCL 764.26. If a juvenile less than 17 years of age is taken into custody, the juvenile must “immediately” be taken before the Family Division of the Circuit Court of the county where the offense was allegedly committed. MCL 764.27. See also MCR 3.933 and 3.934.* However, if the prosecutor has authorized the filing of a complaint in District Court under the “automatic waiver” statute, MCL 600.606, the juvenile need not be taken to the Family Division following apprehension, but to the District Court for arraignment. *People v Brooks*, 184 Mich App 793, 797–98 (1990), *People v Spearman*, 195 Mich App 434, 443–45 (1992), overruled on other grounds 443 Mich 23, 43 (1993), MCR 6.907(A), and MCR 6.909(A).
A conflict existed among Michigan courts for several years as to whether violation of the “immediacy rule” contained in MCL 764.27 dictated exclusion of a confession obtained following a violation of the rule, or whether the violation was merely one factor to consider in determining the voluntariness of the confession. In *People v Good*, 186 Mich App 180, 186–90 (1990), the Court of Appeals resolved the conflict in favor of a “totality of the circumstances” analysis, under which violation of the “immediacy rule” is one factor to consider in determining the voluntariness of a juvenile’s confession. See also *People v Milton*, 191 Mich App 666 (1991) (following the approach adopted in *Good*).

In any case, a confession is inadmissible if a delay in bringing a juvenile before the Family Division is used as a tool to extract a confession. *People v Strunk*, 184 Mich App 310, 314–22 (1990).

**Burden of proof.** The defendant must come forward with evidence that the evidence in question was obtained as a result of a statutorily unlawful detention. If the defendant does so, the prosecuting attorney has the burden of proving the admissibility of the evidence. *People v Jordan*, 149 Mich App 568, 577 (1986).

### B. Determining the Voluntariness of a Juvenile’s Confession

**Standard for voluntariness and factors to consider.** Use of an involuntary confession may violate due-process requirements. *Gallegos v Colorado*, 370 US 49, 50 (1962). “The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused’s will has been overborne and his capacity for self-determination critically impaired.” *People v Givans*, 227 Mich App 113, 121 (1997), citing *People v Peerenboom*, 224 Mich App 195, 198 (1997).

In *People v Good*, 186 Mich App 180, 189 (1990), the Court of Appeals set forth a “non-exhaustive” list of factors to be used to determine whether a statement was voluntarily made. Those factors are:

- whether *Miranda* requirements were met, and whether the juvenile clearly understood and waived his or her *Miranda* rights;
- the degree of police compliance with MCL 764.27 and the “juvenile court rules”;
- the presence of an adult parent, custodian, or guardian;
- the juvenile defendant’s personal background;
- the juvenile’s age, education, and intelligence level;
- the extent of the juvenile’s prior experience with police;

*See Sections 3.1–3.3 for discussion of these requirements.*
• the length of the detention before the statement was made;
• the repeated and prolonged nature of the questioning; and
• whether the juvenile was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention.

**The effect of a failure to comply with Miranda requirements on voluntariness.** If *Miranda* warnings are not required, it is clearly erroneous to find that a failure to give such warnings renders a confession involuntary. *In re SLL*, 246 Mich App 204, 209–10 (2001).*

**Presence of adult parent, guardian, or custodian.** The Court of Appeals has suggested that a juvenile must request the presence of a parent or other adult before the absence of such a person should be considered in weighing the voluntariness of a juvenile’s confession. See *Givans, supra* at 121. In *SLL, supra* at 206, the 13-year-old respondent’s mother drove him to the police station in response to a police request to interview the boy. At the stationhouse, an officer advised respondent’s mother of the allegations against her son and that she could contact an attorney. The officer then requested to speak with respondent alone though he was not under arrest. Respondent’s mother agreed. The Court of Appeals concluded that the separation of respondent and his mother did not provide evidence that the resulting confession was involuntary because there was no suggestion of manipulation by police. *Id.* at 210.

See also *In re De Los Santos*, unpublished opinion per curiam of the Court of Appeals, decided December 28, 2001 (Docket No. 232592) (the trial court erred in suppressing the 12-year-old respondent’s confession to second-degree criminal sexual conduct, where the respondent had recently been abandoned by his mother and was a temporary ward of the court, and where respondent’s caseworker in the neglect case was not present during questioning).

**Coercive police conduct required.** Although a defendant’s mental condition may be relevant to the voluntariness of a confession, coercive police conduct must be present to support a conclusion that a confession is involuntary within the meaning of the federal constitution. *Colorado v Connelly*, 479 US 157, 167 (1986) (mentally ill defendant’s confession freely offered to police did not violate the 14th Amendment’s Due Process Clause). See also *People v Fike*, 228 Mich App 178, 182 (1998) (citing Connelly, the Court of Appeals found no error where the police did not exploit the defendant’s lack of intelligence). Where a defendant claims that police conduct at the time of arrest rendered a subsequent confession involuntary, there must be a sufficient causal link between the police conduct and confession. *People v Wells*, 238 Mich App 383, 386–90 (1999) (factors to consider when evaluating the connection between an alleged beating by police at time of arrest and a subsequent confession).

*See Section 7.5(C), below, for discussion of *Miranda* requirements.*
Promises of leniency. A promise of leniency is merely one factor to be considered in evaluating the voluntariness of a defendant’s or juvenile’s confession. *People v Conte*, 421 Mich 704, 751, 761–62 (1984) (in a 4-3 decision, the Michigan Supreme Court rejected a rule that rendered a confession inadmissible if it was induced by a promise of leniency). Promises to help the accused and statements that cooperation will “make things go easier for the accused” or be taken into account at sentencing are not improper promises of leniency. *People v Ewing (On Remand)*, 102 Mich App 81, 85–86 (1980), and *People v Carigon*, 128 Mich App 802, 810–12 (1983).*

In *Givans, supra* at 121–22, after the 16-year-old suspect in an attempted robbery and shooting told the police officer questioning him that he wanted to “make a deal” with the prosecutor, the officer told the suspect that he would include the suspect’s cooperation during the questioning in the report to the prosecutor. Although the police had not found the suspect’s fingerprints at the scene of the crimes, one of the officers asked him “how his fingerprints could have been found” at the scene. The suspect admitted participating in the offenses. The Court of Appeals upheld the trial court’s finding that the suspect’s statements were voluntarily made. Although a promise of leniency is one factor to consider in determining the voluntariness of a statement, the officer’s promise to report the suspect’s cooperation during the questioning did not constitute a promise of leniency. Moreover, the officer’s implication that the suspect’s fingerprints had been found did not render the suspect’s otherwise voluntary statements involuntary.

Similarly, courts have found that police misrepresentation of facts is one factor to be considered but does not alone render a confession involuntary. *Frazier v Cupp*, 394 US 731, 740 (1969), *Ledbetter v Edwards*, 35 F3d 1062, 1069 (CA 6, 1994), and *People v Hicks*, 185 Mich App 107, 113 (1990).

Evidentiary hearings. A criminal defendant has the right to an evidentiary hearing upon request when he or she challenges the admissibility of evidence on constitutional grounds and a factual dispute exists. *People v Wiejecha*, 14 Mich App 486, 488 (1968), citing *Jackson v Denno*, 378 US 368 (1964), *People v Reynolds*, 93 Mich App 516, 519 (1979), and *People v Johnson*, 202 Mich App 281, 285–87 (1993). Where “a defendant’s mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical and mental duress,” or other alerting circumstances, clearly and substantially raise a question about the voluntariness of a confession, the court may be required to conduct a hearing without a request by the defendant. *People v Hooks*, 112 Mich App 477, 480, 482 (1982), and *People v Ray*, 431 Mich 260, 271 (1988).

The trial judge alone must make a determination at a separate evidentiary hearing of the voluntariness of a confession. *Jackson, supra* 378 US at 395, and *People v Walker (On Rehearing)*, 374 Mich 331, 336–38 (1965). The
mere hearing of legal arguments is insufficient. *People v Wright*, 6 Mich App 495, 502 (1967). The defendant may testify for the limited purpose of making a record of his or her version of the facts and circumstances under which the confession was obtained without waiving the right to decline to take the stand at trial. *Walker, supra* at 338, and MRE 104(d).

The sole issue in a hearing to determine the voluntariness of a confession is whether the confession was coerced. “Whether [the confession] is true or false is irrelevant; indeed, such an inquiry is forbidden. The judge may not take into consideration evidence that would indicate that the confession, though compelled, is reliable, even highly so.” *Lego v Twomey*, 404 US 477, 484, n 12 (1972).

If the court determines that the confession was voluntary, the issue of voluntariness is not submitted to the jury; jury consideration is limited to the weight and credibility of the defendant’s statements. *Walker, supra* at 337–38. Involuntary confessions must not be used to establish guilt or to impeach the defendant’s credibility if he or she testifies at trial. *People v Reed*, 393 Mich 342, 356 (1975).

**Burden and standard of proof.** The prosecutor has the burden of proving that a confession was voluntarily given and not the product of coercion. *People v White*, 401 Mich 482, 494 (1977). The voluntariness of a defendant’s confession must be established by a preponderance of the evidence. *Lego, supra* 404 US at 489 (the prosecutor must prove by a preponderance of the evidence that a defendant’s confession was voluntary although states are free to set a higher standard of proof), and *People v Sears*, 124 Mich App 735, 738 (1983) (the Court of Appeals declined to require the prosecutor to prove the voluntariness of a confession beyond a reasonable doubt).

**C. Determining Admissibility Under Miranda**

**Requirements of Miranda.** Prior to admission of a criminal defendant’s statements in the prosecutor’s case-in-chief, the prosecutor must make an affirmative showing that *Miranda* warnings were given prior to a custodial interrogation and that a waiver was properly obtained. *Miranda v Arizona*, 384 US 436, 444 (1966), and *People v Arroyo*, 138 Mich App 246, 249–50 (1984). In *Miranda, supra*, the United States Supreme Court held that the prosecutor must present evidence that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and rights to consult with and have counsel present during a custodial interrogation. If the defendant claims that he or she did not validly waive *Miranda* rights, the prosecutor has the burden of proving by a preponderance of the evidence that there was a voluntary, knowing, and intelligent waiver of those rights. *Colorado v Connelly*, 479 US 157, 168 (1986), *People v Cheatham*, 453 Mich 1, 27 (1996), and *People v Daoud*, 462 Mich 621, 634 (2000). The court must examine the totality of the circumstances surrounding the interrogation when evaluating the validity of

The *Miranda* rules have been applied to juveniles. See *Fare*, *supra* 442 US at 717, n 4, 725 (assuming without deciding that *Miranda* applies to cases involving juveniles, the Court held that a juvenile’s request to speak with his probation officer did not constitute an invocation of the juvenile’s rights to counsel and to remain silent), and *People v Anderson*, 209 Mich App 527, 530–35 (1995).

**When *Miranda* warnings must be given—custody and interrogation requirements.** *Miranda* warnings must be given only in situations involving “custodial interrogation.” Custodial interrogation means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *People v Hill*, 429 Mich 382, 387 (1987), quoting *Miranda*, *supra* 384 US at 444.

**Custody.** Under both federal and Michigan law, *Miranda* warnings must be given to a suspect prior to questioning only when the suspect is in custody or otherwise deprived of freedom of action in any significant way, not at the time a person becomes the focus of an investigation. *Oregon v Mathiason*, 429 US 492, 495 (1977), *Hill*, *supra* at 391–99, and *People v Peerenboom*, 224 Mich App 195, 197–98 (1997). Warnings need not be given unless the person is arrested or deprived of his or her freedom to a degree associated with formal arrest. *California v Beheler*, 463 US 1121, 1125 (1983), *Terry v Ohio*, 392 US 1 (1968), *People v Chinn*, 141 Mich App 92, 96 (1985) (warnings not required during routine traffic stop), and *People v Edwards*, 158 Mich App 561, 564 (1987) (warnings not required during routine traffic stop where officer asks if there are weapons in the car). “[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California*, 511 US 318, 323 (1994). See also *People v Zahn*, 234 Mich App 438, 449 (1999) (interrogating officer’s unspoken intent to prevent the defendant from leaving the apartment where the interrogation took place was improperly considered by the trial court).

**Interrogation.** In addition to the requirement that a person be in custody, *Miranda* warnings must be provided only if a person is subjected to “interrogation.” “Interrogation” means “express questioning [or] any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject.” *Anderson*, *supra* at 532, citing *Rhode Island v Innis*, 446 US 291, 301 (1980). See also *People v Fisher*, 166 Mich App 699, 708 (1988), rev’d on other grounds 442 Mich 560 (1993), and cases cited therein (placing incriminating evidence in the suspect’s view is generally not “interrogation”). Even where a person is in custody, spontaneous and volunteered statements are not inadmissible due to a failure to provide *Miranda* warnings. *People v Raper*, 222 Mich App
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A person who is not a police officer or not “acting in concert with or at the request of police authority” is not required to give Miranda warnings. Grand Rapids v Impens, 414 Mich 667, 673 (1982), quoting People v Omell, 15 Mich App 154, 157 (1968). In Impens, the Michigan Supreme Court held that a deputy sheriff “moonlighting” as a private security guard at a Meijer store was not required to give Miranda warnings prior to questioning a shoplifting suspect. In Anderson, supra at 530–35, the Court of Appeals held that a juvenile corrections officer is not a law enforcement officer for Miranda purposes. In People v Porterfield, 166 Mich App 562, 567 (1988), the Court of Appeals held that a defendant’s statement made to a Children’s Protective Services caseworker in the course of an investigation was admissible in a criminal prosecution. The Court stated “although the caseworker was a state employee, she was not charged with enforcement of criminal laws and she was not acting at the behest of the police; therefore, she need not have advised defendant of his Miranda rights.” See also In re Garrett, unpublished opinion per curiam of the Court of Appeals, decided February 8, 2002 (Docket No. 234708) (a high school guidance counselor was not required to give the respondent Miranda warnings because he was not acting at the behest of police).

Requirements to establish a valid waiver of Miranda rights. To establish a valid waiver of Miranda rights, the prosecutor must prove that the suspect voluntarily, knowingly, and intelligently waived those rights. Miranda, supra 384 US at 444, 475. A waiver is valid if the “suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction . . . .” Moran v Burbine, 475 US 412, 422 (1986). Coercive police conduct must be present to support a conclusion that a waiver of Miranda rights is involuntary. Connelly, supra 479 US at 165 (1986), and People v Howard, 226 Mich App 528, 538 (1997). When determining whether a waiver was knowing and intelligent, the court must conduct a subjective inquiry into the suspect’s level of understanding of his or her rights, irrespective of police behavior. Cheatham, supra at 26. However, “a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him.” Id. at 28. See also Daoud, supra at 636–39, and In re Abraham, 234 Mich App 640, 646–55 (1999) (11-year-old defendant knowingly and intelligently waived his Miranda rights).

Waiver of Miranda rights need not be explicit but may be determined by examining the surrounding circumstances, “including the background, experience, and conduct of the accused.” North Carolina v Butler, 441 US 369, 375 (1979). In Butler, supra 441 US at 373, the United States Supreme Court stated as follows:
“An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution’s burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.”

In *Abraham*, supra, the defendant, who was 11 years old at the time, allegedly fatally shot one person and attempted to shoot another person. Police questioned defendant two days after the shootings. Defendant’s mother was present during the questioning. After initially offering innocent explanations of his participation in the shootings, defendant told police that he had shot the victim who died. The prosecuting attorney designated defendant’s case for criminal trial in the Family Division. The trial court suppressed the defendant’s confession, finding that he hadn’t knowingly and intelligently waived his *Miranda* rights.

On appeal, the prosecuting attorney argued that the trial court failed to apply the correct legal standard of mental competency for a knowing and intelligent waiver of defendant’s *Miranda* rights, and that the trial court over-emphasized defendant’s lack of understanding that he was being questioned in connection with a murder investigation. The Court of Appeals agreed, concluding that, considering the totality of circumstances surrounding the waiver, defendant understood the rights he was waiving “well enough.” “While we do not suggest that defendant had an especially sophisticated understanding of what police told him, we emphasize again that such an understanding is not legally required,” the Court of Appeals stated.

Defendant’s lack of “expressive language skills” and “abstract verbal reasoning and more practical problem solving skills,” when compared with others in his age group, did not rise to the level of a mental impairment that rendered him incapable of knowingly waiving his rights. Defendant’s actions leading up to the shootings, and his admission during the suppression hearing that he initially misled police during questioning to appear cooperative, indicated that he had sufficient ability to make a knowing waiver of *Miranda* rights. In addition, the police officers’ failure to inform defendant that he was suspected of murder did not alone support the conclusion that the waiver was not “knowing and intelligent.” The Court
of Appeals emphasized that defendant’s mother participated in defendant's waiver of his rights and was present during questioning.

**When an evidentiary hearing must be conducted.** A separate evidentiary hearing must be conducted by the court when the defendant challenges the admissibility of his or her statements on the basis of an alleged *Miranda* violation. *Arroyo, supra* at 249-250.

### D. Limitations on Use of Statements Made by Juveniles During Informal Proceedings

**Diversion.** A diversion conference may not be held until after the questioning, if any, of the minor has been completed or after an investigation has been made concerning the alleged offense. Mention of, or promises concerning, diversion shall not be made by a law enforcement official or court intake worker in the presence of the minor or the minor’s parent, guardian, or custodian during any questioning of the minor. Information divulged by the minor during the conference or after the diversion is agreed to, but before a petition is filed with or authorized by the court, cannot be used against the minor. MCL 722.825(2).

**Consent calendar.** MCR 3.932(C)(8) permits the court to transfer the case to the formal calendar if “it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public . . .” The court need not conduct a hearing before transferring the case to the formal calendar. *Id.* If the case is transferred to the formal calendar, however, the court must inform the juvenile of his or her right to an attorney, and that any statement made by the juvenile may be used against him or her. See *In re Chapel*, 134 Mich App 308, 312–13 (1984) (full panoply of rights under court rules vests when case is placed on formal calendar). Statements made by the juvenile during consent calendar proceedings may not be used at a trial on the formal calendar that is based on the same charge. MCR 3.932(C)(8).

### 7.6 Selected Search and Seizure Issues

**Family Division judge’s authority to issue a search warrant.** MCR 3.922(A)(1)(h) contemplates the issuance of search warrants in juvenile delinquency cases. That rule allows discovery of “all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories.” There is general authority for circuit court judges to issue search warrants. MCL 780.651(2)(a) and (3) specify that judges may issue search warrants. MCL 780.651 also authorizes “magistrates” to issue search warrants. MCL 761.1(f) defines “magistrate” as a district court or municipal court judge, and goes on to state the following:
“This definition does not limit the power of a justice of the supreme court, a circuit judge, or a judge of a court of record having jurisdiction of criminal cases under this act, or deprive him or her of the power to exercise the authority of a magistrate.” (Emphasis added.)

Circuit court referees have no authority to issue search warrants. See MCL 780.651, MCL 761.1(f), MCL 712A.10(1), and MCR 3.913.

Application of constitutional protections to minors. The Fourth Amendment to the United States Constitution and Const 1963, art 1, §11, protect “persons” from unreasonable searches and seizures. These constitutional provisions apply to minors. See Tinker v Des Moines Independent Community School District, 393 US 503, 511 (1969) (students, in school and out, are “persons” under the constitution), and People v Flowers, 23 Mich App 523, 527 (1970) (17-year-old’s rights under the federal and state constitutions were violated by a warrantless search and seizure), disagreed with on other grounds in People v Goforth, 222 Mich App 306, 315 (1997). When evidence seized during a warrantless search is to be admitted in a criminal proceeding, the prosecutor must show that the search was reasonable by showing that he or she had probable cause to believe that contraband or evidence of crime was present. Bd of Educ v Earls, 122 S Ct 2559, 2564 (2002).

MCR 3.922(C) provides for pretrial motions to suppress evidence in juvenile delinquency cases. Evidence secured by a search and seizure conducted in violation of US Const, Am IV, is inadmissible in a state court. Mapp v Ohio, 367 US 643 (1961). The “exclusionary rule” prohibits use of evidence in criminal proceedings that was directly or indirectly obtained through a violation of an accused’s constitutional rights. Wong Sun v United States, 371 US 471, 484–85 (1963), and People v LoCicero (After Remand), 453 Mich 496, 508 (1996). However, it is unclear whether the exclusionary rule must be applied in juvenile delinquency proceedings. See New Jersey v TLO, 469 US 325, 328, 331–32 (1985) (the United States Supreme Court originally granted certiorari to consider the appropriate remedy in a delinquency proceeding for a violation of the Fourth Amendment by a school official but later limited review to the required level of suspicion to support such a search), In re William G, 709 P2d 1287, 1298 (Calif 1985) (exclusionary rule is applicable in delinquency proceedings), and Gilbert v Leach, 62 Mich App 722, 725–26 (1975), aff’d 397 Mich 384 (illegally obtained evidence is inadmissible in civil proceedings). In addition, where no government official is involved in a search and seizure, the objects seized may be admitted at a criminal trial. Burdeau v McDowell, 256 US 465, 475 (1921).

Burden of proof. Where the defendant seeks to suppress evidence seized pursuant to a warrantless search and seizure, the burden of proof is on the prosecution to show that the search and seizure were reasonable and fell under a recognized exception to the warrant requirement. People v White,
392 Mich 404, 410 (1974). Where the prosecution relies on consent to justify a warrantless search and seizure, it has the burden to prove that the consent was unequivocal and specific, and freely and intelligently given. People v Kaigler, 368 Mich 281, 294 (1962). See also People v Dinsmore, 103 Mich App 660, 672 (1981) (prosecutor has the burden of establishing the voluntariness of the consent by “direct and positive evidence”), and United States v Matlock, 415 US 164, 177 (1974) (prosecutor must show the voluntariness of consent by a preponderance of the evidence). Because a consent to search involves the relinquishment of a constitutional right, the prosecutor cannot discharge this burden by showing a mere acquiescence to a claim of lawful authority. Bumper v North Carolina, 391 US 543, 548–49 (1968). Where the defendant is under arrest at the time of the alleged consent, the prosecutor’s burden is “particularly heavy.” Kaigler, supra at 294.

The defendant has the burden of establishing his or her standing to challenge the search or seizure. People v Zahn, 234 Mich App 438, 446 (1999), and People v Lombardo, 216 Mich App 500, 505 (1996).

**Free and voluntary consent to warrantless search.** One exception to the general probable cause and warrant requirements is a search conducted pursuant to a valid consent. Schneckloth v Bustamonte, 412 US 218, 219 (1973). To determine whether consent was freely and voluntarily given rather than a product of police coercion, a court must examine the totality of the circumstances surrounding the consent, including the characteristics of the person who consented. Id., 412 US at 226–27, and People v Reed, 393 Mich 342, 362–63 (1975). Police officers need not always inform persons of their right to refuse consent. Ohio v Robinette, 519 US 33, 39–40 (1996). In addition, age, maturity, and educational level may be considered in determining the voluntariness of the consent to search. United States v Mayes, 552 F2d 729, 732–33 (CA 6, 1977), and In re JM, 619 A2d 497, 502 (DC App 1992) (14-year-old suspect’s age and maturity “critical” to the validity of his consent to frisk of his person).

**Parental consent to a warrantless search of child’s bedroom.** “There is no Fourth Amendment violation where police officers conduct a search pursuant to the consent of a third party whom the officers reasonably believe to have common authority over the premises.” People v Goforth, 222 Mich App 306, 315 (1997), citing People v Grady, 193 Mich App 721, 724 (1992). If a parent has common authority (joint access and control) over a child’s bedroom, a parent may validly consent to a search of the bedroom. Goforth, supra at 316.

**Warrantless searches of students by school officials.** In TLO, supra 469 US at 333, the United States Supreme Court, in a plurality opinion, first held that the Fourth Amendment’s prohibition of unreasonable searches and seizures applies to public school officials. A plurality of the Court also held that evidence seized as a result of a warrantless search by public school officials may be admitted in a delinquency proceeding if the official had a
“reasonable suspicion” that the search would uncover evidence of a violation of school disciplinary rules or a violation of law. The scope of the search must be reasonably related to the objectives of the search and not overly intrusive given the age and sex of the student and the alleged violation. *Id.* at 341–42. See also *People v Mayes (After Remand)*, 202 Mich App 181, 201 (1993) (Corrigan, PJ, concurring) (under *TLO*, an assistant principal could have legally searched a car parked in a school parking lot where the assistant principal had reliable information that a gun was in the car).

Prior to *TLO*, the Michigan Court of Appeals addressed the issue of searches by school officials in *People v Ward*, 62 Mich App 46 (1975). The Court of Appeals adopted a “reasonable suspicion” standard for such searches. The Court stated the following rationale for its holding:

“School officials stand in a unique position with respect to their students. They possess many of the powers and responsibilities of parents to enable them to control conduct in their schools. . . . At times, the powers and responsibilities regarding discipline and the maintenance of an educational atmosphere may conflict with fundamental constitutional safeguards. A student cannot be subjected to unreasonable searches and seizures. On the other hand, the public interest in maintaining an effective system of education and the more immediate interest of a school official in protecting the well-being of the students entrusted to his supervision against the omnipresent dangers of drug abuse must be considered. In striking a balance, we adopt a ‘reasonable suspicion’ standard.” *Id.* at 50–51 (citations omitted).

A “reasonable suspicion” is based upon the totality of the surrounding circumstances and requires “articulable reasons” and “a particularized and objective basis for suspecting the particular person.” *United States v Cortez*, 449 US 411, 417–18 (1981).

**Warrantless searches of lockers and lockers’ contents by school officials and law enforcement officers.** The United States Supreme Court in *TLO* did not address the issue of whether a public school student has a reasonable expectation of privacy in school lockers. *TLO*, *supra* 469 US at 337, n 5. In Michigan, this issue is addressed in MCL 380.1306. MCL 380.1306(1) states that “[a] pupil who uses a locker that is the property of a school district, local act school district, intermediate school district, or public school academy is presumed to have no expectation of privacy in that locker or that locker’s contents.”

MCL 380.1306(2)–(5) require school boards and boards of directors of public school academies to adopt policies on searches of pupil lockers and lockers’ contents. MCL 380.1306(2) requires that pupils and their parents
receive copies of the policies. Pursuant to a search policy, a public school principal or designee may search a pupil’s locker or a locker’s contents at any time. MCL 380.1306(3). “Any evidence obtained as a result of a search of a pupil’s locker or locker’s contents shall not be inadmissible in any court or administrative proceedings because the search violated this section, violated the policy under subsection (2), or because no policy was adopted.” MCL 380.1306. Because these provisions allow for random searches of school lockers and admissibility of evidence seized, they may contradict the Court of Appeals’ holding in Ward, supra, that a “reasonable suspicion” standard applies to searches of students by school officials.

The statute also provides for law enforcement assistance in conducting a search. MCL 380.1306(4) states:

“A law enforcement agency having jurisdiction over the school may assist school personnel in conducting a search of a pupil’s locker and the locker’s contents if that assistance is at the request of the school principal or his or her designee and the search is conducted in accordance with the policy under subsection (2).

In TLO, supra 469 US at 341, n 7, the United States Supreme Court did not address the proper standard to apply to school searches conducted in conjunction with or at the behest of law enforcement officials. See also Mayes, supra (Corrigan, PJ, concurring) (the quantum of suspicion for a search on school property should not shift only because a law enforcement officer conducts the search at the behest of a school official).

**Warrantless searches of juvenile probationers.** The Family Division may enter an order of disposition placing the juvenile “on probation, or under supervision in the juvenile’s own home or in the home of an adult who is related to the juvenile.” MCL 712A.18(1)(b). The court must order terms and conditions of probation “as the court deems necessary for the physical, mental, or moral well-being and behavior of the juvenile.” Id. In cases involving adult criminal defendants, it is unclear whether consent to warrantless searches may properly be made a condition of probation. Compare People v Hellenthal, 186 Mich App 484, 486 (1990) (such a condition is proper if reasonably tailored to the defendant’s rehabilitation) and People v Peterson, 62 Mich App 258 (1975) (such a condition is improper).

**Strip and body cavity searches.** MCL 764.25a provides rules governing strip searches of juveniles and adult prisoners charged with misdemeanor offenses and civil infractions. MCL 764.25a(1)–(3) contain the general requirements for such searches:

“(1) As used in this section, “strip search” means a search which requires a person to remove his or her clothing to expose underclothing, breasts, buttocks, or genitalia.
“(2) A person arrested or detained for a misdemeanor offense, or an offense which is punishable only by a civil fine shall not be strip searched unless both of the following occur:

(a) The person arrested is being lodged into a detention facility by order of a court or there is reasonable cause to believe that the person is concealing a weapon, a controlled substance, or evidence of a crime.

(b) The strip search is conducted by a person who has obtained prior written authorization from the chief law enforcement officer of the law enforcement agency conducting the strip search, or from that officer’s designee; or if the strip search is conducted upon a minor in a juvenile detention facility which is not operated by a law enforcement agency, the strip search is conducted by a person who has obtained prior written authorization from the chief administrative officer of that facility, or from that officer’s designee.

“(3) A strip search conducted under this section shall be performed by a person of the same sex as the person being searched and shall be performed in a place that prevents the search from being observed by a person not conducting or necessary to assist with the search. A law enforcement officer who assists in the strip search shall be of the same sex as the person being searched.”

By its terms, MCL 764.25a does not apply to persons arrested or detained for felony offenses. Furthermore, MCL 764.25a(7) provides that the statute does not apply if a person is being lodged or detained pursuant to a court order:

“(7) This section shall not apply to the strip search of a person lodged in a detention facility by an order of a court or in a state correctional facility housing prisoners under the jurisdiction of the department of corrections, including a youth correctional facility operated by the department of corrections or a private vendor under section 20g of 1953 PA 232, MCL 791.220g.”

For purposes of MCL 764.25a(7), the court order authorizing detention must be entered upon the record of the court. In criminal cases, an arrest warrant is not “an order of a court authorizing continued custody or detention of a person in a detention facility.” OAG, 1985, No 6,298, p 89 (June 6, 1985). See also MCL 712A.2c and MCR 3.933(B), which allow the court to issue
an order to apprehend a juvenile. “Detention in a facility subsequent to an arrest, but prior to an appearance before a magistrate, is not pursuant to an order of a court requiring the lodging of the person in a detention facility.” Id. If a person is lodged in a detention facility pursuant to court order following a preliminary hearing or arraignment, a strip search may be conducted without regard to the requirements of MCL 764.25a.

A body cavity search may only be conducted pursuant to a valid search warrant, unless the person to be searched is serving a sentence for a criminal offense in a detention or correctional facility under the jurisdiction of the Department of Corrections. See MCL 764.25b for the requirements for body cavity searches.

Any strip or body cavity search must comply with the Fourth Amendment’s “reasonableness” requirement. See Bell v Wolfish, 441 US 520, 559 (1979) (setting forth the balancing test to determine reasonableness, and upholding the practice of routine strip searches following contact visitation).

7.7 Order for Examination of Juvenile

MCL 712A.12 states that “[a]fter a petition shall have been filed and after such further investigation as the court may direct, in the course of which the court may order the child to be examined by a physician, dentist, psychologist or psychiatrist,” the court may dismiss the petition or issue a summons to the persons who have custody or control of the child. See also MCR 3.923(B), which allows the court to order an evaluation or examination of a minor or parent.

MCL 722.124a(1) allows a court or an agency to consent to emergency medical or surgical treatment in the absence of parental consent if the child is placed outside the home. Psychological evaluations have been defined by the Court of Appeals as routine care for emotionally disturbed children in temporary custody. In re Trowbridge, 155 Mich App 785, 787–88 (1986).

7.8 Evaluating a Juvenile’s Competence

In In re Carey, 241 Mich App 222, 223–25 (2000), the prosecuting attorney filed a motion requesting that the juvenile be evaluated for both competency and criminal responsibility. The Institute for Forensic Psychiatry apparently refused to conduct the evaluations, and the juvenile was evaluated by two psychologists in private practice. Although the psychologists testified regarding the juvenile’s level of intellectual functioning, they were not allowed to testify regarding his competency to “stand trial.” The trial court ruled that a juvenile’s competency was irrelevant to the adjudicative phase of a delinquency proceeding. The Court of Appeals reversed, concluding:
“(1) juveniles have a due process right not to be subjected to the adjudicative phase of juvenile proceedings while incompetent, and (2) although the Mental Health Code provisions for competency determinations by their terms apply only to defendants in criminal proceedings, they can serve as a guide for juvenile competency determinations.”

The Court of Appeals noted that a juvenile’s right to counsel “means little if the juvenile is unaware of the proceedings or unable to communicate with counsel because of a psychological or developmental disability.” Id. at 230. With regard to the procedures to be used, the Court first concluded that the court rule governing competency determinations of adults, MCR 6.125, does not apply to juvenile proceedings. Id. at 231. The provisions of the Mental Health Code governing competency determinations, MCL 330.2020 et seq., should be followed where possible. Although by statute the Institute for Forensic Psychiatry may not perform evaluations of juvenile respondents, other provisions of the Mental Health Code should be applied to the extent possible. Id. at 233, n 3. “[I]n the absence of other applicable rules or statutes, . . . provisions [of the Mental Health Code] should be used to assure that the due process rights of a juvenile are protected.” Id. at 234. Furthermore, competency evaluations should be made using juvenile rather than adult norms. Because a juvenile may not understand court proceedings as well as an adult due to age and lack of experience, a juvenile need not be found incompetent merely because he or she does not understand the proceedings as well as an adult would. Id.

In light of the Court of Appeals’ opinion in Carey, the following summary of the provisions of the Mental Health Code applicable to competency determinations is provided for guidance.* The summary also includes case law interpreting the rules applicable to adult competency determinations.

**Moving party and burden of proof.** The issue of a criminal defendant’s competence to stand trial is usually raised by the defendant, but it may be raised by the prosecuting attorney or by the court. MCL 330.2024. A criminal defendant is presumed competent to stand trial, MCL 330.2020(1); he or she must prove incompetence by a preponderance of the evidence. See Medina v California, 505 US 437, 449 (1992) (it does not violate the federal constitution for a state to presume that the defendant is competent and to require him or her to prove incompetence by a preponderance of the evidence).

A criminal defendant must be competent to stand trial or plead guilty. MCL 330.2022(1) and People v Kline, 113 Mich App 733, 738 (1982). The standard of competence to stand trial is stated in MCL 330.2020(1):

“[A defendant] shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the
proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during trial.”


**Raising the issue of competence.** A criminal defendant’s competence to stand trial or participate in other criminal proceedings may be raised by a party or the court at any time during the proceedings. MCL 330.2024. When facts are brought to the trial court’s attention that raise a *bona fide* doubt about a defendant’s competency to stand trial, the trial court has a duty to raise the issue *sua sponte* even though defense counsel does not request a competency examination. *People v Harris* 185 Mich App 100, 102–03 (1990). Otherwise, the defendant must make a sufficient showing in order to be entitled to an examination. *People v Stripling*, 70 Mich App 271, 276 (1976).

In *Drope v Missouri*, 420 US 162, 177 n 13, 180 (1975), the United States Supreme Court set forth relevant considerations to determine when the issue of a criminal defendant’s competency should be explored further. Those considerations are 1) an expressed doubt by counsel concerning a client’s competency although a court is not required to accept such representations without question, 2) evidence of a defendant’s irrational behavior and demeanor at trial, and 3) prior medical opinion regarding the defendant’s competency to stand trial. See also *Owens v Sowder*, 661 F2d 584, 586–87 (CA 6, 1981) (defense counsel did not document prior psychiatric problems and defendant’s behavior did not suggest need for examination). In *People v Whyte*, 165 Mich App 409, 413 (1988), the Court of Appeals held that the requisite showing that the defendant may have been incompetent to plead guilty was made when the presentence investigation reports containing the defendant’s extensive history of mental illness were disclosed to the trial court.

**Ordering an examination.** The court must order a criminal defendant to undergo a forensic examination upon a showing that the defendant may be incompetent to stand trial. MCL 330.2026(1). For adult criminal defendants, the examination must be conducted by personnel of the Center for Forensic Psychiatry or of another facility officially certified by the Department of Mental Health to perform examinations relating to the issue of incompetence to stand trial. MCL 330.2026(1). As noted in *Carey, supra* at 233, n 3, the Center for Forensic Psychiatry may not perform competency examinations of juveniles. In the absence of another certified facility, a court may utilize a local psychiatrist or psychologist who is qualified to conduct such examinations.
A forensic examination must be performed and a written report submitted to the court and parties within 60 days after the examination is ordered. MCL 330.2028(1). Pursuant to MCL 330.2028(2)(a)–(d), the report must contain the following elements:

“(a) The clinical findings of the center or other facility.

“(b) The facts, in reasonable detail, upon which the findings are based, and upon request of the court, defense, or prosecution additional facts germane to the findings.

“(c) The opinion of the center or other facility on the issue of the incompetence of the defendant to stand trial.

“(d) If the opinion is that the defendant is incompetent to stand trial, the opinion of the center or other facility on the likelihood of the defendant attaining competence to stand trial, if provided a course of treatment, within [15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less].”

Conducting a hearing. If a forensic examination is conducted, a competency hearing must be held within five days of the court’s receipt of the report of the forensic examination or on conclusion of the proceedings, whichever is sooner. The court may grant an adjournment upon a showing of good cause. MCL 330.2030(1). Although MCL 330.2030(1) explicitly requires the court to conduct a hearing upon receiving the report of the forensic examination, case law suggests that a hearing need be held only if there is evidence of incompetence and a request by the defendant. “If there be evidence of incompetence, the issue must be decided [at a hearing].” People v Blocker, 393 Mich 501, 510 (1975) (emphasis in original). In Blocker, an independent psychiatric examination of the defendant was conducted and a report returned, but the defendant did not request a hearing following the examination or present evidence of incompetence at trial. The Supreme Court held that the trial court did not err in failing to decide the issue at a formal hearing. Id. However, there is also authority for the proposition that the defendant is entitled to a hearing on statutory and constitutional grounds. See Id. at 519 (Swainson, J, dissenting), and People v Lucas, 393 Mich 522, 527 (1975). The trial court may base its decision solely on the report only if the parties choose not to present other evidence. People v Livingston, 57 Mich App 726, 735–36 (1975) (“[t]he parties must be expressly made aware that a competency hearing . . . is being held, that they have the right to present evidence, and that failure to exercise that right will result in a determination of competency . . .”).

A criminal defendant must appear at the hearing. MCL 330.2030(1). See also People v Thompson, 52 Mich App 262, 264–66 (1974) (because the defendant has a constitutional right to be present at the hearing, defense
counsel may not waive that right by failing to contest the issue of the defendant’s competence).

The Michigan Rules of Evidence apply during the hearing. MRE 1101(a). The court must determine the issue of competency based on evidence admitted at the hearing. Absent objection, the written forensic examination report is admissible at the hearing but is not admissible for any other purpose. The defense, prosecution, and court may present additional evidence at the hearing. MCL 330.2030(2) and (3).

If the court finds that the defendant is incompetent to stand trial and that there is not a substantial probability that the defendant, if provided a course of treatment, will attain competence to stand trial within 15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less, the court may order the prosecuting attorney to petition for the involuntary civil commitment of the defendant. MCL 330.2031.* If the court finds that there is a substantial probability that the defendant will attain competence to stand trial within these time limits, the court must order the defendant to undergo an appropriate course of treatment. MCL 330.2032(1).

**Redetermining competence.** The court must conduct a hearing to redetermine the competence of a defendant at least every 90 days. MCL 330.2040. The person supervising the defendant’s treatment must submit a report to the court, parties, and Center for Forensic Psychiatry every 90 days, whenever he or she believes that the defendant is competent to stand trial, or whenever he or she believes that there is a substantial probability that the defendant, with treatment, will attain competence to stand trial within 15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less. MCL 330.2038(1)(a)–(c).

**Dismissing charges against a criminal defendant.** Pursuant to MCL 330.2044(1)(a)–(b), the court must dismiss the charges against a criminal defendant in the following cases:

>“(a) When the prosecutor notifies the court of his intention not to prosecute the case; or

>“(b) Fifteen months after the date on which the defendant was originally determined incompetent to stand trial.”

The 15-month period starts when the defendant is adjudicated incompetent, not when the defendant is committed for a diagnostic examination. *People v Davis*, 123 Mich App 553, 557 (1983). When an accused has been adjudicated incompetent for a total period of more than 15 months, regardless of whether the period was continuous, the charges against the defendant must be dismissed. *People v Miller*, 440 Mich 631, 633 (1992). However, if the defendant was charged with a life offense, the prosecuting attorney may petition at any time to refile the charge. For other offenses, the
prosecuting attorney may petition to refile the charge within the period of time equal to one-third of the maximum possible sentence for the offense. MCL 330.2044(3). The court must grant the prosecuting attorney permission to refile charges if after a hearing it determines that the defendant is competent to stand trial. MCL 330.2044(4).

If the defendant is to be discharged or released, the person supervising the defendant’s treatment may file a petition requesting the involuntary civil commitment of the defendant. MCL 330.2034(3).*

Maintaining a criminal defendant’s competence through the use of psychotropic drugs. MCL 330.2020(2) states:

“A defendant shall not be determined incompetent to stand trial because psychotropic drugs or other medication have been or are being administered under proper medical direction, and even though without such medication the defendant might be incompetent to stand trial. However, when the defendant is receiving such medication, the court may, prior to making its determination on the issue of incompetence to stand trial, require the filing of a statement by a treating physician that such medication will not adversely affect the defendant’s understanding of the proceedings or his ability to assist in his defense.”

In order to maintain the competence of the defendant, the trial court may order that defendant continue to take such medication during trial. MCL 330.2030(4). In People v Hardesty, 139 Mich App 124, 137 (1984), the Court of Appeals first held that MCL 330.2020(2) is constitutional. In addition, the Court held that the issue of whether MCL 330.2030(4) improperly interferes with a defendant’s right to present an insanity defense must be decided on a case-by-case basis. Id. at 145. A trial court must “balance the state’s interest in safety and trial continuity . . . . with the defendant’s interest in presenting probative evidence of insanity through his manner and demeanor on the witness stand . . . .” Id.

7.9 Raising Alibi or Insanity Defenses

MCR 3.922(B)(1)–(3) provide procedural requirements for raising an alibi, insanity, or diminished capacity defense in juvenile delinquency proceedings. These rules provide that:

“(1) Within 21 days after the juvenile has been given notice of the date of trial, but no later than 7 days before the trial date, the juvenile or the juvenile’s attorney must file a written notice with the court and prosecuting attorney of the intent to rely on a defense of alibi or
insanity. The notice shall include a list of the names and addresses of defense witnesses.

“(2) Within 7 days after receipt of notice, but no later than 2 days before the trial date, the prosecutor shall provide written notice to the court and defense of an intent to offer rebuttal to the above-listed defenses. The notice shall include names and addresses of rebuttal witnesses.

“(3) Failure to comply with subrules (1) and (2) may result in the sanctions set forth in MCL 768.21.”

Michigan’s so-called diminished capacity defense, which allows evidence of mental incapacity short of insanity to be used to avoid or reduce criminal responsibility by negating specific intent, has been abrogated by the Supreme Court in People v Carpenter, 464 Mich 223 (2001). Although the defense was once part of Michigan’s comprehensive statutory framework governing the insanity defense, the Supreme Court in Carpenter held that the Legislature demonstrated its policy choice by eliminating diminished capacity as a defense and by creating an “all or nothing insanity defense,” in which a “mentally ill” or “mentally retarded” criminal defendant can only be legally insane or guilty but mentally ill:

“We conclude that, through this [comprehensive statutory] framework, the Legislature has created an all or nothing insanity defense. Central to our holding is the fact that the Legislature has already contemplated and addressed situations involving persons who are mentally ill or retarded yet not legally insane. As noted above, such a person may be found ‘guilty but mentally ill’ and must be sentenced in the same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment. MCL 768.36(3).” Id. at 237.

MCL 768.36(1) allows the trier of fact to return a verdict of “guilty but mentally ill” if the trier of fact finds 1) that a criminal defendant is guilty of an offense, 2) the defendant has proven by a preponderance of the evidence that he or she was mentally ill when the offense was committed, but 3) the defendant has not established by a preponderance of the evidence that he or she was legally insane when the offense was committed. In contrast to a “not guilty by reason of insanity” verdict, a “guilty but mentally ill” verdict does not absolve a defendant of criminal responsibility; instead, it affords the defendant psychiatric treatment as part of his or her sentence. MCL 768.36(3)–(4). It is unclear whether Michigan’s statutory “guilty but mentally ill” verdict applies in juvenile delinquency cases. See In re Ricks, 167 Mich App 285, 293–94 (1988) (noting that in a delinquency case, the verdict is either that the juvenile does or does not come within the court’s
jurisdiction), MCR 3.942(D) (verdict in delinquency proceeding must be either guilty or not guilty of alleged or lesser-included offense), and MCL 712A.18(1) (after the trier of fact determines that a juvenile comes within the court’s jurisdiction, the court may enter an appropriate order of disposition based upon the best interests of the juvenile and public).

A. Alibi

According to People v Erb, 48 Mich App 622, 630 (1973), a jury must be instructed that the alibi defense provides two avenues of relief:

“First, if the alibi is established, a perfect defense has been shown and the defendant should accordingly be acquitted. Alternatively and perhaps more importantly, the instruction must clearly indicate that if any reasonable doubt exists as to the presence of the defendant at the scene of the crime [if such presence is necessary to commit the crime] then, also, the defendant should be acquitted.” See also People v Burden, 395 Mich. 462, 467 (1975), which added the bracketed language above into its jury instruction.

While the prosecutor has to prove beyond a reasonable doubt that the defendant was at the crime scene at the time of the crime, the defendant has the “burden of producing at least some evidence in support of his claim of alibi, possibly sufficient evidence to raise a reasonable doubt.” People v Fiorini, 85 Mich App 226, 229-230 (1985). See also People v McCoy, 392 Mich 231, 235 (1974) (a defendant need not prove an alibi by preponderance of the evidence, but must only raise a reasonable doubt concerning the defendant’s presence at the crime scene). A general denial of charges does not constitute an alibi defense, although a defendant’s uncorroborated testimony that he or she was elsewhere than at the crime scene entitles the defendant to a jury instruction. People v McGinnis, 402 Mich 343, 346-347 (1978).

B. Insanity or Mental Illness Negating an Element of the Alleged Offense

Insanity defense. MCL 768.21a(1) governs the insanity defense:

“It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in [MCL 330.1400a] or as a result of being mentally retarded as defined in [MCL 330.1500], that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of
his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.” [Emphasis added.]

Note: MCL 768.21a(1) references MCL 330.1400a for the definition of “mental illness.” However, MCL 330.1400a was repealed by 1995 PA 290. For purposes of the insanity statute, the definition in MCL 330.1400(g) should be used. People v Mette, 243 Mich App 318, 325 (2000). MCL 768.21a(1) also references MCL 330.1500 for the definition of “mentally retarded.” However, MCL 330.1500 no longer contains a definition of “mentally retarded.” Substantially similar definitions of “mentally retarded” appear in the Mental Health Code at MCL 330.2001a(6), and in the Penal Code at MCL 750.520a(i).

“Mental illness,” as defined in MCL 330.1400(g), means:

“a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”

“Mentally retarded,” as defined in MCL 330.2001a(6), means:*

“significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior.”

The defendant has to prove the affirmative defense of insanity by a preponderance of evidence. MCL 768.21a(3).

Under the insanity statute, “[a]n individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.” MCL 768.21a(2).

The exception above does not apply if the voluntary and continued use of a mind-altering substance results in a settled condition of insanity before, during, or after the alleged offense. People v Caulley, 197 Mich App 177, 187 n 3 (1992). See also People v Conrad, 148 Mich App 433, 438 (1986) lv den 424 Mich 908 (1986) (the insanity statute “does not automatically preclude for all time the assertion of an insanity defense if a person is rendered insane by the voluntary ingestion of a drug” [emphasis in original]). In Conrad, the defendant was found guilty but mentally ill of second-degree murder for killing his younger brother. At trial, he interposed

*A substantially similar definition also appears in MCL 750.520a(i) of the Penal Code.
an insanity defense based upon his voluntary use of phencyclidine (PCP) four or five times in the two weeks preceding the murder. The trial court rejected defendant’s insanity defense, claiming that defendant’s use of PCP was voluntary and thus prohibited him from asserting an insanity defense under MCL 768.21a(2). On appeal, the Court of Appeals held that defendant was denied a fair trial when the trial court rejected his insanity defense, stating “[I]f a defendant is actually and demonstrably rendered insane by the ingestion of mind-altering substances, an insanity defense is not absolutely precluded.” Conrad, supra at 441.

Ordering the examination. If a juvenile is raising a defense of insanity or mental illness negating an element of the alleged offense, upon receipt of the required notice, the trial court must order the juvenile to undergo an examination for a period not to exceed 60 days by the Center for Forensic Psychiatry or other qualified personnel. MCL 768.20a(2). See also In re Ricks, 167 Mich App 285, 290–91 (1988) (juvenile court did not err by ordering juvenile’s examination to be conducted at the Wayne County Clinic for Child Study rather than the Center for Forensic Psychiatry). Both parties also may obtain independent psychiatric examinations. MCL 768.20a(3). See, however, People v Smith, 103 Mich App 209, 210-211 (1981) (the trial court properly denied defendant’s request for an independent examination made on the day of trial.) An indigent defendant is entitled to one independent examination at public expense. Id. and Ake v Oklahoma, 470 US 68, 78-79, 83 (1985).

After the psychiatric examination is conducted, the examiner must prepare a written report and submit it to the prosecuting attorney and defense counsel. MCL 768.20a(6). It must contain the following information:

“(a) The clinical findings of the center [for forensic psychiatry], the qualified personnel, or any independent examiner.

“(b) The facts, in reasonable detail, upon which the findings were based.

“(c) The opinion of the center or qualified personnel, and the independent examiner on the issue of the defendant’s insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed.” MCL 768.20a(6)(a)-(c).

Within ten days of receipt of the report from the forensic center or the prosecutor’s independent examiner, whichever occurs later, but no less than five days before trial, or at such other time as the court directs, the prosecutor must file and serve notice of rebuttal, including witness names. MCL 768.20a(7).
A juvenile’s statements made during an examination are privileged.
MCL 768.20a(5) provides:

“Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense.”

C. Exclusion of Evidence for Failure to Meet Notice Requirements

MCL 768.21(1)–(2) allow the court to exclude evidence offered by the defendant or prosecuting attorney for the purpose of establishing or rebutting an alibi or insanity defense. If the required notice is not filed and served at all, the court must exclude the proffered evidence. In addition, if the notice given by the defendant or the prosecuting attorney does not state, as particularly as is known to the party, the name of a witness to be called to establish or rebut the defense, the court must exclude the testimony of the witness.

Alibi. Despite the language in MCL 768.21(1)–(2) that suggests that exclusion is mandatory if a proper notice is not filed, the trial court retains discretion to fix the timeliness of a notice. People v Travis, 443 Mich 668, 679 (1993). In exercising its discretion, a court should consider:

- the amount of prejudice resulting from the failure to disclose;
- the reason for nondisclosure;
- the extent to which the harm caused by nondisclosure was mitigated by subsequent events;
- the weight of the properly admitted evidence supporting defendant’s guilt; and
- other relevant factors arising out of the circumstances of the case. Id. at 681–83, citing United States v Myers, 550 F2d 1036, 1043 (CA 5, 1977).

Insanity. Strict compliance with the statutory notice requirements regarding an insanity defense may not be necessary, where the parties have actual notice of witnesses who may be called and no surprise will result from the noncompliance. People v Blue, 428 Mich 684, 690 (1987), People v Stinson, 113 Mich App 719, 723–26 (1982) (the trial court properly ordered a one-week adjournment of trial to allow the prosecutor to file a notice of rebuttal, where defense counsel was aware of the prosecutor’s intent to call an expert witness), and People v Jurkiewicz, 112 Mich App 415, 417 (1982)
(prosecutor’s failure to file notice of rebuttal or request permission to file a late notice of rebuttal required exclusion of witness’s testimony).

**Section 7.10** Demand for Jury Trial or Trial Before a Judge

**Demand or waiver of trial by jury.** MCR 3.911(A) states that “[t]he right to a jury in a juvenile proceeding exists only at the trial.” MCR 3.911(B) provides that a party may demand a jury trial by filing a written demand with the court. The demand must be filed within 14 days after the court gives notice of the right to a jury trial or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later. The demand must be filed no later than 21 days before trial, but the court may excuse a late filing in the interest of justice. *Id.* MCL 712A.17(2) allows an interested person to demand a jury trial, or the court, on its own motion, to order a jury trial.

Neither the Juvenile Code nor the applicable court rules sets forth the procedure to waive the right to jury trial or withdraw a demand for jury trial. In *In re Whittaker*, 239 Mich App 26, 29 (1999), the Court of Appeals held that MCL 763.3, which governs waiver of the right to jury trial in criminal cases, does not apply to delinquency cases. The Court also noted that because juveniles do not have a constitutional right to jury trial in delinquency proceedings, the “waiver process does not implicate constitutional concerns.” *Id.* at 28, citing *McKeiver v Pennsylvania*, 403 US 528, 533 (1971). The Court in *Whittaker* concluded that the applicable due-process standard of “fundamental fairness” was met where respondent’s attorney stated in open court that respondent’s attorney had spoken to the respondent’s mother, and that they had decided to waive the right to jury trial. Neither the prosecutor nor the court objected. *Id.* at 29–30.

**Note:** In *Whittaker*, the Court of Appeals did not address the applicability of MCR 1.104 to the case. MCR 3.901(A)(1) states in part that “[t]he rules in . . . subchapter 1.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.” MCR 1.104 states that “[r]ules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court.” As noted above, no court rule applicable to juvenile delinquency proceedings governs waiver of the right to jury trial or withdrawal of a demand for jury trial. Thus, MCL 763.3 arguably applies to delinquency proceedings. That statute states:

“(1) In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury. Except in cases of minor offenses, the waiver and election by a defendant shall be in writing
signed by the defendant and filed in the case and made a part of the record. The waiver and election shall be entitled in the court and case, and in substance as follows: ‘I, ______________________, defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury.’

_______________________
Signature of defendant.

“(2) Except in cases of minor offenses, the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel.

**Demand for a judge to preside at a hearing.** Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines “formal calendar” as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding. A judge must preside at a jury trial. MCR 3.912(A)(1). The right to have a judge sit as factfinder is not absolute, however. A party who fails to make a timely demand for a judge to serve as factfinder at a nonjury trial may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived.

MCR 3.912(B) states that a party may demand that a judge rather than a referee serve as factfinder at a nonjury trial by filing a written demand with the court. The demand must be filed within 14 days after the court has given the parties notice of their right to have a judge preside, or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later. The demand must be made no later than 21 days before trial, but the court may excuse a late filing in the interest of justice.

Whenever practicable, two or more matters within the Family Division’s jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023(1).

The disqualification of a judge is governed by MCR 2.003. MCR 3.912(D).

**Referees.** MCR 3.913(B) states that unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. Thus, if a referee tries a case, that same referee may conduct dispositional and dispositional review hearings even if the juvenile later requests that a judge preside at a hearing.
MCR 3.913(A)(2) and MCL 712A.10 specify the requisite qualifications of a referee. If a juvenile is charged with an offense that would be a criminal offense if committed by an adult, only referees who are licensed attorneys may conduct delinquency proceedings other than preliminary inquiries or preliminary hearings. The sole exception is for probation officers or county agents who were designated to act as referees by a probate judge prior to January 1, 1988, and were acting as referees at that time. MCL 712A.10(2).*

**7.11 “Speedy Trial” Requirements**

**Delinquency cases.** MCR 3.942(A) contains the “speedy trial” requirements for delinquency cases. That rule states:

“In all cases the trial must be held within 6 months after the filing of the petition, unless adjourned for good cause. If the juvenile is detained, the trial has not started within 63 days after the juvenile is taken into custody, and the delay in starting the trial is not attributable to the defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter.”

There is no sanction stated in MCR 3.942(A) for violation of the 6-month rule.

**Adjournments and continuances.** “The power in a criminal case to grant or deny a continuance is within the sound discretion of the trial court. *People v Dowell*, 199 Mich App 554, 555 (1993) (trial court did not abuse its discretion in denying prosecutor’s seventh request for continuance).

In criminal cases, four factors are important for determining whether a defendant is entitled to an adjournment:

- Is the defendant requesting the adjournment so that he or she may assert a constitutional right (e.g., the right to be represented by competent counsel)?
- Does the defendant have legitimate grounds for asserting this right (e.g., an irreconcilable *bona fide* dispute with counsel over whether to call alibi witnesses)?
- Is the defendant guilty of negligence for not having asserted this right earlier?
MCL 768.2 states the following regarding stipulations for adjournments, continuances, or delays:

“[N]o court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his [or her] discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done.” Id.

“Speedy trial” requirements when a motion for “traditional waiver” has been denied. In cases where the prosecutor has sought waiver of the court’s jurisdiction and the motion has been denied, MCR 3.950(F) states that “[i]f the juvenile is detained and the trial of the matter in the family division has not started within 28 days after entry of the order denying the waiver motion, and the delay is not attributable to the defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter.”

Motions for expedited trial on behalf of a victim. MCL 780.786a(1)(a)–(d) state that a “speedy trial” may be scheduled if the prosecuting attorney declares the victim to be one of the following:

“(a) A victim of child abuse, including sexual abuse or any other assaultive crime.

“(b) A victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit criminal sexual conduct involving penetration or to commit criminal sexual conduct in the second degree.

“(c) Sixty-five years of age or older.

“(d) An individual with a disability that inhibits the individual’s ability to attend court or participate in the proceedings.”

Upon motion of the prosecuting attorney for a “speedy trial” in a delinquency case involving any of the victims described above, the court must set a hearing date on the motion within 14 days after it is filed. If the motion is granted, the trial shall not be scheduled earlier than 21 days from the date of the hearing. MCL 780.786a(2).
7.12 Closing Delinquency Proceedings to the Public

MCL 3.925(A)(1) provides that, as a general rule, all juvenile court proceedings on the formal calendar and all preliminary hearings shall be open to the public. However, MCL 712A.17(7) and MCR 3.925(A)(2) allow the court to close proceedings to the general public under limited circumstances. The court, on motion of a party or a victim,* may close proceedings to the general public during the testimony of a juvenile witness or a victim to protect the welfare of the juvenile witness or victim. In making such a decision, the court must consider:

- the age and maturity of the juvenile witness or the victim;
- the nature of the proceedings; and
- the desire of the juvenile witness, of the juvenile witness’ family or guardian or legal custodian, or of the victim to have the testimony taken in a room closed to the public.

For purposes of MCL 712A.17(7) a “juvenile witness” does not include the juvenile against whom the proceeding is brought for a criminal offense. MCL 712A.17(8) and MCR 3.925(A)(2).

If a hearing is closed under MCL 712A.17(7), the records of that hearing shall only be open by order of the court to persons having a legitimate interest. MCL 712A.28(2).*

7.13 Alternative Procedures to Obtain Testimony of Victim

A. Victims and Witnesses (Regardless of Age or Disability)

Under MRE 611(a), a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. MRE 611(a) provides:

“(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” [Emphasis added.]

Unlike the statute discussed in the next section, MRE 611(a) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Moreover, MRE 611(a) contains no restrictions as to the specific type of procedures or protections that may be employed to
protect victims and witnesses. Some of these procedures may include the protections discussed in the next section, such as allowing the use of dolls or mannequins, providing a support person, rearranging the courtroom, shielding or screening the witness from the defendant, and allowing close-circuit television or videotaped depositions in lieu of live, in-court testimony.

In juvenile delinquency proceedings, the court may appoint an impartial person to address questions to a child witness as the court directs. MCR 3.923(F).

B. Protections for Child or Developmentally Disabled Witnesses

MCL 712A.17b(18) provides that the procedures in MCL 712A.17b are in addition to other protections or procedures afforded to a witness by law or court rule.

Pursuant to MCL 712A.17b(2)(a), the alternative procedures explained in this section may only be used when one of the following offenses is alleged:

- child abuse, MCL 750.136b;
- sexually abusive commercial activity involving children, MCL 750.145c;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e; and
- assault with intent to commit criminal sexual conduct, MCL 750.520g.

In cases involving the foregoing offenses, special statutory protections apply to victim-witnesses who are either:

- under 16 years of age, or
- 16 years of age or older and developmentally disabled. MCL 712A.17b(1)(d).

MCL 712A.17b(1)(b) provides that “developmental disability” is defined in MCL 330.1100a(20)(a)–(b). If applied to a minor from birth to age five, “developmental disability” means a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in a developmental disability as defined below if services are not provided. MCL 330.1100a(20)(b).
If applied to an individual older than five years of age, “developmental disability” means a severe, chronic condition that meets all of the following additional conditions:

- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more of the following areas of major life activity:
  - self-care;
  - receptive and expressive language;
  - learning;
  - mobility;
  - self-direction;
  - capacity for independent living;
  - economic self-sufficiency; and
- reflects the individual’s need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated. MCL 330.1100a(20)(a)(ii)–(v).

A “developmental disability” includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, but does not include a condition attributable to a physical impairment unaccompanied by a mental impairment. MCL 712A.17b(1)(a).

If the offense and age or disability requirements of MCL 712A.17b are met, a party or the court may move to allow one or more of the following measures to protect a witness.

**Dolls or mannequins.** The witness must be permitted to use dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination. MCL 712A.17b(3).

**Support person.** MCL 712A.17b(4) provides that a child or developmentally disabled witness who is called upon to testify must be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person must name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the
proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person must be filed with the court and served upon all parties to the proceeding. The court shall rule on a motion objecting to the use of a named support person before the date on which the witness desires to use the support person.

In *People v Jehnsen*, 183 Mich App 305, 308–11 (1990), the Court of Appeals held that the trial court did not abuse its discretion by allowing the four-year-old victim’s mother to remain in the courtroom following the mother’s testimony. Although the victim’s mother engaged “in nonverbal behavior which could have communicated the mother’s judgment of the appropriate answers to questions on cross-examination,” the trial court found no correlation between the mother’s conduct and the victim’s answers. *Jehnsen, supra* at 310. See also *People v Rockey*, 237 Mich App 74, 78 (1999) (where there was no evidence of nonverbal communication between the victim and her father, the trial court did not err in allowing the seven-year-old sexual assault victim to sit on her father’s lap while testifying).

**Rearranging the courtroom.** A party may make a motion to rearrange the courtroom to protect a child or developmentally disabled victim-witness. If the court determines on the record that it is necessary to protect the welfare of the witness, the court shall order one or both of the following:

“(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent’s position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.

“(b) A questioner’s stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand.” MCL 712A.17b(15)(a)–(b).

In determining whether it is necessary to rearrange the courtroom to protect the witness, the court shall consider the following:

“(a) The age of the witness.

“(b) The nature of the offense or offenses.” MCL 712A.17b(10)(a)–(b).

**Using videotape depositions or closed-circuit television when other protections are inadequate.** The court may order a videorecorded deposition of a child or developmentally disabled victim-witness on motion
of a party or in the court’s discretion. MCL 712A.17b(16) provides that if the court finds on the record that the witness is or will be psychologically or emotionally unable to testify even with the benefit of the protections set forth above, the court must order that a videorecorded deposition of a witness be taken to be admitted at the adjudication stage instead of the live testimony of the witness. The court must find that the witness would be unable to testify truthfully and understandably in the juvenile’s presence, not that the witness would “stand mute” when questioned. See People v Pesquera, 244 Mich App 305, 311 (2001).

If the court grants the party’s motion to use a videorecorded deposition, the deposition must comply with the requirements of MCL 712A.17b(17). This provision requires that:

- the examination and cross-examination of the witness must proceed in the same manner as if the witness testified at trial; and
- the court must order that the witness, during his or her testimony, not be confronted by the respondent or defendant, but the respondent or defendant must be permitted to hear the testimony of the witness and to consult with his or her attorney.

In order to preserve a juvenile’s Sixth Amendment right to confront witnesses against him or her face-to-face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child witness who seeks to testify. See In re Gault, 387 US 1, 57 (1967) and Pesquera, supra at 309–10. In Maryland v Craig, 497 US 836, 855–56 (1990), the United States Supreme Court described the necessary findings:

“The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e.,
more than ‘mere nervousness or excitement or some reluctance to testify’ ...” (Citations omitted.)

See also In re Vanidestine, 186 Mich App 205, 209–12 (1990) (Craig applied to juvenile delinquency case).

In Michigan, in addition to the constitutional right to be present at trial and to confront witnesses, defendants in felony cases also have a statutory right to be “personally present” at trial. MCL 768.3. Similarly, juveniles have the right to be present at delinquency trials. MCR 3.942(B)(1)(a). In People v Krueger, 466 Mich 50, 53–54 (2002), the Michigan Supreme Court reversed defendant’s CSC I and attempted CSC II convictions, concluding that the trial court violated his statutory right to be “personally present” at trial under MCL 768.3. The trial court removed defendant over his objection from the courtroom and made him watch his daughter’s testimony via closed-circuit television. However, defendant was allowed to take notes while viewing the testimony and to confer with counsel during the one recess that was called. In addition, the trial court explained to the jury that defendant would not be present in the courtroom during the testimony, and that arrangements had been made so that defendant could view the testimony from another room. On appeal, defendant claimed that these procedures violated both his statutory and constitutional rights to be present at trial. The Supreme Court, after applying principles of statutory construction, which included applying the ordinary meaning of the words “personally” and “present,” held that “[g]iven these definitions, there can be no doubt that when a defendant is physically removed from the courtroom during trial, he is not personally present as required by MCL 768.3. Under the facts of this case, the statute was violated.” Krueger, supra at 53–54.

In People v Burton, 219 Mich App 278, 291 (1996), the Court of Appeals held that in extreme cases, allowing a victim-witness to testify in a criminal case via closed circuit television may not violate the defendant’s rights of confrontation even though MCL 600.2163a does not apply. Burton involved the savage sexual assault and beating of an adult victim who did not fall within the definition of “disabled” in the statute. The Court of Appeals found that where the victim is “mentally and psychologically challenged and the nature of the assault is extreme,” the state’s interest in protecting such victims may be sufficient to limit the defendant’s right to confront his accuser face-to-face. Id. at 289. The Court of Appeals also added that the state’s interest in the proper administration of justice warranted limitation of the defendant’s rights of confrontation. The trial court found that the victim would have been unable to testify in the defendant’s presence. Without use of closed-circuit television to present the victim’s testimony, the victim’s preliminary examination testimony would have been read into the record at trial, depriving the defendant of his right to cross-examine the victim. Id. The Court of Appeals concluded that the trial court properly found that use of the alternative procedure was necessary to preserve the victim’s testimony and protect her from substantial mental and emotional harm. Id. at 290–91.
C. Notice of Intent to Use Special Procedure or Admit Hearsay Statements

MCR 3.922(E) requires a party to file and serve a notice of intent to use a special procedure discussed in this section. This rule states:

(E) Notice of Intent.

“(1) Within 21 days after the parties have been given notice of the date of trial, but no later than 7 days before the trial date, the proponent must file with the court, and serve all parties, written notice of the intent to:

(a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.

(b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.

(c) use a videotape deposition as permitted by law.

. . . .

“(2) Within 7 days after receipt or notice, but no later than 2 days before the trial date, the nonproponent parties must provide written notice to the court of an intent to offer rebuttal testimony or evidence in opposition to the request and must include the identity of the witnesses to be called.

“(3) The court may shorten the time periods provided in subrule (E) if good cause is shown.

7.14 Change of Venue

In delinquency cases not involving a waiver of jurisdiction, venue is proper where the offense occurred or where the juvenile is physically present. MCL 712A.2(a) and (d) and MCR 3.926(A).

MCR 3.926(D)(1)–(2) allow for change of venue in juvenile delinquency proceedings in two circumstances:
“(1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case; or

“(2) when an impartial trial cannot be had where the case is pending.”

“All costs of the proceeding in another county are to be borne by the juvenile court ordering the change of venue.” MCR 3.926(D).

**Note:** Prior to trial, a court in a county where an offense occurred may transfer a case to the juvenile’s county of residence pursuant to MCR 3.926(B). In many jurisdictions, courts may agree that the court in the county where the offense occurred will retain jurisdiction for trial while the county of residence will pay the expenses of trial (witness fees, jury fees, appointed counsel fees, etc.).
# Chapter 8: Pleas of Admission or No Contest in Delinquency Proceedings

## 8.1 Parties’ Right to Have Judge Take Plea

MCR 3.912(B) provides that the parties have a right to a judge at a hearing on the formal calendar. The parties in a delinquency proceeding are the petitioner and juvenile. MCR 3.903(A)(18)(a). MCR 3.903(A)(10) defines formal calendar as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a

### Note on court rules

On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).

## 8.2 Prosecuting Attorney Participation

## 8.3 Advice of Right to Counsel

## 8.4 Plea Procedures

- **A. Available Pleas:**
- **B. Understanding, Voluntary, and Accurate Plea:**
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## 8.5 Special Requirements for No Contest Pleas

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delinquency proceeding. Thus, the parties have a right to have a judge conduct a plea proceeding.

Rules governing referees who conduct plea proceedings. If a party has not demanded that a judge take a juvenile’s plea, a referee may be assigned to conduct the plea proceedings. MCR 3.913(A)(1). A referee may not, however, enter an order of adjudication following plea proceedings. MCL 712A.10(1)(b) and (c) state that if a referee is to conduct a hearing, he or she must:

“(b) Administer oaths and examine witnesses.

“(c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge . . . containing a summary of the testimony and a recommendation for the court’s findings and disposition.”

“Neither the court rules nor any statute permits a hearing referee to enter an order for any purpose.” In re AMB, 248 Mich App 144, 217 (2001). A referee’s recommendation cannot be accepted without judicial examination. Id., citing Campbell v Evans, 358 Mich 128, 131 (1959).*

MCR 3.913(A)(2)(a) provides that except as otherwise provided in MCL 712A.10, only a person licensed to practice law in Michigan may serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing if the juvenile is before the court for allegedly committing an offense that would be a criminal offense if committed by an adult. Non-attorney referees may conduct plea proceedings in status offense cases.

MCL 712A.10(2) allows a probation officer or county agent who is not a licensed attorney to serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing if he or she was designated to serve as referee prior to January 1, 1988, and was acting as a referee on that date.

8.2 Prosecuting Attorney Participation in Plea Proceedings

If the court requests, the prosecuting attorney must review the petition for legal sufficiency and appear at any delinquency proceeding. MCR 3.914(A) and MCL 712A.17(4). If an offense that would be a criminal offense if committed by an adult is alleged, the prosecuting attorney must participate in every delinquency proceeding “that requires a hearing and the taking of testimony.” MCR 3.914(B)(2). MCL 712A.17(4) only requires the prosecuting attorney to appear if a criminal offense is alleged and the proceeding requires a hearing and the taking of testimony. Thus, if a status offense is alleged, the prosecuting attorney must appear at a plea hearing if the court requests; if a
criminal offense is alleged, the prosecuting attorney must appear and participate in a plea hearing.

The prosecuting attorney may be a county prosecuting attorney, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or, if an ordinance violation is alleged, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based. MCR 3.903(B)(4).

Prosecutorial charging authority and pleas. In delinquency proceedings, the court cannot accept a plea from a juvenile in confession to a lesser-included offense without the concurrence of the prosecutor. In re Wilson, 113 Mich App 113, 120–22 (1982). In Wilson, the Court of Appeals concluded that during the second phase of a “traditional waiver” hearing, the court cannot accept a plea of admission from a juvenile to a lesser-included offense, thereby assuming jurisdiction over the juvenile as a delinquent, without the concurrence of the prosecutor. The court must allow the prosecuting attorney to present evidence supporting the motion for waiver and determine whether the best interests of the juvenile and public support waiver. Id., citing Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672 (1972), and Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115 (1974) (in criminal cases, acceptance of plea to a lesser-included offense over prosecutor’s objection violates separation of powers doctrine).

8.3 Advice of Right to Counsel

If a juvenile is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). MCR 3.915(A)(1) states that this advice is required “at each stage of the proceedings on the formal calendar, including . . . plea of admission . . . .”*  

8.4 Plea Procedures

A. Available Pleas

MCR 3.941(A) allows a juvenile to offer a plea of admission or no contest to an alleged offense. That rule states:

(A) Capacity. A juvenile may offer a plea of admission or of no contest to an offense with the consent of the court. The court shall not accept a plea to an offense unless the court is satisfied that the plea is accurate, voluntary, and understanding.”
This rule explicitly states that juveniles have the capacity to enter pleas of admission or no contest. However, the rule does not provide for a juvenile to enter a plea of “guilty but mentally ill” or “not guilty by reason of insanity.” Compare MCR 6.303 and 6.304, which apply to the taking of such pleas in criminal cases.*

**Court’s discretion to accept plea.** In criminal cases, there is no constitutional right to have a guilty plea accepted by the court. *North Carolina v Alford*, 400 US 25, 34–35 (1970), citing *Lynch v Overholser*, 369 US 705, 719 (1962). Simply because a factual basis could have been inferred from the facts presented at a guilty plea hearing does not mean the court must accept the plea. The decision to accept or reject a plea is within the court’s discretion. *People v Bryant*, 129 Mich App 574, 577–78 (1983). In addition, MCL 768.35 (the “true plea doctrine”) requires a judge to refuse to accept a guilty plea, or to vacate an accepted plea, where he or she has “reason to doubt the truth of such plea.” See *People v Wolff*, 389 Mich 398, 404 (1973).

In *People v Grove*, 455 Mich 439, 464–65 (1997), the Court found no abuse of the trial court’s discretion in refusing to accept the defendant’s guilty pleas, made pursuant to a plea agreement, where the pleas were tendered after the “plea cutoff date” in a pretrial scheduling order. The trial judge may refuse to accept the defendant’s plea “pursuant to the rules,” which was interpreted to include MCR 2.401(B)(1)(b), governing pretrial scheduling orders.*

**B. Understanding, Voluntary, and Accurate Plea**

Before accepting a plea of admission or no contest, the court must personally address the juvenile and must comply with the following rules. MCR 3.941(C) and *People v Tallieu*, 132 Mich App 402, 404 (1984) (use of “guilty plea form” does not excuse judge from personally addressing the accused).

- **An Understanding Plea**

To establish that the plea is understanding, the court must tell the juvenile:

“(a) the name of the offense charged,

“(b) the possible dispositions,

“(c) that if the plea is accepted, the juvenile will not have a trial of any kind, so the juvenile gives up the rights that would be present at trial, including the right:

(i) to trial by jury,
(ii) to trial by the judge if the juvenile does not want trial by jury,

(iii) to be presumed innocent until proven guilty,

(iv) to have the petitioner or prosecutor prove guilt beyond a reasonable doubt,

(v) to have witnesses against the juvenile appear at the trial,

(vi) to question the witnesses against the juvenile,

(vii) to have the court order any witnesses for the juvenile’s defense to appear at the trial,

(viii) to remain silent and not have that silence used against the juvenile, and

(ix) to testify at trial, if the juvenile wants to testify.” MCR 3.941(C)(1)(a)–(c).

MCR 3.941(C)(1)(b) requires the court to advise a juvenile of “possible dispositions.” A court’s failure to inform a juvenile that he or she will be required to register as a sex offender upon adjudication does not require reversal. In re Lyons, unpublished memorandum opinion of the Court of Appeals, December 19, 2000 (Docket No. 217858), relying on People v Davidovich, 238 Mich App 422, 428 (1999) (the court must advise a criminal defendant of the direct consequences of a guilty plea, not collateral consequences).

To establish a sufficient factual basis in the record for a determination that a plea is understandingly made, it may be necessary to ask questions of the juvenile. For example, the court may want to inquire about the juvenile’s age, extent of education, and grades in school. If the juvenile is represented by counsel, the court may want to ask whether he or she has had an adequate opportunity to discuss the plea with his or her attorney. Also, the court may ask if the juvenile is under the influence of drugs, alcohol, or medication, which might affect his or her ability to understand the proceedings.

- **A Voluntary Plea**

To establish that the plea is voluntary, the court must:

- confirm any plea agreement* on the record, and

- ask the juvenile if any promises have been made beyond those in a plea agreement or whether anyone has threatened the juvenile. MCR 3.941(C)(2)(a)–(b).

*See Section 8.6, below, for further discussion of plea agreements.
• An Accurate Plea

To establish that a plea is accurate, the court must determine that there is support for a finding that the juvenile committed the offense. MCR 3.941(C)(3)(a)–(b) and In re Bailey, 137 Mich App 616, 623–24 (1984), citing Guilty Plea Cases, 395 Mich 96 (1975). MCR 3.941(C)(3)(a)–(b) state:

“(3) An Accurate Plea. The court may not accept a plea of admission or of no contest without establishing support for a finding that the juvenile committed the offense:

(a) either by questioning the juvenile or by other means when the plea is a plea of admission, or

(b) by means other than questioning the juvenile when the juvenile pleads no contest. The court shall also state why a plea of no contest is appropriate.”

To establish factual support for a finding that the accused committed the offense, a court may draw inculpatory inferences from the facts presented, even though exculpatory inferences could also be drawn from those facts. People v Eloby (After Remand), 215 Mich App 472, 477–78 (1996).

C. Support for Plea

The court must also determine whether the juvenile’s parent, guardian, legal custodian, or guardian ad litem supports the juvenile’s plea. MCR 3.941(C)(4) states as follows:

“The court shall inquire of the parent, guardian, legal custodian, or guardian ad litem, if present, whether there is any reason why the court should not accept the plea tendered by the juvenile.”

8.5 Special Requirements for No Contest Pleas

Pleas of no contest must be supported by a sufficient factual basis. Because MCR 3.941(C)(3)(b) requires that means other than questioning the juvenile must be used, resort to a police report, transcripts, or other documents, or an offer of proof by the prosecutor seems justified. The court should get the
agreement of defense counsel if something other than actual testimony is used.

In addition, the court must state why a no-contest plea is appropriate. A number of appropriate reasons to allow acceptance of no-contest pleas have been recognized in criminal cases, including:

- reluctance of the defendant to relate details of a particularly sordid crime;
- severe intoxication impairing the defendant’s memory of details of the crime;
- commission of so many crimes that the defendant couldn’t remember which was which; and
- minimizing civil liability.

Guilty Plea Cases, 395 Mich 96, 134 (1975). The ultimate test of whether a no-contest plea is appropriate is whether “the interest of the defendant and the proper administration of justice do not require interrogation of the defendant.” Id. at 132–33. The court may also wish to consider the treatment implications of a no-contest plea. Effective treatment may depend upon the perpetrator’s willingness to admit that he or she committed the offense. If the respondent is unwilling to make this admission in court, he or she may also be reluctant to make an admission in therapy.

When a no-contest plea is offered to a specific intent offense because a criminal defendant was too intoxicated to remember the events surrounding the offense, the prosecution must offer evidence refuting the intoxication defense. Without any refutation, the specific intent element is without a sufficient factual basis. People v Polk, 123 Mich App 737, 740–41 (1983).

8.6 Plea Agreements

If there is any plea agreement, the court must confirm the agreement on the record, and the court must ask the juvenile if any promises have been made beyond those in the agreement or whether anyone has threatened the juvenile. MCR 3.941(C)(2)(a)–(b).

“Charge bargaining” and “sentence bargaining.” In criminal cases, plea agreements between a prosecuting attorney and a defendant may be limited to agreement about the offense to which defendant will plead. Plea agreements may also contain terms that “provide for the defendant’s plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation.” MCR 6.302(C)(3). If the prosecutor and defendant agree that the defendant will plead guilty to an offense but the agreement does not address the sentence to be imposed upon the defendant, the court has limited authority to reject the plea agreement. MCR
6.302(C)(3) and Staff Comment to MCR 6.302. However, if the plea agreement contains a “specific sentence disposition” or a “prosecutorial sentence recommendation,” the court does have authority to reject both the underlying plea and the sentence agreement or recommendation. People v Grove, 455 Mich 439, 455 (1997). Although juvenile dispositions are often not limited in duration in the same manner as a criminal sentence, “sentence” or “disposition bargaining” may occur in delinquency cases.

In addition to sentence agreements and recommendations, the parties may ask the court for a preliminary sentencing evaluation. In People v Cobbs, 443 Mich 276, 283–85 (1993), the Michigan Supreme Court outlined the proper procedure in these cases:

“At the request of a party, and not on the judge’s own initiative, a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.

. . . .

“The judge’s preliminary evaluation of the case does not bind the judge’s sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources.

. . . .

[T]he victim’s right to participate must be fully recognized. Crime victims have rights provided in the constitution of this state, and implemented by a number of statutory provisions. Among the rights of a crime victim are the right of allocution at sentencing and to provide an impact statement for inclusion in the presentence report. These events will each take place if the victim wishes, and the judge’s final sentencing decision must await receipt of all the necessary information.” (Emphasis in original; footnotes omitted.)*

A presentence report is not required in juvenile delinquency cases. In re Lowe, 177 Mich App 45, 47 (1989). In many cases, however, a probation officer or caseworker submits a similar report to the judge prior to disposition.

**Fulfilling the terms of a plea agreement.** Once the court accepts a plea induced by a plea agreement, the terms of the agreement must be fulfilled.
Santobello v New York, 404 US 257, 262 (1971). In In re Robinson, 180 Mich App 454, 459 (1989), the Court of Appeals stated:

“A defendant’s rights under Santobello . . . to have the prosecutor perform his promise in a plea bargaining agreement does not inure to a defendant until after he has pled guilty or performed part of the plea agreement to his prejudice in reliance upon the agreement. . . . Santobello and its progeny do not involve court-compelled performance of a tentative agreement from which the prosecutor has withdrawn prior to judicial approval.” (Citations omitted.)

If the offender has pled guilty in reliance on a bargain with the prosecution, should the prosecution not honor the agreement, courts must specifically enforce the agreement if it can be fulfilled, or if the agreement can no longer be fulfilled, the offender must be allowed to withdraw his or her plea. Guilty Plea Cases, 395 Mich 96, 127 (1975).

8.7 Taking Pleas Under Advisement and Plea Withdrawal

MCR 3.941(D) gives the court authority to take a plea under advisement and establishes standards for withdrawal of pleas. This rule states:

“(D) Plea Withdrawal. The court may take a plea of admission or of no contest under advisement. Before the court accepts the plea, the juvenile may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the juvenile to withdraw a plea.”

Withdrawal of plea after acceptance. “[I]n order to withdraw a guilty plea before sentencing, the defendant must first establish that withdrawal of the plea is supported by reasons based on the interests of justice. If sufficient reasons are provided, the burden then shifts to the prosecution to demonstrate substantial prejudice. In the Matter of Raphael Hastie, unpublished opinion of the Court of Appeals, decided March 28, 2000 (Docket No. 213880), quoting People v Spencer, 192 Mich App 146, 151 (1991). To establish that withdrawal is in the interest of justice, the defendant must show a fair and just reason for withdrawal. Spencer, supra. Inducement of a plea by inaccurate legal advice, the defendant’s misunderstanding of the ramifications of trial, ineffective assistance of counsel, and the defendant’s inability personally to recount a sufficient basis for the plea may support a finding that withdrawal is in the interest of justice. Id. at 151–52. Concern about the potential penalty is not a sufficient basis for withdrawal of a guilty plea. People v Lafay, 182 Mich App 528, 530 (1990). The discarding of vital physical evidence or the death of a chief government witness may support a finding that the prosecutor has been
substantially prejudiced because of reliance on a plea; trial preparations and costs are also appropriate considerations in evaluating prejudice. *Spencer*, *supra* at 150–52.

If the court has not accepted a plea conditioned on the preservation of an issue for appellate review, a juvenile must move to withdraw his or her plea in the trial court to preserve an alleged error in the plea proceedings for appellate review. *In re Zelzack*, 180 Mich App 117, 126 (1989).

### 8.8 Conditional Pleas

MCR 3.941(B) allows the court to accept a plea of admission or no contest conditioned upon the preservation of an issue for appellate review. Entering an unconditional plea of admission or no-contest plea constitutes a waiver of all issues except “jurisdictional issues,” which preclude the state from ever prosecuting an offender for the offense regardless of his or her factual guilt (e.g., double jeopardy). *People v New*, 427 Mich 482, 491 (1986). Jurisdictional issues include the constitutionality of statutes and court rules applicable to juveniles. *People v Williams*, 245 Mich App 427, 430–31 (2001), and *People v Hogan*, 225 Mich App 431, 438 (1997). A conditional plea of admission under the court rules applicable to juveniles will preserve a non-jurisdictional issue for appeal. *In re Bailey*, 137 Mich App 616, 621 (1984).

### 8.9 Record of Proceedings at Plea Hearings

MCR 3.925(B) states that “[a] plea of admission or no contest, including any agreement with or objection to the plea, must be recorded.”
Chapter 9: Trials in Delinquency Cases

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In this chapter. . .

This chapter outlines the general procedural requirements for delinquency trials or “adjudicative hearings.” Section 9.1 distinguishes between delinquency adjudications and criminal convictions and contains a discussion of the common-law “infancy defense.” For discussion of demands for trial by jury or by judge, See Section 7.10.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).
9.1 Definition and Purpose of Delinquency Adjudications

MCR 3.903(A)(26) defines a “trial” in delinquency proceedings as “the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court.” To find a juvenile within the jurisdiction of the court, the factfinder must find that the juvenile has violated a criminal law or committed a civil infraction or status offense. MCL 712A.2(a)(1)–(4). See also In re Alton, 203 Mich App 405, 407 (1994) (when a criminal offense is alleged as a basis for the court’s jurisdiction, the “critical issue” is whether the juvenile violated a substantive criminal law). The verdict in a delinquency proceeding must be guilty or not guilty of the offense charged or a lesser-included offense. MCR 3.942(D).

If a minor is found not to be within the court’s jurisdiction (i.e., “not guilty” of the alleged offense), the court must dismiss the petition. If a minor is found to be within the court’s jurisdiction, the court may enter orders of disposition “that are appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained.” MCL 712A.18(1). The rehabilitative purpose of proceedings under the Juvenile Code is set forth in MCL 712A.1(3), which states:

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

The “infancy defense.” Before the advent of the juvenile court, the common law “infancy defense” was applied to minors charged with crimes. The “infancy defense” consists of three presumptions regarding minors’ capacity to form a criminal intent. If a minor is under seven years old, he or she is conclusively presumed incapable of forming a criminal intent and therefore cannot be criminally punished. If a minor is between the ages of seven and 14, a rebuttable presumption arises that the minor is incapable of forming a criminal intent. Minors over the age of 14 are conclusively presumed to have the capacity to form a criminal intent. In Allen v United States, 150 US 551, 558 (1893), the United States Supreme Court described the common law “infancy defense”:

“The rule of the common law was that one under the age of 7 years could not be guilty of felony, or punished for any capital offense, for within that age the infant was conclusively presumed to be incapable of committing the crime; and that, while between the ages of 7 and 14 the same presumption obtained, it was only prima facie, and
rebuttable. The maxim, ‘malice supplies the want of maturity of years,’ was then applied, and upon satisfactory evidence of capacity the child within these ages might be punished; but no presumption existed in favor of the accused when above 14.”

For children between the ages of seven and 14, the prosecuting attorney has the burden of producing evidence and proving that the child had the requisite capacity. The quantum of proof needed to rebut the presumption of incapacity may decline the greater the child’s age. See Adams v State, 262 A2d 69, 72 (1970). “The relevant inquiry is whether the child appreciated the quality of his or her acts at the time the act was committed.” State v TEH, 960 P2d 441, 444 (Wash App, 1998). The prosecutor may meet this burden by exploring the child’s age, experience, knowledge, and conduct. In re Gladys R, 464 P2d 127, 136 (Cal, 1970).

Capacity to form criminal intent should be distinguished from the “mens rea” or “state of mind” requirement for a given criminal offense. Capacity to form a criminal intent (i.e., to be legally responsible for an act that is criminal) is a necessary prerequisite to possessing the requisite state of mind to commit a specific criminal offense. However, at least one court has held that requiring the “state of mind” element for the charged offense to be proved beyond a reasonable doubt protects against punishing those unable to form any criminal intent, and that allowing juveniles between the ages of seven and 14 to show that they did not have the requisite state of mind to commit the charged offense satisfies the policy considerations underlying the “infancy defense.” In re Robert M, 441 NYS 2d 860 (1981).

The Michigan Supreme Court has held that a child under 7 years of age is incapable of committing a negligent act, an intentional tort, or a crime. Burhans v Witbeck, 375 Mich 253, 254–55 (1965), and Queen Ins Co v Hammond, 374 Mich 655, 657–58 (1965). However, Michigan appellate courts have not addressed the applicability of the “infancy defense” to criminal or delinquency proceedings. MCL 712A.1(2) states that “[e]xcept as otherwise provided, proceedings under this chapter are not criminal proceedings.” The exception is designated case proceedings, which are discussed in Chapters 17–19 and 23. Because designated case proceedings are criminal and may involve children under age 14, the “infancy defense” applies to those proceedings.
*In addition, a juvenile’s age and mental maturity are often taken into account when deciding whether to treat a case formally or informally. See Sections 4.4 (diversion) and 4.5 (consent calendar).

The applicability of the “infancy defense” to delinquency adjudications. Since the advent of the juvenile court, several courts have concluded that the “infancy defense” does not apply to delinquency proceedings. See Ex rel Humphrey, 201 SW 771 (Tenn, 1918) (the state’s “Juvenile Court Act” implicitly abolished the “infancy defense”) and In the Interest of MCH, 637 NW 2d 678, 679–80 (ND, 2001). This is in part due to distinctions between a “juvenile adjudication” and a criminal conviction. The purpose of a delinquency trial is to determine if a juvenile committed an act that would be a criminal offense if committed by an adult. The juvenile is not convicted of the offense itself. State v DH, 340 S2d 1163 (Fla, 1976) (distinguishing between a finding of delinquency based on an act that would be criminal if committed by an adult and a criminal conviction). More importantly, the purpose of the “infancy defense” is to avoid punishing persons who cannot appreciate the wrongfulness of their conduct. Criminal punishment is deemed ineffectual if the person punished does not understand that he or she committed a wrongful act in the first place. Because juveniles adjudicated delinquent are not punished in the same way that persons convicted of a criminal offense are punished, the rationale for the “infancy defense” may not apply in the delinquency context.* However, one may argue that delinquency proceedings have become similar to criminal proceedings and more punitive; therefore, the “infancy defense” may be properly applied in delinquency proceedings. See In re Andrew M, 398 NYS 2d 824 (1977) (because the Gault and Winship cases imposed criminal procedures upon delinquency proceedings, the “infancy defense” should apply), State v JPS, 954 P2d 984 (Wash, 1998) (describing application of a statutory presumption of incapacity of children between eight and 12 years of age), and Walkover, The infancy defense in the new juvenile court, 31 UCLA L Rev 503 (1984) (discussing how the “infancy defense” was negated by the juvenile court’s emphasis on treatment of the offender rather than punishment, but arguing that the defense should apply because delinquency proceedings have become more like criminal proceedings).

9.2 Advice of Right to Counsel and Waiver of Right to Counsel

If a juvenile charged with an offense that would be a criminal offense if committed by an adult or a status offense is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). MCR 3.915(A)(1) states that this advice is required “at each stage of the proceedings on the formal calendar, including trial. . . .”

MCL 712A.17c(3) and MCR 3.915(A)(3) set forth the required procedures for a juvenile to waive his or her right to counsel. MCL 712A.17c(3) states as follows:
“Except as otherwise provided in this subsection, in a proceeding under [MCL 712A.2(a) or (d) (criminal violations, status offenses, and violation of the “wayward minor” provisions)] the child may waive his or her right to an attorney. The waiver by a child shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child’s parent or guardian ad litem objects or if the appointment is made under [MCL 712A.17c(2)(e)*].”

MCR 3.915(A)(3) states:

“Waiver of Attorney. The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on [MCR 3.915(A)(2)(e)]. The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made.”

See also In re Bennett, 135 Mich App 559, 565 (1984) (as a best practice, the court should require the juvenile and parent, guardian, or custodian to sign a waiver of counsel form).*

MCR 3.942(B)(3) imposes additional requirements for a waiver of counsel at trial. That rule states:

“The court shall inform the juvenile of the right to the assistance of an attorney pursuant to MCR 3.915 unless an attorney appears representing the juvenile. If the juvenile requests to proceed without the assistance of an attorney, the court must advise the juvenile of the dangers and disadvantages of self-representation and make sure the juvenile is literate and competent to conduct the defense.”

9.3 Prosecuting Attorney Participation

If the court requests, the prosecuting attorney must review the petition for legal sufficiency and appear at any delinquency proceeding. MCR 3.914(A) and MCL 712A.17(4). If an offense that would be a criminal offense if committed by an adult is alleged, the prosecuting attorney must participate in every delinquency proceeding “that requires a hearing and the taking of testimony.” MCR 3.914(B)(2). MCL 712A.17(4) only requires the prosecuting attorney to appear if a criminal offense is alleged and the proceeding requires a
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hearing and the taking of testimony. Thus, if a status offense is alleged, the
prosecuting attorney must appear at trial if the court requests; if a criminal
offense is alleged, the prosecuting attorney must appear and participate in a
trial.

The prosecuting attorney may be a county prosecuting attorney, an assistant
prosecuting attorney for a county, the attorney general, the deputy attorney
general, an assistant attorney general, or, if an ordinance violation is alleged,
an attorney for the political subdivision or governmental entity that enacted
the ordinance, charter, rule, or regulation upon which the ordinance
violation is based. MCR 3.903(B)(4).

9.4 Order of Proceedings

MCR 3.942(B) contains rules governing preliminary matters at trials. This
rule states:

“(1) The court shall determine whether all parties are
present.

(a) The juvenile has the right to be present at the
trial with an attorney, parent, guardian, legal
custodian, or guardian ad litem if any.

(b) The court may proceed in the absence of a
parent, guardian, or legal custodian who was
properly notified to appear.

(c) The victim has the right to be present at trial
as provided by MCL 780.789.*

“(2) The court shall read the allegations contained in the
petition, unless waived.”

The 1988 Staff Comment to MCR 3.942 (Trials) discusses in general terms
the procedures to be followed at trial.

“The order of proceedings, although not spelled out, is
intended to be similar to that in criminal proceedings.
The court would allow the parties to deliver an opening
statement. The petitioner would make his or her opening
statement first. The petitioner would offer evidence in
support of the petition and then the juvenile would be
allowed to offer evidence in defense. The petitioner may
offer evidence in rebuttal of the juvenile’s evidence, and
the juvenile may then offer evidence in rebuttal of the
petitioner’s evidence. In the interest of justice, the court
may allow the parties to offer further rebuttal or
surrebuttal evidence. At the conclusion of the evidence,
the petitioner, followed by the juvenile, has the right to deliver a closing argument. The petitioner would then have the right to deliver a rebuttal closing argument.”

See Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 810.

**Required procedures for the factfinding hearing on an alleged violation of the Michigan Vehicle Code.** MCL 712A.2b states:

“When a juvenile is accused of an act that constitutes a violation of the Michigan vehicle code, . . . or a provision of an ordinance substantially corresponding to any provision of [the Michigan Vehicle Code], the following procedure applies, *any other provision of this chapter notwithstanding* . . .” (Emphasis added.)

The last phrase of this provision excludes application of other provisions of the Juvenile Code to cases involving alleged violations of the Michigan Vehicle Code. The subsection of §2b that pertains to the factfinding hearing on such a violation, MCL 712A.2b(c), states:

“If after hearing the case the court finds the accusation to be true, the court may dispose of the case under section 18 of this chapter.”

Section 2b(c) suggests that a “bench trial” will occur if the juvenile contests the charges, rather than a jury trial. Under MCL 712A.17(2), any “interested person” may demand a jury trial.*

### 9.5 Jury Procedures

In delinquency proceedings, prospective jurors must be summoned and impaneled in accordance with MCL 600.1376 et seq. Juries in delinquency cases consist of six individuals. MCL 712A.17(2). Alternate jurors may be impaneled and may deliberate pursuant to MCR 2.511(B) and 2.512(A)(3).

Jury procedures in delinquency cases are governed by MCR 2.508–2.516 (civil cases), except that each party is entitled to 5 peremptory challenges and the verdict must be unanimous. MCR 3.911(C)(1)(a) and (b). The applicable jury procedure rules are as follows:

- MCR 2.508 Jury Trial of Right
- MCR 2.509 Trial by Jury or Trial by Court
- MCR 2.510 Juror Personal History Questionnaire
- MCR 2.511 Impaneling the Jury

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*See Section 7.10 for further discussion of the right to jury trial.*
Section 9.6

*See Section 9.8, below.

*See Section 9.7, below.

*See Section 9.6, below.

- MCR 2.512 Rendering Verdict*
- MCR 2.513 View
- MCR 2.514 Special Verdicts
- MCR 2.515 Motion for Directed Verdict*
- MCR 2.516 Instructions to Jury*

Peremptory challenges. MCR 3.911(C)(1)(a) provides that each party is entitled to five peremptory challenges. However, MCR 3.911(C)(3) qualifies this as follows:

“(3) Two or more parties on the same side, other than a child in a child protective proceeding, are considered a single party for the purpose of peremptory challenges.

(a) When two or more parties are aligned on the same side and have adverse interests, the court shall allow each such party represented by a different attorney 3 peremptory challenges.

(b) When multiple parties are allowed more than 5 peremptory challenges under this subrule, the court may allow the opposite side a total number of peremptory challenges not to exceed the number allowed to the multiple parties.”

9.6 Jury Instructions

MCR 2.516(D) governs the creation, modification, and use of Model Civil Jury Instructions. Because there are no Model Civil Jury Instructions for use in delinquency proceedings, an alternative must be used. MCR 2.516(D)(4) states:

“This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative.”

The Michigan Probate Judges Association has approved using the Standard Criminal Jury Instructions, with appropriate modifications.

“In cases of juvenile delinquency, the Standard Criminal Jury Instructions, Second Edition, should be used, with
appropriate modifications. Whether modifications are either desirable or necessary depends in part on the allegations in the petition. If the juvenile is charged with an offense which would be a crime if committed by an adult, the terms ‘defendant’ and ‘crime’ in the Standard Criminal Jury Instructions may be used to avoid confusion and slips of the tongue by attorneys or the words ‘respondent’ and ‘offense’ may be substituted. However, where a juvenile is charged with an offense which would not be a crime if committed by an adult, such substitutions are mandatory. In addition, the form of verdict is optional with the court. The jury should either be instructed that if they find the juvenile guilty (or not guilty) of the offense as charged, they must find that the juvenile comes (or does not come) within the jurisdiction of the court, or the jury may be instructed that they are to find the juvenile guilty or not guilty, with the judge ruling that, as a matter of law, the jury having found the juvenile guilty (or not guilty), the juvenile comes (or does not come) within the jurisdiction of the court.” Hon. Donald S. Owens, Juvenile Jury Instructions, “Delinquency Jury Instructions,” January 1995.


**Instructing the jury on the nature of the proceedings.** MCR 2.516(B)(1) requires the court to give the jury preliminary instructions on the nature of the proceedings and the applicable law. That rule states in part:

> “After the jury is sworn and before evidence is taken, the court shall give such preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence.”

It violates the court’s duty under MCR 2.516(B)(1) to inform a jury that it should not be concerned with whether it is hearing a juvenile delinquency or criminal matter. In re Azizuddin Mujtabaa-el, unpublished opinion per curiam of the Court of Appeals, March 8, 2002 (Docket No. 234828).

In In re Spears, 250 Mich App 349, 350–51 (2002), the prosecuting attorney requested that the trial court bar the juvenile’s attorney from questioning prospective jurors during voir dire about the Sex Offenders Registration Act (SORA). After the trial court denied the prosecutor’s motion, the prosecutor took an interlocutory appeal. The Court of Appeals reversed and remanded the case, finding that discussion in the jury’s presence of the consequences of a conviction or adjudication, including disposition of the accused after a
verdict, is not permitted at any point in the proceedings. *Id.* at 352–53, citing *People v Bailey*, 169 Mich App 492, 500–01 (1988), and *People v Goad*, 421 Mich 20, 25–26 (1984). The Court also held that although registration is not a penalty or punishment, it is a consequence of a conviction or adjudication, and informing a jury of the requirements under SORA may distract jurors from deducing the truth from the evidence presented at trial. *Id.* at 354–55.

### 9.7 Motions for Directed Verdict in Jury Trials

MCR 2.515 allows for a motion for directed verdict to be made at the close of the evidence offered by the opponent. Because the petitioner must show beyond a reasonable doubt that the juvenile comes within the jurisdiction of the court, the juvenile may move for a directed verdict at the close of the prosecuting attorney’s or petitioner’s proofs. The motion must be supported by specific grounds. If the motion is denied, the moving party may offer evidence without having reserved the right to do so. Denial of a motion for directed verdict does not constitute waiver of trial by jury.

In deciding on the motion, the court must examine, in a light most favorable to the petitioner, all evidence presented up to the time of the motion and all legitimate inferences that may be drawn from it. The petitioner must have introduced sufficient evidence of each element of the offense to justify a rational trier of fact in finding the juvenile “guilty” beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368 (1979), and *In re Winship*, 397 US 358, 364 (1970).

### 9.8 Taking the Verdict in a Jury Trial

The verdict in a delinquency proceeding must be guilty or not guilty of the offense charged or a lesser-included offense. MCR 3.942(D). MCR 3.911(C)(1)(b) requires the verdict to be unanimous. A party may require the jury to be polled. If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation. MCR 2.512(B)(2)–(3) and *People v Bufkin*, 168 Mich App 615, 617 (1988). The court may discharge a jury:

“(1) because of an accident or calamity requiring it;

“(2) by consent of all the parties;

“(3) whenever an adjournment or mistrial is declared;

“(4) whenever the jurors have deliberated until it appears that they cannot agree.
“The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury discharged.” MCR 2.512(C)(1)–(4).

9.9 Sequestering Witnesses and Victims

Witnesses other than victims. Under the Revised Judicature Act, pursuant to MCL 600.1420, a court, for good cause shown, has the authority to sequester witnesses from the courtroom to discourage collusion. Additionally, under MRE 615, a court may exclude nonparty witnesses from the courtroom at the request of a party or on its own motion. Sequestration requests are within the trial court’s discretion and are ordinarily granted. People v Cutler, 73 Mich App 313, 315 (1977), and People v Hill, 88 Mich App 50, 65 (1979). The purpose of sequestering a witness is to prevent the witness from “coloring” his or her testimony to conform with the testimony of other witnesses. People v Stanley, 71 Mich App 56, 61 (1976). Thus, a trial court presumably has discretion to sequester witnesses from all stages of the proceeding, including jury selection, opening statements, presentation of the case-in-chief, presentation of the defense case, presentation of rebuttal evidence, and closing arguments.

The foregoing authority to sequester witnesses or other persons is not unlimited. Under MRE 615, a trial court must not exclude “a person whose presence is shown by a party to be essential to the presentation of the party’s cause.” This exception ordinarily applies in criminal cases where law enforcement personnel assist the prosecutor with the presentation of evidence, or where victim “support persons” are used. See People v Jehnsen, 183 Mich App 305, 308 (1990).*

A trial court may sequester a rebuttal witness before or after he or she testifies in rebuttal. Neither MCL 600.1420 nor MRE 615 limit a court’s authority in such circumstances.

Victims. In Michigan, a crime victim has a constitutional right to attend a criminal trial, juvenile adjudication, and other court proceedings. Const 1963, art 1 § 24 provides in pertinent part:

“(1) Crime victims, as defined by law,* shall have the following rights, as provided by law:

* * * * *

“The right to attend trial and all other court proceedings the accused has the right to attend.”

A crime victim may attend every court proceeding that an accused person has a right to attend. Note that an accused person does not have a right to attend all court proceedings. An accused person has a right to attend
proceedings involving voir dire, selection of and subsequent challenges to
the jury, presentation of evidence, summation of counsel, instructions to the
jury, rendition of the verdict, imposition of sentence, and any other stage of
trial where a defendant’s “substantial rights” might be adversely affected.
People v Mallory, 421 Mich 229, 247 (1984). See also People v Thomas, 46
Mich App 312, 320 (1973) (the accused is entitled to be present at pretrial
evidentiary hearings on admissibility of evidence), and MCL 768.3 (a
person accused of a felony must be present during trial, but a person accused
of a misdemeanor may request leave of court to appear through an attorney).
However, the accused does not have the right to attend motions,
conferences, and discussions of law, even during trial, if they do not involve
“substantial rights” vital to the defendant’s participation in his or her own
defense. Thomas, supra at 320.

A victim’s constitutional right to attend trial is circumscribed by one
significant limitation: upon good cause shown, the victim may be
sequestered as a witness until he or she first testifies. MCL 780.789 states:

“The victim has the right to be present throughout the
entire contested adjudicative hearing or waiver hearing
of the juvenile, unless the victim is going to be called as
a witness. If the victim is going to be called as a witness,
the court, for good cause shown, may order the victim to
be sequestered until the victim first testifies. The victim
shall not be sequestered after he or she first testifies.”

If the defense also identifies the victim as a witness for trial, i.e., places the
victim’s name on the defense witness list, a court may, under the foregoing
statutory provisions, and upon good cause shown, only sequester the victim
until he or she first testifies, which would presumably have occurred in the
prosecution’s case-in-chief.

9.10 Limitations on Testimony Identifying a Victim's Address,
Place of Employment, or Other Information

In juvenile delinquency cases, MCR 3.922(A)(1)(c) allows discovery of the
names of prospective witnesses, but not their addresses. Compare MCR
6.201(A)(1). In addition, the prosecuting attorney or victim may request that
a victim’s identifying information be protected from disclosure at trial.
MCL 780.788 states:

“Based upon the victim’s reasonable apprehension of
acts or threats of physical violence or intimidation by the
juvenile or at the juvenile’s direction against the victim
or the victim’s immediate family, the prosecuting
attorney may move or, in the absence of a prosecuting
attorney, the victim may request that the victim or any
other witness not be compelled to testify at any court
hearing for purposes of identifying the victim as to the victim’s address, place of employment, or other personal identification without the victim’s consent. A hearing on the motion shall be in camera.”

In Alford v United States, 282 US 687, 692–94 (1931), the United States Supreme Court held that it was error for the trial court to prohibit cross-examination of a prosecution witness regarding the witness’ place of residence. In Smith v Illinois, 390 US 129, 133 (1968), the Supreme Court held that the trial court’s refusal to allow the defendant to cross-examine a witness concerning his real name and address denied defendant his federal constitutional right to confront the witnesses against him. See also People v Paduchoski, 50 Mich App 434, 438 (1973) (the trial court denied defendant his federal constitutional right of confrontation by refusing to allow cross-examination regarding a witness’ place of employment).

However, there are two exceptions to the rules stated in Alford and Smith. The trial court may limit cross-examination regarding a witness’ address if the questions tend merely to harass, annoy, or humiliate the witness, or if the questions would tend to endanger the personal safety of the witness. Alford, supra, at 694, and Smith, supra, at 134–35 (White, J, concurring).

In People v McIntosh, 400 Mich 1, 8 (1977), the Michigan Supreme Court held that the trial court did not err in refusing to allow defense counsel to ask a key prosecution witness where she lived. The witness’ address was available in police reports and the prosecutor’s case file, and the witness had been threatened by several spectators in the courtroom.

9.11 Rules of Evidence and Standard of Proof


Admissibility of evidence under the “teacher-student privilege.” MCL 600.2165 prohibits public school employees from disclosing records or confidences without the consent of a parent or legal guardian if the child is under 18 years of age. That statute states:

“No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker or such schools and institutions, who maintains records of students’ behavior or who has records in his custody, or who receives in
confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose information obtained by him from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian.”

To show that a juvenile comes within the court’s jurisdiction under MCL 712A.2(a)(4) (truancy), the petitioner must show that “[t]he juvenile wilfully and repeatedly absents himself or herself from school or other learning program intended to meet the juvenile’s educational needs, or repeatedly violates rules and regulations of the school or other learning program, and the court finds on the record that the juvenile, the juvenile’s parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile’s educational problems and educational counseling and alternative agency help have been sought.” In Weiss, supra at 41, the Court of Appeals found that incorrigibility under MCL 712A.2(a)(3) “encompasses getting suspended from school or performing illegal acts.” If a petitioner seeks to admit school records or statements by a juvenile to school personnel to prove truancy or incorrigibility, the petitioner must obtain the consent of a parent or guardian if the juvenile is under 18 years old. However, it appears that MCL 600.2165 does not prevent a petitioner from calling school personnel to testify regarding their personal observations of a student’s attendance or behavior.

Where no teacher or administrator is called to testify, MCL 600.2165 is inapplicable. People v Pitts, 216 Mich App 229, 235 (1996). “Moreover, where there is no indication that the communication was confidential, the student-teacher privilege is neither at issue nor violated.” Id. (privilege did not apply where the defendant made an incriminating statement in the presence of an assistant principal, a teacher, the complainant, and another person).

9.12 The Court’s Authority to Call Additional Witnesses or Order Production of Additional Evidence

The court has authority to call or examine witnesses and to order production of additional evidence or witnesses. MCR 3.923(A)(1) states:

“(A) Additional Evidence. If at any time the court believes that the evidence has not been fully developed, it may:

(1) examine a witness,
(2) call a witness, or

(3) adjourn the matter before the court, and

(a) cause service of process on additional witnesses, or

(b) order production of other evidence.”

See *In re Alton*, 203 Mich App 405, 407–08 (1994) (court properly allowed additional testimony that directly addressed key conflicts between the testimony of the complainant and juvenile).

9.13 Findings of Fact and Conclusions of Law by Judge or Referee

Subchapter 3.900 of the Michigan Court Rules does not have a specific court rule dealing with findings of fact and conclusions of law by a judge or referee in a nonjury trial.

MCL 712A.10(1)(c) states that a referee must “make a written signed report to the judge . . . containing a summary of the testimony taken and a recommendation for the court’s findings . . .”

9.14 Record of Proceedings at Adjudicative Hearings

MCR 3.925(B) states that “[a] record of all hearings must be made. All proceedings on the formal calendar must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108.”

9.15 Motions for Rehearing or New Trial

*See SCAO Form JC 15.*

In a delinquency proceeding, a party may seek a rehearing or new trial by filing a written motion* stating the basis for the relief sought. MCR 3.992(A). MCL 712A.21 allows a petition for rehearing to be filed by “an interested person,” which includes a member of a local foster care review board. MCL 712A.21(3). “A motion will not be considered unless it presents a matter not previously presented to the court, or presented but not previously considered by the court, which, if true, would cause the court to reconsider the case.” MCR 3.992(A).
A. Standards for Granting Relief

MCR 3.992(A) does not state the standard for granting relief following a court’s consideration of a party’s motion for rehearing. In re Alton, 203 Mich App 405, 409 (1994). However, MCR 2.613(A), the “harmless error rule” for civil proceedings, applies to juvenile delinquency proceedings. MCR 3.902(A). The “harmless error rule” states that “[a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.”

In In re Alton, supra, at 409–10, the Court of Appeals remanded the case to the juvenile court for a rehearing on the juvenile’s motion for a new trial. In doing so, the Court adopted the following guidelines for ruling on such motions:

“In ruling on the motion, the parties and the trial court applied the rules for granting a new trial embodied in MCR 2.611(A)(1). That court rule is not applicable in juvenile delinquency proceedings. See MCR 3.901(B). Therefore, we remand this case for the trial court to reconsider the juvenile’s motion under the proper standard of review: whether, in light of the new evidence presented, it appears to the trial court that a failure to grant the juvenile a new trial would be inconsistent with substantial justice. MCR 2.613(A). In this case, that means the trial court must decide whether it appears that if the court refuses to grant the motion, it will be exercising jurisdiction over a juvenile who is not properly within its jurisdiction. The trial court must state the reasons for its decision on the record or in writing. MCR 3.992(E).” (Footnote omitted.)

In In re Ayres, 239 Mich App 8, 23–24 (1999), the Court of Appeals applied the standard applied in criminal cases when deciding whether to grant a new trial on the ground that the verdict was against the great weight of the evidence. A court may grant such a motion “only if the evidence preponderates heavily against the verdict so that a miscarriage of justice would result from allowing the verdict to stand. People v Lemmon, 456 Mich 625, 642; 576 NW 2d 129 (1998). The trial judge is not allowed to sit as the ‘thirteenth’ juror and grant a new trial on the basis of a disagreement with the jurors assessment of credibility. Id. at 647.” Ayres, supra. In Ayres, the Court of Appeals held that inconsistencies in the witnesses’ testimony did not require reversal of the jury’s verdict, where the inconsistencies resulted from the witnesses’ age (from four to six years), and the charged offenses occurred about six months before trial. Id. at 24–25.
B. Procedural Requirements

Time requirements for filing motions and responses. The written motion stating the basis for the relief sought must be filed “within 21 days after the date of the order resulting from the hearing or trial. The court may entertain an untimely motion for good cause shown.” MCR 3.992(A).

Any response by parties to a motion for rehearing or new trial must be in writing and filed with the court and served on opposing parties within seven days after notice of the motion. MCR 3.992(C).

Notice requirements. MCR 3.992(B) states that all parties must be given notice of the motion in accordance with MCR 3.920.*

No hearing required. MCR 3.992(E) provides that the court need not hold a hearing for a ruling on a motion for rehearing or new trial. “Any hearing conducted shall be in accordance with the rules for dispositional hearings and, at the discretion of the court, may be assigned to the person who conducted the hearing.”*

Stay of proceedings and grant of bail. MCR 3.992(F) provides that the court may stay any order or grant bail to a detained juvenile pending a ruling on a motion for rehearing or new trial.

Findings by court. The court shall state the reasons for its decision on the record or in writing. MCR 3.992(E).

C. Remedies

MCR 3.992(D) states that “[t]he judge may affirm, modify, or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the court in its discretion finds appropriate for the case.” The court may enter an order for supplemental disposition while the juvenile remains under the court’s jurisdiction. MCL 712A.21(1).
# Chapter 10: Juvenile Dispositions

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Section

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If the factfinder determines that a juvenile has not committed an offense, the court must enter an order dismissing the petition. If the factfinder determines that a juvenile has committed an offense that would be a criminal offense if committed by an adult, a civil infraction, or a status offense, the court must find that the juvenile is under its jurisdiction. The court may then enter disposition orders, including leaving a juvenile in his or her home but imposing probation conditions, or placing a juvenile in or committing a juvenile to a private or public institution. This chapter discusses the court’s authority to enter disposition orders and the required procedures for disposition hearings. It also discusses the requirements for ordering and collecting restitution and the Crime Victim’s Rights Fund assessment. Court allocation of funds received from a juvenile or his or her parent for fines, costs, restitution, fees, and assessments is discussed in Section 10.14.

For discussion of related issues, see the following:

- Chapter 11 (costs of dispositions);
- Section 3.7 (places of detention for juveniles and persons over 17 years of age);
- Section 5.15 (limits on placement of Indian children);
- Section 19.1 (juvenile dispositions in designated case proceedings);
- Section 15.22(C) (juvenile dispositions in minor PPO proceedings);
- Chapter 12 (review of a referee’s recommended findings and conclusions);
- Section 13.8 (dispositions following violations of probation);
- Chapter 14 (dispositional review hearings);
- Section 2.19 (notice requirements where court has prior continuing jurisdiction over a juvenile); and
• Chapter 25 (reporting and recordkeeping requirements).

**Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).

### 10.1 Purpose of Dispositional Hearings

In delinquency proceedings, dispositional hearings are conducted after a jury or the court has found that a juvenile has committed an offense. The purpose of a disposition hearing is to craft orders concerning the juvenile and his or her parents or other adults to remedy the circumstances that caused the juvenile to come under the court’s jurisdiction. MCR 3.943(A) sets forth the general purpose of dispositional hearings:

> “(A) General. A dispositional hearing is conducted to determine what measures the court will take with respect to a juvenile and, when applicable, any other person, once the court has determined following trial or plea that the juvenile has committed an offense.”

A dispositional hearing may also be conducted in designated case proceedings if the court chooses to order a disposition following conviction instead of sentencing the juvenile as an adult. MCL 712A.2d(8) and MCL 712A.18(1)(n).*

### 10.2 Time Requirements for Dispositional Hearings

MCR 3.943(B) states that “[t]he interval between the plea of admission or trial and disposition, if any, is within the court’s discretion. When the juvenile is detained, the interval may not be more than 35 days, except for good cause.”

The dispositional phase of proceedings may immediately follow the adjudicative phase where the parties do not object, and where they have notice of the proceedings and an opportunity to present suggestions and objections. *In re Hardin*, 184 Mich App 107, 109 (1990), and *In re Chapel*, 134 Mich App 308, 314 (1984).*

*See Section 19.1 (court’s options following conviction in designated cases).

*See also Section 10.7 below, discussing a victim’s right to make an impact statement.*
10.3 Right to Have Judge Preside at Dispositional Hearing

“The right to a jury in a juvenile proceeding exists only at the trial.” MCR 3.911(A).

Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines “formal calendar” as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding. Thus, a party may be entitled to have a judge conduct a dispositional hearing. MCR 3.913(B) states that unless a party has demanded a trial by judge or jury,* a referee may conduct the trial and further proceedings through the dispositional phase. Thus, if a referee tries a case, that same referee may conduct dispositional and dispositional review hearings even if the juvenile later requests that a judge preside at a hearing.

If a juvenile disposition rather than an adult sentence is imposed following trial or plea in designated case proceedings, the juvenile does not have the right to have the same judge who presided at trial or who accepted a plea in the designated case preside at the dispositional hearing. MCR 3.912(C)(2).*

10.4 Persons Entitled or Required to Be Present at Dispositional Hearings

**Juvenile.** “The juvenile may be excused from part of the dispositional hearing for good cause shown, but must be present when the disposition is announced.” MCR 3.943(D)(1).

**Parent or guardian.** A provision of the Juvenile Code, MCL 712A.6a, requires the parent or guardian of a juvenile who is within the court’s jurisdiction under MCL 712A.2(a)(1) (criminal offenses) to attend all hearings unless excused for good cause. Thus, parents or guardians may be required to attend dispositional and dispositional review hearings. This provision may be enforced through the court’s contempt power.*

**Prosecuting attorney.** If the court requests, the prosecuting attorney must appear at any delinquency proceeding. MCR 3.914(A) and MCL 712A.17(4). If an offense that would be a criminal offense if committed by an adult is alleged, the prosecuting attorney must participate in every delinquency proceeding “that requires a hearing and the taking of testimony.” MCR 3.914(B)(2). MCL 712A.17(4) only requires the prosecuting attorney to appear if a criminal offense is alleged and the proceeding requires a hearing and the taking of testimony. Thus, if a status offense is alleged, the prosecuting attorney must appear at a dispositional hearing if the court requests; if a criminal offense is alleged, the prosecuting attorney must appear and participate in a dispositional hearing.
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The prosecuting attorney may be a county prosecuting attorney, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or, if an ordinance violation is alleged, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based. MCR 3.903(B)(4).

**Victim.** MCR 3.943(D)(2) states that “[t]he victim has the right to be present at the dispositional hearing and to make an impact statement as provided in the Crime Victim’s Rights Act, MCL 780.751 et seq.”

10.5 Advice of Right to Counsel

If a juvenile charged with an offense that would be a criminal offense if committed by an adult or a status offense is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). MCR 3.915(A)(1) states that this advice is required “at each stage of the proceedings on the formal calendar, including . . . disposition.”

10.6 Evidentiary Standards at Dispositional Hearings

MCR 3.943(C)(1)–(3) govern the admissibility of evidence at dispositional hearings. These rules state:

“(C) Evidence.

(1) The Michigan Rules of Evidence, other than those with respect to privileges, do not apply at dispositional hearings. 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, even though such evidence may not be admissible at trial.

(2) The juvenile, or the juvenile’s attorney, and the petitioner shall be afforded an opportunity to examine and controvert written reports so received and, in the court’s discretion, may be allowed to cross-examine individuals making reports when such individuals are reasonably available.

“(3) No assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at a dispositional hearing, of materials prepared

*See also Section 10.7, below (victim’s right to make impact statement).

*See Section 5.7(C) for the requirements for a valid waiver of counsel.
MCR 3.943(C)(1) does not mandate consideration of any particular report. Because a juvenile dispositional proceeding is not criminal or governed by the Code of Criminal Procedure, the Family Division need not consider a sentencing information report as required for adults. In re Lowe, 177 Mich App 45, 47 (1989).

The proper procedure for the court to follow is to take sworn testimony on the record, allow defense counsel and the prosecuting attorney to argue for an appropriate disposition, and articulate reasons for the disposition imposed. In re Chapel, 134 Mich App 308, 314–15 (1984), relying on People v Coles, 417 Mich 523 (1983). See also In re Barber, 168 Mich App 661, 665–66 (1988) (duty of juvenile court judge to respond to allegations of inaccuracy in a social report is analogous to the duty of a judge in a criminal case to respond to alleged inaccuracies in a presentence report).

However, sworn testimony may often not be taken at dispositional hearings. A probation officer or caseworker assigned to the juvenile’s case may submit a report and recommendation for disposition. Defense counsel may make a statement agreeing with or disputing the recommendation. In addition to the probation officer’s or caseworker’s report, the court may receive reports from the juvenile’s school, psychological evaluations, substance abuse evaluations, and, if commitment to the Family Independence Agency is contemplated, the classification and assignment report submitted by a delinquency services worker.

When the court orders a person to be examined by a physician, psychiatrist, social worker, or other professional, the professional’s interview and opinion cannot be excluded from the dispositional hearing on the theory that it is privileged. MCR 3.943(C)(3) and In re Lowe, 177 Mich App 45, 47 (1989).

10.7 Victim Impact Statements

A crime victim has the rights to submit an impact statement for inclusion in a disposition or presentence investigation report and to deliver an oral impact statement to the court at disposition or sentencing. In a criminal case, a sentencing court may properly consider the actual or possible impact of the crime on the victim in tailoring the sentence. See Payne v Tennessee, 501 US 808, 825 (1991) (“[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities”), and People v Girardin, 165 Mich App 264, 266–67 (1987) (the sentencing court could consider the possible future psychological repercussions to the six-year-old sexual assault victim even though no evidence established that such repercussions would occur).
Notice of the right to submit an impact statement for inclusion in disposition or sentencing report. In juvenile delinquency and designated case proceedings, a victim has the right to submit an oral or written impact statement if a disposition or presentence investigation report is prepared. MCL 780.792(1) and (3). If a report is to be prepared, the person preparing the report must give the victim notice of the following:

“(a) The victim’s right to make an impact statement for use in preparing the report.

“(b) The address and telephone number of the person who is to prepare the report.

“(c) The fact that the report and any statement of the victim included in the report will be made available to the juvenile unless exempted from disclosure by the court.” MCL 780.791(2)(a)–(c).

A sentencing court may exempt from disclosure “sources of information obtained on a promise of confidentiality.” MCL 771.14(3), MCL 771.14a(2), and MCR 6.425(B). If the court exempts information from disclosure, the court must inform the parties of the nondisclosure, note the exemption in the PSIR, and state on the record its reasons for this action. MCR 6.425(B). See People v Mellado, unpublished opinion per curiam of the Court of Appeals, decided March 12, 1992 (Docket No. 133711) (resentencing was required where the trial court exempted victim impact statements from disclosure to defendant before sentencing without following the procedures required by MCR 6.425(B)).

Oral victim impact statements. In addition to providing impact information for inclusion in a dispositional report, a victim or a person designated by a victim may deliver an oral impact statement to the court at the disposition hearing. MCL 780.793(1) states:

“The victim has the right to appear and make an oral impact statement at the juvenile’s disposition or sentencing. If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney.”

Note: If a person chosen by the victim will deliver the oral impact statement, the victim should provide his or her designee with a written statement to read to the court.
Contents of victim impact statements. MCL 780.791(3)(a)–(d) state that the victim’s impact statements may include but are not limited to the following:

“(a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.

“(b) An explanation of the extent of any economic loss or property damage suffered by the victim.

“(c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.*

“(d) The victim’s recommendation for an appropriate disposition or sentence.”

In criminal cases, the court must give the victim “an opportunity to advise the court of any circumstances [he or she] believe[s] the court should consider in imposing sentence.” MCR 6.425(D)(2)(c). See also People v Steele, 173 Mich App 502, 504–05 (1988) (although the victim’s impact statements were emotional, they were within her statutory rights, and the defendant did not object to the statements).

Letters from victims. Prior to sentencing in a criminal case, a victim may send a letter to the court describing the effects of the crime. In People v McAllister, 241 Mich App 466, 474–75 (2000), the defendant argued that he was entitled to examine letters sent by the victim and the victim’s family to the court prior to sentencing. The defendant cited United States v Hayes, 171 F3d 389 (CA 6, 1999), in which the sentencing court relied on the victims’ letters in imposing the maximum possible sentence. The Hayes court held that reversal is required where the sentencing court relies on ex-parte communications in determining a defendant’s sentence. The Court of Appeals in McAllister distinguished Hayes, finding that there was no evidence that the sentencing court relied on the letters’ contents in sentencing the defendant. Moreover, the contents of the victim’s letter to the court were cumulative to evidence admitted at trial and information disclosed by the victim’s oral impact statement. The Court of Appeals also expressed confidence that trial judges “are able to separate the evidence at trial from the subjective requests of victims or their family members.” McAllister, supra at 476. Judge Whitbeck concurred in the result but wrote separately to state that such letters should be disclosed in all cases because the sentencing court must allow the defendant an opportunity to rebut or explain facts introduced for the purpose of sentencing. Id. at 479, citing People v Ewing (After Remand), 435 Mich 443, 446, 474 (1990).

Thus, if the court receives letters directly from a victim or others, such letters must be disclosed to the parties prior to disposition or sentencing if
the court will rely on information contained in the letters. If the letters are disclosed, victim identifying information should be deleted. MCR 3.903(A)(3)(a) and (b)(v)–(vi).

**Impact statements by third parties.** In *People v Kisielewicz*, 156 Mich App 724, 728–29 (1986), the defendant was convicted of vehicular manslaughter. The presentence investigation report contained copies of letters from the deceased victim’s parents, grandparents, aunt, uncle, and an attorney. The Court of Appeals held that the sentencing judge properly considered all of the letters. The letters from the deceased victim’s parents were properly included in the PSIR under MCL 780.764 of the Crime Victim’s Rights Act because the parents met the statutory definition of “victim.”* Although the other letters were not from “victims” as defined by statute, the letters concerned society’s need to be protected from the offender, which is a valid sentencing consideration.

In *People v Albert*, 207 Mich App 73, 74 (1994), the Court of Appeals found no error in allowing an attorney who was representing one of the victims in a separate civil suit to address the court at sentencing. The attorney called the defendant, who was convicted of criminal sexual conduct against two child victims, a “pedophilic.” The Court of Appeals concluded that the sentencing court was entitled to consider relevant information about the defendant’s life and circumstances, and no bias or prejudice resulted from the attorney’s statements. *Id.* at 74–75.

10.8 **Required Evaluation of Juveniles Adjudicated of Cruelty to Animals or Arson**

Juveniles found responsible for an offense that if committed by an adult would constitute cruelty to animals or arson must be evaluated to determine the need for psychiatric or psychological treatment. MCL 712A.18/ states:

> “If a juvenile is found to be within the court’s jurisdiction under section 2(a)(1) of this chapter for an offense that, if committed by an adult, would be a violation of [MCL 750.50b], having to do with cruelty to animals, or would be a violation of [MCL 750.71–750.80], having to do with arson, the court shall order that the juvenile be evaluated to determine the need for psychiatric or psychological treatment. If the court determines that psychiatric or psychological treatment is appropriate for that juvenile, the court may order that treatment. This section does not preclude the court from entering any other order of disposition allowed under this chapter.”
10.9 Dispositional Options Available to Court

MCR 3.943(E)(1) provides that if a juvenile has been found to have committed an offense, the court may enter an order of disposition as provided by MCL 712A.18. Under MCR 3.903(B)(3), “offense by a juvenile” includes a violation of a criminal law or ordinance, violation of a traffic law, or commission of a status offense.*

MCL 712A.18(1) states as follows:

“If the court finds that a juvenile concerning whom a petition is filed is not within this chapter, the court shall enter an order dismissing the petition. Except as otherwise provided in subsection (10) [dealing with fingerprinting], if the court finds that a juvenile is within this chapter, the court may enter any of the following orders of disposition that are appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained . . . .”

Both the Juvenile Code and the applicable court rules state a preference for leaving the juvenile in his or her home. See MCL 712A.1(3) and MCR 3.902(B). “If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents.” MCL 712A.1(3). MCR 3.902(B)(2) contains substantially similar language.

The court’s dispositional options are as follows:

A. Warning Juvenile and Dismissing Petition

The court may warn the juvenile or the juvenile’s parents, guardian, or custodian and dismiss the petition. MCL 712A.18(1)(a).

However, if the juvenile’s offense has resulted in financial damages to any victim, then the court must order the juvenile and may order the juvenile’s parent to pay restitution pursuant to MCL 712A.30 and 712A.31 and relevant provisions of the Crime Victim’s Rights Act. MCL 712A.18(7).*

B. Appointing a Guardian

Pursuant to a petition filed with the court by a person interested in the welfare of the juvenile, the court may appoint a guardian under MCL 700.424 or 700.5204. MCL 712A.18(1)(h). Note, however, that this provision does not allow the court to appoint a guardian unless a petition is filed by the prospective guardian. If the court appoints a guardian in response to a petition filed by a person interested in the juvenile’s welfare,
it may enter an order dismissing the petition under this chapter. MCL 712A.18(1)(h).

C. In-Home Probation

The court may “[p]lace the juvenile on probation, or under supervision in the juvenile’s own home or in the home of an adult who is related to the juvenile. As used in this subdivision, ‘related’ means being a parent, grandparent, brother, sister, stepparent, stepsister, stepbrother, uncle, or aunt by blood, marriage, or adoption.” MCL 712A.18(1)(b).

MCL 712A.18(1)(b) also requires the court to order terms and conditions of probation, including rules governing the conduct of parents, guardians, or custodians. “The court shall order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court deems necessary for the physical, mental, or moral well-being and behavior of the juvenile.” *Id.*

Unlike the statutes governing probation in criminal cases, §18 of the Juvenile Code does not contain mandatory and discretionary probation terms and conditions.* MCL 771.3(1) contains required probation conditions, including that the probationer not violate any criminal law, not leave the state without the court’s consent, and report to the probation officer in person or in writing as often as required. See In re Belcher, 143 Mich App 68, 69–70 (1985). MCL 771.3(2) contains conditions that may be in a probation order, and MCL 771.3(4) allows the court to “impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper.” “Other lawful conditions” must be rationally related to the rehabilitation of the offender. People v Miller, 182 Mich App 711, 713 (1990).

D. Community Service

The court may order the juvenile to engage in community service. MCL 712A.18(1)(i).*

E. Foster Care

The court may place the juvenile in a suitable foster care home subject to the court’s supervision. MCL 712A.18(1)(c).
F. Juvenile Boot Camp

The court may place the juvenile in and order the juvenile to complete satisfactorily a program of training in a juvenile boot camp established by the Family Independence Agency under the Juvenile Boot Camp Act, MCL 400.1301 et seq. MCL 712A.18(1)(m). If the county is a County Juvenile Agency, the court must commit a juvenile to the County Juvenile Agency for placement in a boot camp program. Id.*

Juvenile boot camp programs are described in MCL 400.1304. “A juvenile boot camp program shall provide a program of physically strenuous work and exercise, patterned after military basic training, and other programming as the [FIA] determines, including at a minimum educational and substance abuse programs, and counseling.”

To place a juvenile in or commit a juvenile to a juvenile boot camp program, a court or County Juvenile Agency shall determine all of the following:

“(i) Placement in a juvenile boot camp will benefit the juvenile.

“(ii) The juvenile is physically able to participate in the program.

“(iii) The juvenile does not appear to have any mental handicap that would prevent participation in the program.

“(iv) The juvenile will not be a danger to other juveniles in the boot camp.

“(v) There is an opening in a juvenile boot camp program.

“(vi) If the court must commit the juvenile to a county juvenile agency, the county juvenile agency is able to place the juvenile in a juvenile boot camp program.”

MCL 712A.18(1)(m)(i)–(vi).

The court may order the juvenile to remain in the boot camp for a period of 90–180 days. MCL 400.1305(2). Following satisfactory completion of the juvenile boot camp program, the juvenile shall complete an additional period of not less than 120 days or more than 180 days of intensive supervised community reintegration in the juvenile’s local community. MCL 712A.18(1)(m) and MCL 400.1305(3).

If a juvenile does not meet the program’s requirements or perform satisfactorily or if there is no opening in a program, the juvenile must be returned to the court for entry of an alternative order of disposition. MCL
712A.18(14) and MCL 400.1305(1)–(2). A juvenile shall not be placed in a juvenile boot camp pursuant to an order of disposition more than once, except that a juvenile returned to the court for a medical condition or because there was not an opening in a juvenile boot camp program may be placed again in the juvenile boot camp program after the medical condition is corrected or an opening becomes available. MCL 712A.18(14).

G. Placement in or Commitment to a Private Institution or Agency

The court may place the juvenile in or commit the juvenile to a private institution or agency approved or licensed by the Department of Consumer and Industry Services for the care of juveniles of similar age, sex, and characteristics. MCL 712A.18(1)(d).* The court must transmit with the order of disposition a summary of its information concerning the child. MCL 712A.24.

Special requirements when a juvenile is placed outside of Michigan. MCL 712A.18a sets forth special requirements for placing a juvenile in or committing a juvenile to a private institution or agency outside of Michigan. That statute states:

“If desirable or necessary, the court may place a ward of the court in or commit a ward of the court to a private institution or agency incorporated under the laws of another state and approved or licensed by that state’s department of social welfare, or the equivalent approving or licensing agency, for the care of children of similar age, sex, and characteristics.”

MCR 3.943(E)(3)(a)–(c) provide, however, that before a juvenile may be placed in an institution outside of Michigan, the court must find that:

“(a) institutional care is in the best interests of the juvenile,

“(b) equivalent facilities to meet the juvenile’s needs are not available within Michigan, and

“(c) the placement will not cause undue hardship.”

Distinguishing between placement and commitment. Committing the juvenile to a private institution or agency does not divest the Family Division of jurisdiction unless the juvenile is adopted in a manner provided by law. MCL 712A.5. However, while placement of a juvenile in an institution preserves the court’s authority to specify the manner in which the juvenile will be housed and treated, a commitment does limit the court’s authority to enter more specific orders concerning the juvenile. See In re Meeboer, 134 Mich App 294, 298 (1984) (although commitment does not
require removal from the home, MCL 803.303, it does deprive the court of authority to supervise the child while under the court’s jurisdiction), and Petition of Wehr, 88 Mich App 184, 193 (1979) (“Since the word “place” does not carry the connotations of finality and severance of authority inherent in the term “commit”, we conclude that the Legislature used these terms advisedly and intended a commitment under [MCL 712A.18(1)(e)] to be final and irrevocable”). Commitments under MCL 712A.18(1)(e) are discussed further in the next subsection.

H. Commitment to a Public Institution or Agency

MCL 712A.18(1)(e) states in part:

“Except as otherwise provided in this subdivision, [the court may] commit the juvenile to a public institution, county facility, institution operated as an agency of the court or county, or agency authorized by law to receive juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the juvenile to the family independence agency or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to such an institution or facility as the family independence agency or county juvenile agency determines is most appropriate, subject to any initial level of placement the court designates. If a child is not less than 17 years of age and is in violation of a personal protection order, the court may commit the child to a county jail within the adult prisoner population. In a placement under subdivision (d)* or a commitment under this subdivision, except to a state institution or a county juvenile agency institution, the juvenile’s religious affiliation shall be protected by placement or commitment to a private child-placing or child-caring agency or institution, if available.”

In In re Family Independence Agency (On Rehearing), 248 Mich App 565 (2001), the Family Division judge entered an order of disposition continuing the juvenile as a temporary court ward, directing that the juvenile be placed at “Maxey Boys Training School to receive treatment as a sex offender,” and committing the juvenile to the FIA. The FIA sought an order of superintending control, arguing that the court’s order deprived it of its authority under MCL 712A.18(1)(e) to determine an appropriate placement for the juvenile. The Court of Appeals upheld the disposition order. The Court of Appeals concluded that the first sentence of §18(1)(e) gives the Family Division general authority to commit juveniles to the facilities and institutions designated in the statute. The only limitation on that authority arises when the juvenile is not continued as a court ward. In re Family Independence Agency, supra at 569. If the juvenile is not a court ward, the

*If the court designates an initial level of placement, eligibility for funding under Title IV-E of the Social Security Act is affected. See Section 11.1.
court must commit the juvenile to the FIA or a county juvenile agency and may only designate an initial level of placement.* The Court of Appeals recognized that §18(1)(e) does not address disposition orders that both commit a juvenile to FIA and continue the juvenile as a court ward but stated that the Legislature must address that issue rather than an appellate court. *In re Family Independence Agency, supra at 572.*

Juveniles may be committed to a county FIA office “for placement and care” under MCL 400.55(h). See SCAO Form JC 25. MCL 400.55(h) requires a county office of the Family Independence Agency to provide supervision of or foster care services to delinquent children under the Family Division’s jurisdiction when ordered by the court. Juveniles may also be committed as “public wards” to the FIA pursuant to the Youth Rehabilitation Services Act, MCL 803.301 et seq. “Public ward” is defined in MCL 803.302(c) as:

"(i) A youth accepted for care by a youth agency who is at least 12 years of age when committed to the youth agency by the . . . family division of circuit court under [MCL 712A.18(1)(e)], if the court acquired jurisdiction over the youth under [MCL 712A.2(a) or (d)], and the act for which the youth is committed occurred before his or her seventeenth birthday.

“(ii) A youth accepted for care by a youth agency who is at least 14 years of age when committed to the youth agency by a court of general criminal jurisdiction under [MCL 769.1], if the act for which the youth is committed occurred before his or her seventeenth birthday.”*

A “youth agency” is either the FIA or a “county juvenile agency.” MCL 803.302(d). “County juvenile agency” is defined in the “County Juvenile Act,” MCL 45.621 et seq. MCL 803.302(a). Because the act applies only to a county that is eligible for transfer of federal Title IV-E funds under a 1997 waiver, the act only applies to Wayne County. The act and related amendments to other statutes allow a “county juvenile agency” to provide services to juveniles “within or likely to come within” the Family Division’s jurisdiction of criminal offenses by juveniles and the Criminal Division’s jurisdiction over “automatically waived” juveniles.

The FIA or “county juvenile agency” has custody of a “public ward” as provided in MCL 803.303 and may place him or her as provided in MCL 803.304 and 400.115b(1). “Public wards” must be discharged from wardship pursuant to MCL 803.307.*

The court must transmit with the order of disposition a summary of its information concerning the child. MCL 712A.24.
I. Commitment to Detention Facility for Use of a Firearm

Under MCL 712A.18g(1)(c) and MCR 3.943(E)(7)(a), a juvenile must be committed under MCL 712A.18(1)(e) to a detention facility for a specified period of time if the court finds that the juvenile used a firearm during a criminal violation. The period of time in detention shall not exceed the length of the sentence that could have been imposed if the juvenile had been sentenced as an adult for the offense. MCL 712A.18g(2) and MCR 3.943(E)(7)(b).

"Firearm" means any weapon from which a dangerous projectile may be propelled using explosives, gas, or air as a means of propulsion, except any smooth-bore rifle or handgun designed and manufactured exclusively for propelling BB’s not exceeding .177 caliber by means of spring, gas, or air. MCL 712A.18g(3) and MCR 3.943(E)(7)(c). “Use” of a firearm is not defined in the statute or court rule. However, comparison of these provisions to the felony firearm statute, MCL 750.227b, may be instructive. The felony firearm statute prohibits possession of a firearm during the commission or attempted commission of an offense.

This provision does not apply to juveniles sentenced as adults following conviction in designated case proceedings. MCL 712A.18g(1) and MCR 3.943(E)(7)(a). However, the provision does appear to apply to cases in which the court delays imposition of sentence and places the juvenile on probation in designated cases.* MCL 712A.18(1)(n) provides that in such cases, the court may order any probation terms and conditions it considers appropriate, including any disposition under §18 of the Juvenile Code.

J. Civil Fines

The court may order the juvenile to pay a civil fine in the amount of the penal fine provided by the ordinance or law that was violated by the juvenile. MCL 712A.18(1)(j).

The maximum amount of a penal fine is usually found in the penal statute that defines the offense. If the penal statute is silent on the amount of the fine, then the maximum amount of the fine shall be $2000.00 for a felony and $100.00 for a misdemeanor. MCL 750.503 and 750.504.

“Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.” MCR 1.110.

K. Court Costs

The court may order the juvenile to pay court costs. MCL 712A.18(1)(k). In criminal cases, costs may not be imposed as part of a defendant’s prison sentence unless the costs are expressly authorized by a procedural statute or...
court rule, or by the penal statute under which a defendant was convicted. *People v Krieger*, 202 Mich App 245, 247 (1993). MCL 769.1f allows a court to order a person convicted of an enumerated offense to reimburse the state or a local unit of government for law enforcement, emergency medical response, fire department, prosecutorial, and other expenses incurred in relation to the incident. If a criminal defendant is placed on probation, the sentencing court may order the defendant to pay costs as a condition of probation. MCL 771.3(2)(c). Such costs must be limited to expenses specifically incurred in prosecuting the defendant, providing legal assistance to the defendant, and providing probation supervision of the defendant. MCL 771.3(6). The general rule is that court costs must bear a reasonable relationship to actual expenses incurred in the defendant’s case. See *People v Blachura*, 81 Mich App 399, 403–04 (1978) (it was improper to assess a flat fee of $1000.00 in costs for each count in a five-count information). The costs must be assessed to reimburse the court for expenditures reasonably and properly made in defendant’s case, rather than to punish defendant for his offense. *People v Teasdale*, 335 Mich 1, 8 (1952).

In designated case proceedings, if the court imposes a sentence of probation in the same manner as probation could be imposed upon an adult or enters an order of disposition delaying imposition of sentence and placing a juvenile on probation, the probation supervision and related services shall not be performed by employees of the Department of Corrections. MCL 712A.9a. Thus, in such cases, a probation supervision fee would not be paid to the Department of Corrections pursuant to MCL 771.3c but to the Family Division pursuant to MCL 712A.18.*

“Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.” MCR 1.110.

**Hearings on amount or ability to pay.** A sentencing court is not required to hold a hearing to determine a criminal defendant’s ability to pay before ordering a defendant to pay costs as part of defendant’s sentence. In *People v Music*, 428 Mich 356, 361–62 (1987), the Supreme Court held that the sentencing judge is not required to hold a hearing at sentencing unless the defendant requests such a hearing. Otherwise, a hearing shall be held only at such time that defendant fails to make the required payments. Furthermore, a defendant who does not timely challenge the amount of costs waives his or her right on appeal to challenge an order for costs that appears on its face to be a reasonable approximation of costs permitted by MCL 771.3(4). *Id.* at 363.

However, if a defendant does request such a hearing, the following provisions apply:

“(a) The court shall not require a probationer to pay costs unless the probationer is or will be able to pay them
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during the term of probation. In determining the amount and method of payment of costs, the court shall take into account the probationer’s financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.

“(b) A probationer who is required to pay costs and who is not in willful default of the payment of the costs may petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.” MCL 771.3(7)(a)–(b).*

**Probation revocation for willful failure to pay costs.** Probation may not be revoked for failure to pay fines, costs, or restitution if the reason for non-payment was the defendant’s indigence. *Bearden v Georgia,* 461 US 660, 664 (1983), *People v Terminelli,* 68 Mich App 635, 637–38 (1976), and *People v Lemon,* 80 Mich App 737, 745 (1978). In criminal cases, the court has authority to alter and amend conditions of probation. MCL 771.2(2). Upon petition by the probationer, the court should conduct a hearing to determine whether the probation order should be modified. *People v Ford,* 410 Mich 902 (1981), and *Lemon, supra* at 743 (sentencing court abused its discretion by refusing to modify the restitution condition of the probation order where the defendant petitioned for modification of the order).

In a criminal case, the sentencing judge may revoke a defendant’s probation because of the defendant’s failure to pay costs only if the judge finds that defendant has not made a good-faith effort to comply with the order for costs. In determining this, the judge shall consider defendant’s employment status, earning ability, financial resources, the willfulness of defendant’s failure to pay, and any other special circumstances that may have a bearing on defendant’s ability to pay. MCL 771.3(9).

These required findings are necessary to avoid an equal protection violation when a defendant or juvenile is incarcerated for failing to pay fines, costs, or restitution. A sentence that exposes an indigent offender to incarceration unless he or she pays fines, costs, or restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on ability to pay the fines, costs, or restitution. *Tate v Short,* 401 US 395, 397–400 (1971), and *People v Baker,* 120 Mich App 89, 99 (1982). In *People v Collins,* 239 Mich App 125 (1999), the trial court sentenced defendant to 48 months of probation, including a year in jail. The sentence provided that 270 days of the jail time would be suspended if defendant paid $31,505.50 in restitution. Defendant sought a hearing on his ability to pay the restitution, but the trial court denied defendant’s request.

*See also MCL 769.1f(5) and (7).*
The trial court reasoned that defendant was not being jailed for failing to pay restitution; instead, he was being denied a suspension of the sentence for failing to meet a condition of the suspension. The Court of Appeals rejected the trial court’s distinction. *Id.* at 133. Defendant could not be required to serve the suspended portion of the sentence without findings by the trial court that defendant had the ability to pay the restitution and had willfully defaulted. *Id.* at 136. The Court of Appeals remanded the case to the trial court for findings on these issues.

**Use of bail money to pay costs.** MCR 3.935(F)(4)(a) permits the application of bail money paid by a parent to costs and reimbursement of the costs of care and service. MCR 6.106(I)(3) and MCL 765.15(2) permit the application of bail money after conviction against costs, fines, restitution, and other assessments. See also MCL 765.6c, which states that when a defendant personally pays his or her own bond, he or she shall be notified that this money may be used to pay fines, costs, restitution, or other payments ordered by the court.

**L. Orders Directed to Parents and Other Adults**

**Orders to refrain from conduct harmful to the juvenile.** The court may order the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under the court’s jurisdiction, or that obstructs placement or commitment of the juvenile pursuant to a dispositional order. MCL 712A.18(1)(g). See also MCL 712A.6 (Family Division has jurisdiction over adults and may make such orders affecting adults the court finds necessary for physical, mental, or moral well-being of children under its jurisdiction).*

In *In re Macomber*, 436 Mich 386, 393, 398 (1990), the Michigan Supreme Court found that the trial court’s authority to make dispositional orders extends beyond remedies listed in MCL 712A.18. The Court stated the following:

“Thus, we hold that the Legislature has conferred very broad authority to the probate court. There are no limits to the ‘conduct’ [under MCL 712A.18(1)(g)] which the court might find harmful to a child. The Legislature intended that the court be free to define ‘conduct’ as it chooses. Moreover, in light of the directive that these provisions are to be ‘liberally construed’ [under MCL 712A.1(3)] in favor of allowing a child to remain in the home, we find these sections supportive of the court’s order prohibiting the father from living with his daughter.” *Macomber, supra*, at 393.

**Order to parent or guardian to participate in treatment.** The court may order the juvenile’s parent or guardian to personally participate in treatment
reasonably available in the parent’s or guardian’s location. MCL 712A.18(1)(l).

**Notice and hearing requirements.** “An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in sections 12 and 13 of [the Juvenile Code] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in section 13 of [the Juvenile Code].” MCL 712A.18(4).*

**M. Order for Health Care**

The court may provide the juvenile with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items as the court considers necessary. MCL 712A.18(1)(f).

A provision of the Child Care Organizations Act, MCL 722.124a, limits the authority of persons other than parents to consent to non-emergency medical treatment. That statute states in relevant part:

“(1) A probate court, a child placing agency, or the department may consent to routine, nonsurgical medical care, or emergency medical and surgical treatment of a minor child placed in out-of-home care pursuant to . . . [MCL] 400.1 to 400.121 . . ., [MCL] 710.21 to 712A.28 . . ., or this act. If the minor child is placed in a child care organization, then the probate court, the child placing agency, or the department making the placement shall execute a written instrument investing that organization with authority to consent to emergency medical and surgical treatment of the child. The department may also execute a written instrument investing a child care organization with authority to consent to routine, nonsurgical medical care of the child. If the minor child is placed in a child care institution, the probate court, the child placing agency, or the department making the placement shall in addition execute a written instrument investing that institution with authority to consent to the routine, nonsurgical medical care of the child.

. . . .

“(3) Only the minor child’s parent or legal guardian shall consent to nonemergency, elective surgery for a child in foster care. If parental rights have been permanently terminated by court action, consent for nonemergency,
elective surgery shall be given by the probate court or the agency having jurisdiction over the child.

“(4) As used in this section, ‘routine, nonsurgical medical care’ does not include contraceptive treatment, services, medication or devices.”

MCL 722.124a applies when a child is “placed in out-of-home care.” MCL 712A.18(1)(f), on the other hand, allows a court to order medical treatment as “the court considers necessary.” Moreover, when the court has taken jurisdiction over a juvenile, parental rights are effectively suspended, with the court acting in the place of a parent.

10.10 Required Procedures When a Juvenile Escapes From Placement

Notification of law enforcement agency and victim that juvenile has escaped. MCL 712A.18j requires notification of a law enforcement agency when a juvenile escapes from a facility or residence in which he or she has been placed. MCL 712A.18j(1) states:

“If a juvenile escapes from a facility or residence in which he or she has been placed for a violation described in section 2(a)(1) of this chapter [criminal offenses], other than his or her own home or the home of his or her parent or guardian, the individual at that facility or residence who has responsibility for maintaining custody of the juvenile at the time of the escape shall immediately notify 1 of the following of the escape or cause 1 of the following to be immediately notified of the escape:

(a) If the escape occurs in a city, village, or township that has a police department, the police department of that city, village, or township.

(b) Except as provided in subdivision (a), 1 of the following:

(i) The sheriff department of the county in which the escape occurs.

(ii) The department of state police post having jurisdiction over the area in which the escape occurs.”

MCL 400.115n and MCL 803.306a contain substantially similar provisions dealing with juveniles placed with FIA and juveniles committed to FIA (public wards), respectively. These provisions apply to juveniles placed
with or committed to FIA following delinquency, designated case, or “automatic waiver” proceedings.

In juvenile delinquency proceedings, if the victim requests in writing, the Family Independence Agency, county juvenile agency, or court must give the victim notice of the juvenile’s escape from “a secure detention or treatment facility.” MCL 780.798(3). The victim must be given “immediate notice of the escape by any means reasonably calculated to give prompt actual notice.” *Id.*

A juvenile’s escape must be entered into the Law Enforcement Information Network (“LEIN”). MCL 400.115n(1)–(2) and MCL 712A.18j(1)–(2).

**Apprehension of juveniles absent from placement without authority.** The Family Division may issue an order to apprehend a juvenile who is absent without leave from a facility or institution in which the juvenile has been placed. Like an arrest warrant for an adult, the Family Division’s order may only issue upon probable cause and must specify the juvenile and the place where the juvenile may be found. MCL 712A.2c states in part:

> “The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is absent without leave from an institution or facility to which he or she was committed under [MCL 712A.18] . . . . The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found.”

However, MCL 803.306(1), which deals with juveniles committed to FIA as public wards, provides that a juvenile apprehended after being absent without approval may be returned to placement. That provision states:

> “(1) A public ward shall not absent himself or herself from the facility or residence in which he or she has been placed without the youth agency’s prior approval. A public ward who violates this provision may be returned to the facility in which he or she was placed by a peace officer without a warrant. A person who knows the whereabouts of a public ward who violates this subsection shall immediately notify the youth agency and the nearest peace officer.”

**Procedures required to detain a juvenile.** If a juvenile is apprehended and brought to court, the juvenile may be detained without bail. MCR 3.946 sets forth the required procedure following apprehension of a juvenile who is absent without leave from a placement. The rule applies only to juveniles who were found responsible for offenses that would be criminal if committed by an adult.* MCR 3.946 states:
“(A) If a juvenile who has been found to have committed an offense that would be a misdemeanor or a felony if committed by an adult has been placed out of home by court order or by the Family Independence Agency, and the juvenile leaves such placement without authority, upon being apprehended the juvenile may be detained without the right to bail. Any detention must be authorized by the court.

“(B) If a juvenile is placed in secure detention pursuant to this rule and no new petition is filed that would require a preliminary hearing pursuant to MCR 3.935, and no probation violation petition is filed, the court must conduct a detention hearing within 48 hours after the juvenile has been taken into custody, excluding Sundays and holidays as defined by MCR 8.110(D)(2).

“(C) At the detention hearing the court must:

(1) assure that the custodial parent, guardian, or legal custodian has been notified, if that person’s whereabouts are known,

(2) advise the juvenile of the right to be represented by an attorney,

(3) determine whether the juvenile should be released or should continue to be detained.”

Criminal offense. MCL 750.186a(1) makes it a felony for an individual who is placed in a juvenile facility to escape or attempt to escape from that juvenile facility or from the custody of an employee of that facility. “Escape” means to leave without lawful authority or to fail to return to custody when required. MCL 750.186a(2)(a). MCL 712A.18j(3) and MCL 803.306a(4) contain substantially similar definitions of “escape.” A juvenile facility includes an institution operated as an agency of the county or court, and a state institution to which an offender has been committed for a misdemeanor or felony offense. MCL 750.186a(2)(b).

Notifying a victim of a juvenile’s detention for a subsequent criminal offense. Upon the victim’s written request, the court, Family Independence Agency, or county juvenile agency shall make a good faith effort to notify the victim when the juvenile is detained for committing a subsequent criminal offense. MCL 780.798(1)(d).

10.11 Supplemental Orders of Disposition

At any time while a juvenile is under the Family Division’s jurisdiction, the court may terminate jurisdiction or amend or supplement a disposition order
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“within the authority granted to the court in [MCL 712A.18].” MCL 712A.19(1). MCR 3.943(E)(2) requires the court to consider imposing “graduated sanctions” upon a juvenile when making second and subsequent dispositions in delinquency cases. That rule states as follows:

(2) In making second and subsequent dispositions in delinquency cases, the court must consider imposing increasingly severe sanctions, which may include imposing additional conditions of probation; extending the term of probation; imposing additional costs; ordering a juvenile who has been residing at home into an out-of-home placement; ordering a more restrictive placement; ordering state wardship for a child who has not previously been a state ward; or any other conditions deemed appropriate by the court. Waiver of jurisdiction to adult criminal court, either by authorization of a warrant or by judicial waiver, is not considered a sanction for purposes of this rule.”

In Breed v Jones, 421 US 519, 531 (1975), the United States Supreme Court held that jeopardy attaches when a juvenile court assumes jurisdiction over a juvenile as a delinquent. Therefore, requiring waiver proceedings to occur before the adjudicatory phase of a delinquency proceeding is constitutionally required, and does not diminish the juvenile court’s ability to create flexible remedies. Id., at 535–41. See also People v Saxton, 118 Mich App 681, 688–89 (1982).

10.12 Restitution

The Michigan Constitution preserves the right of crime victims to restitution from their offenders. Const 1963, art 1, § 24, states in relevant part:

“(1) Crime victims, as defined by law, shall have the following rights, as provided by law:

The right to restitution.”

Compensatory nature of restitution. Michigan courts have consistently stated that restitution is intended to compensate the victim rather than punish the defendant or juvenile. See, for example, People v Grant, 455 Mich 221, 230 n 10 (1997) (attempting to return the victim to his or her pre-offense state contrasts with the traditional purposes of criminal sentences—rehabilitation, deterrence, community protection, and punishment), People v Law, 459 Mich 419, 424 (1999) (the term “restitution” as used in the Crime Victim’s Rights Act (“CVRA”) has the same meaning as used in civil actions; therefore, prejudgment interest on restitution may be properly
ordered under the CVRA), and People v Carroll, 134 Mich App 445, 446 (1984) (the purpose of restitution is to compensate the injured party, not to force the defendant to disgorge the benefit gained from the offense). See, however, Kelly v Robinson, 479 US 36, 52–53 (1986) (for purposes of federal bankruptcy proceedings, there is no meaningful distinction between criminal fines and restitution).

Because restitution is the victim’s constitutional right and is mandatory under the Crime Victim’s Rights Act, the prosecutor and defendant or juvenile cannot exclude restitution from a plea or sentence agreement. People v Ronowski, 222 Mich App 58, 61 (1997).

The Michigan Supreme Court has held that because the nature of restitution is compensatory, not punitive, a restitution order survives the defendant’s death and may be enforced against his or her estate. People v Peters, 449 Mich 515, 523–24 (1995).

A. Statutory Authority for Ordering Restitution

Restitution is authorized under MCL 780.794–780.795 (restitution under the juvenile article of the CVRA), and MCL 712A.30–712A.31 (restitution in cases under the Juvenile Code). Prior to 2001 amendments to the CVRA, the foregoing provisions were substantially similar to one another. The recent amendments to the CVRA added several rights and procedures to the restitution provisions of the CVRA. See 2000 PA 503, effective June 1, 2001. However, the restitution provisions contained in the other statutes listed above were not contemporaneously amended. To avoid confusion, the amended restitution provisions of the CVRA are discussed throughout this section, and the provisions contained in other law are discussed only when they contain additional rights or procedures not contained in the amended CVRA provisions.

A restitution order is governed by the statute in effect at the time of sentencing, not at the time of the offense. In People v Lueth, ___ Mich App ___ (2002), the Court of Appeals held that the trial court did not err by retrospectively applying an amended version of MCL 780.767(1), which was in effect at the time of sentencing but not at “the time of at least some of the crimes.” The Court concluded that the amended statute, which deleted the requirement that a court consider a defendant’s ability to pay before assessing the amount of restitution, could be applied retrospectively, since it “operate[d] in furtherance of a remedy already existing.” Id. at ___. The Court found its holding to be “in accord with previous cases from this Court and our Supreme Court recognizing that a restitution order is governed by the statute in effect at the time of sentencing.” Id. Finally, the Court rejected defendant’s argument that the amended restitution statute violated the Ex Post Facto Clause of the Michigan Constitution, Const 1963, art 1, § 10, since the “amended language did not add an obligation to defendant’s burden but instead removed consideration of what may have been used to reduce defendant’s punishment.” Id.
**B. Claims for Restitution That Arise After Disposition or Sentencing**

All articles of the CVRA require the court to order restitution “when sentencing a defendant” or “at the dispositional hearing or sentencing” of a juvenile. MCL 780.766(2), MCL 780.794(2), and MCL 780.826(2). However, the CVRA does not provide a time limit within which restitution claims must be made. Compare 18 USC 3664(d)(5) of the federal Victim and Witness Protection Act (“If the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing”).*

If a juvenile has been placed on probation, the court has authority to alter or amend conditions of probation while the court has jurisdiction over the juvenile. MCL 712A.18(2) (court has authority to alter or amend probation conditions when imposition of adult sentence has been delayed in a designated case), and MCL 712A.19(1) (court may amend or supplement disposition order at any time while it has jurisdiction over a juvenile in juvenile delinquency cases).

If a juvenile is committed to the Family Independence Agency following juvenile delinquency or “automatic waiver” proceedings, the court maintains jurisdiction over the juvenile. MCL 769.1(10) and MCL 712A.18c(2). However, no explicit statutory authority exists to amend the court’s order of commitment to include restitution. See MCL 712A.18c(3) and MCL 769.1(11) (court may order changes in juvenile’s placement or treatment plan based on an annual progress review).

The Michigan Court of Appeals has held that a sentencing court may amend an existing order of restitution after sentencing with regard to persons entitled to restitution and the amount of restitution owed. People v Greenberg, 176 Mich App 296, 311 (1989).

**C. Offenses for Which Restitution Must Be Ordered**

The CVRA requires restitution for any criminal offense. MCL 780.794(2) requires a court to order restitution at the disposition or sentencing hearing for an “offense.” MCL 780.794(1)(a) defines “offense” as “a violation of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine.”

The CVRA requires the person preparing a disposition report to notify victims of their right to submit information to the court regarding restitution in cases involving “serious misdemeanors.” MCL 780.791(3)(c).* This notice requirement does not apply to other misdemeanors (e.g., malicious destruction of property of less than $1000.00, MCL 750.380(4)–(5).
Nonetheless, all crime victims have constitutional and statutory rights to restitution whether or not they receive notice of their right to submit information regarding the amount of their losses prior to disposition or sentencing.

D. Required Restitution When Ordering an Informal Disposition in a Juvenile Delinquency Case

Under MCL 780.786b(1), the court in a juvenile delinquency case must notify the prosecuting attorney of the court’s intent to divert the case, place the case on the consent calendar, or use any other disposition that removes the case from the adjudicative process.* The prosecuting attorney, in turn, must notify the victim, who must be given the opportunity to address the court on the court’s proposed action. If the court enters an order removing the case from the adjudicative process, “the court shall order the juvenile or the juvenile’s parents to provide full restitution as provided in [MCL 780.794].” MCL 780.786b(1). See also MCL 780.794(2) (the court must order restitution under MCL 780.794 even though no dispositional hearing is held).

E. Persons or Entities Entitled to Restitution

In all cases, the court must order restitution to victims of the course of conduct that led to the defendant’s or juvenile’s conviction or adjudication, to individuals or entities (including insurance companies) that have compensated the victim for losses incurred due to that course of conduct, and to individuals or entities that have provided services to the victims of that course of conduct. The court must order restitution to be paid to the victim or the victim’s estate first. However, if an individual or entity has compensated or will compensate the victim for losses resulting from the defendant’s or juvenile’s course of conduct, the court shall not order restitution to the victim and shall state on the record why it is not doing so. MCL 780.794(8) states in relevant part:

“[A]n order of restitution shall require that all restitution to a victim or victim’s estate under the order be made before any restitution to any other person or entity under that order is made. The court shall not order restitution to be paid to a victim or victim’s estate if the victim or victim’s estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action.”

Any victim of the course of conduct that gave rise to the conviction or adjudication. In all cases, the court must order restitution to any victim of the course of conduct that gave rise to the defendant’s or juvenile’s conviction or disposition. MCL 780.794(2).
For purposes of restitution, “victim” is defined as an individual who suffers direct or threatened physical, financial, or emotional harm as a result of an offense, or a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of an offense. MCL 780.794(1)(b).

If the victim is deceased, the court shall order restitution to the victim’s estate. MCL 780.794(7).

The offender may be ordered to pay restitution to victims of offenses for which the offender was not convicted or adjudicated. In People v Gahan, 456 Mich 264 (1997), the trial court ordered defendant to pay a total of $25,000.00 in restitution. Defendant was ordered to compensate more than 10 different victims whom he had defrauded in a similar fashion, even though he was only convicted of two counts of embezzlement. The Supreme Court unanimously affirmed, holding that the phrase “any victim of the defendant’s course of conduct” should be given the broad meaning that was intended by the Legislature. The Court concluded that “the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction.” Id. at 272. See also People v Persails, 192 Mich App 380, 383 (1991) (the defendant was properly ordered to pay restitution for uncharged offenses where a plea bargain was likely motivated by dismissal of those offenses), and compare People v Winquest, 115 Mich App 215, 221–22 (1982) (requiring the defendant to pay restitution related to an offense for which he was tried but acquitted was improper).

In People v Letts, 207 Mich App 479, 481 (1994), the defendant, who pled guilty to breaking and entering an occupied dwelling, was properly ordered to pay restitution for damage caused by a fire that was set by one of his accomplices after the defendant had left the dwelling. The defendant was neither charged with nor convicted of arson.

Expenses that are not reimbursable under the relevant statutes may not be included in a restitution order. See, e.g., People v Jones, 168 Mich App 191, 196 (1988) (the trial court erred in ordering restitution of the victim’s traveling expenses).

The court may order restitution to a governmental agency for the loss of “buy money” resulting from drug offenses. “Narcotics Enforcement Teams” (NETs) may obtain restitution of “buy money” used to purchase controlled substances. People v Crigler, 244 Mich App 420, 427–28 (2001). In Crigler, the Court of Appeals first noted that the Crime Victim’s Rights Act was amended in 1993 to provide that governmental entities could be victims under the act. The Court then concluded that loss of the “buy money” constituted “financial harm” resulting from an offense because loss of the money limited the NET’s ability to conduct future investigations.*
Individuals or entities that have compensated the victim. In addition to direct victims of the defendant’s or juvenile’s course of conduct, the court must order restitution to individuals or organizations that have compensated the direct victim for losses incurred as a result of that course of conduct. The relevant portion of MCL 780.794(8) states as follows:

“The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim’s estate for a loss incurred by the victim to the extent of the compensation paid for that loss.”

This provision allows the court to order restitution to insurance companies to the extent that they have compensated the victim for his or her loss. See People v Washpun, 175 Mich App 420, 423 (1989) (prior to the statutory amendment that added the section quoted above, the Legislature intended insurance companies to receive restitution under the CVRA to the extent that they compensated victims for losses arising from crimes).

Individuals or entities that have provided services to the victim. The court must also order restitution to individuals or organizations that have provided services to the victim as a result of the defendant’s or juvenile’s course of conduct. This includes victim services organizations. The relevant portion of MCL 780.794(8) states as follows:

“The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the offense. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation.”

F. Time Requirements for Making Restitution

Unless otherwise provided by the court, restitution must be made immediately. The court may require the defendant or juvenile to make restitution within a specified period or in specified installments. MCL 780.794(10). See also MCR 1.110 (“Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown”).
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G. Amount of Restitution Required

“In determining the amount of restitution to order. . . , the court shall consider the amount of the loss sustained by any victim as a result of the offense.” MCL 780.795(1).*

When determining the amount of restitution to order, the court must not consider a defendant’s or juvenile’s ability to pay the restitution. See 1996 PA 562 (eliminating the possibility that the court order partial restitution because of the offender’s inability to pay full restitution). MCL 780.794(2) states that “at the dispositional hearing or sentencing for an offense, the court shall order, in addition to or in lieu of any other disposition or penalty authorized by law, that the juvenile make full restitution to any victim of the juvenile’s course of conduct that gives rise to the disposition or conviction or to the victim’s estate.” (Emphasis added.)

Codefendants and coconspirators may be held jointly and severally liable for the entire amount of loss. People v Peterson, 62 Mich App 258, 267–68 (1975). In People v Grant, 455 Mich 221 (1997), defendant pleaded guilty to conspiracy to utter and publish and was ordered to pay $175,000.00 in restitution. Defendant appealed, arguing that he played a limited role in the conspiracy and should not be liable for the entire $175,000.00. The Michigan Supreme Court disagreed, reasoning that because each conspirator is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy, ordering the defendant to pay full restitution was justified. Id. at 236.

In an appropriate case, the amount of the victim’s loss may include prejudgment interest. In People v Law, 459 Mich 419, 424 (1999), the Michigan Supreme Court held that where the defendant pled guilty to criminal desertion and abandonment, the trial court properly ordered interest on unpaid child support and medical bills under the CVRA. The Court also stated that the appropriate interest rate may be determined by reference to a “closely related statute” (the Support and Visitation Enforcement Act in this case); however, where there is no “closely related statute,” the court has discretion to set a reasonable rate of interest. Id. at 429 n 12.

Pending civil litigation between the victim and offender is an insufficient reason for ordering less than full restitution. The amount of restitution paid to the victim must be set off against any amount the victim recovers as compensatory damages in a civil suit against the defendant or juvenile. People v Avignone, 198 Mich App 419, 423 (1993).*

H. Calculating Restitution Where the Offense Results in Property Damage, Destruction, Loss, or Seizure

If an offense results in damage to or loss or destruction of a victim’s property, or if it results in the seizure or impoundment of a victim’s property, the court may order the juvenile to pay restitution to the victim.
The relevant statutory provisions, MCL 780.794(3)(a)–(c), determine the amount of restitution to be ordered in such cases. These provisions state that the court may order the juvenile to do one or more of the following:

“(a) Return the property to the owner of the property or to a person designated by the owner.

“(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:

(i) The value of the property on the date of the damage, loss, or destruction.

(ii) The value of the property on the date of disposition.

“(c) Pay the costs of the seizure or impoundment, or both.”

Thus, the court may order the juvenile to return the property to the victim or the victim’s designee. If return of the property is impossible, impractical, or inadequate, the court may order the juvenile to pay the value of the property on the day it was damaged, lost, or destroyed (if the value of the property has depreciated or remained the same) or the value of the property at disposition (if the property has appreciated in value), less the value of any property returned to the victim. In addition, the court may order the juvenile to pay the costs of seizure, impoundment, or both.

In *People v Guajardo*, 213 Mich App 198, 199–200 (1995), the defendant was ordered to pay $28,105.00 in restitution for jewelry that he stole from a retail jewelry store. This amount, which was uncontroverted by any credible evidence, represented the retail value of the stolen jewelry. The Court of Appeals upheld the restitution order, finding that the victim lost the replacement value of the jewelry plus expected profit from its sale, and the victim’s profit would have been used to pay operating expenses and employee wages.

I. Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

Expenses related to physical or psychological injury. If an offense results in physical or psychological injury to a victim, the court may order the juvenile to pay restitution for professional services and devices, physical and occupational therapy, lost income, medical and psychological treatment for the victim’s family, and homemaking and child care expenses. MCL
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780.794(4)(a)–(e) state that the court may order the juvenile to do one or more of the following, as applicable:

“(a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.

“(b) Pay an amount equal to the reasonably determined cost of physical and occupational therapy and rehabilitation actually incurred and reasonably expected to be incurred.

“(c) Reimburse the victim or the victim’s estate for after-tax income loss suffered by the victim as a result of the offense.

“(d) Pay an amount equal to the reasonably determined cost of psychological and medical treatment for members of the victim’s family actually incurred and reasonably expected to be incurred as a result of the offense.

“(e) Pay an amount equal to the reasonably determined costs of homemaking and child care expenses actually incurred and reasonably expected to be incurred as a result of the offense or, if homemaking or child care is provided without compensation by a relative, friend, or any other person, an amount equal to the costs that would reasonably be incurred as a result of the offense for that homemaking and child care, based on the rates in the area for comparable services.”

The amount of restitution for professional services and devices, physical and occupational therapy, medical and psychological treatment for the victim’s family, and homemaking and child care expenses must be reasonably determined and include both expenses actually incurred and reasonably expected to be incurred. Thus, “prospective” restitution may be ordered.*

MCL 780.794(4)(c) allows the court to order a juvenile to “[r]eimburse the victim or the victim’s estate for after-tax income loss suffered by the victim as a result of the offense.” The Court of Appeals has held that the court may not order restitution for lost income of a homicide victim’s family member under a similar provision applicable to adult felony offenses. People v Paquette, 214 Mich App 336, 346 (1995). The Court of Appeals in Paquette noted that MCL 780.766(4)(c) does not explicitly include the direct victim’s family members, and that for purposes of restitution, “victim” includes only those individuals who have suffered direct or threatened harm. Id.
**Expenses related to the victim’s death.** If criminal conduct results in the death of a victim, the court must order the restitution to be paid to the victim’s estate. MCL 780.794(7).

The court may order restitution in “an amount equal to the cost of actual funeral and related services.” MCL 780.794(4)(f). Where the defendant failed to show that the $11,864.22 in restitution ordered by the sentencing court for funeral and burial expenses included an $11,000.00 reward paid by the victim’s family, the Court of Appeals found no error in the restitution order. *People v Ho*, 231 Mich App 178, 192 (1998).

The court may also order a juvenile to reimburse a victim’s parent or guardian for a lost tax deduction or credit. MCL 780.794(4)(g) states:

“If the deceased victim could be claimed as a dependent by his or her parent or guardian on the parent’s or guardian’s federal, state, or local income tax returns, pay an amount equal to the loss of the tax deduction or tax credit. The amount of reimbursement shall be estimated for each year the victim could reasonably be claimed as a dependent.”

**Triple restitution for serious bodily impairment or death of a victim.** If an offense causing bodily injury to the victim also results in the serious impairment of a body function or the death of that victim, the court may order up to three times the amount of restitution otherwise allowed under the CVRA. MCL 780.794(5). “Serious impairment of a body function” includes but is not limited to the following:

“(a) Loss of a limb or use of a limb.

“(b) Loss of a hand or foot or use of a hand or foot.

“(c) Loss of an eye or use of an eye or ear.

“(d) Loss or substantial impairment of a bodily function.

“(e) Serious visible disfigurement.

“(f) A comatose state that lasts for more than 3 days.

“(g) Measurable brain damage or mental impairment.

“(h) A skull fracture or other serious bone fracture.

“(i) Subdural hemorrhage or subdural hematoma.

“(j) Loss of a body organ.” MCL 780.794(5)(a)–(j).
Michigan’s “no-fault” automobile insurance act provides that an injured person may recover non-economic (“pain and suffering”) tort damages from a driver if the person suffers “serious impairment of a body function.” MCL 500.3135(7) defines “serious impairment of a body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” “Objectively manifested” means that the injury or condition must be medically identifiable and have a physical basis but it need not be permanent. DiFranco v Picard, 427 Mich 32, 74 (1986), and M Civ JI 36.11. Important body functions include walking, movement of the back, neck, or hands, and heart and lung function. See M Civ JI 36.11, Comment, for case citations. The Court of Appeals has stated that trial courts should consider the following nonexhaustive list of factors when deciding whether an impairment is serious for purposes of the no-fault act: “extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery.” Kern v Blethen-Coluni, 240 Mich App 333, 341 (2000).

Mental or emotional injuries may qualify as impairments of body functions. M Civ JI 36.02 states:

“The operation of the mind and of the nervous system are body functions. Mental or emotional injury which is caused by physical injury or mental or emotional injury not caused by physical injury but which results in physical symptoms may be a serious impairment of . . . body function.”

J. Required Reports by Probation Officers

The court may order a probation officer to obtain information pertaining to the amount of loss suffered by a victim. If the court orders a probation officer to obtain such information, he or she must include this information in a disposition report or a separate report, as the court directs. MCL 780.795(1)–(2).

The court must disclose to the juvenile, the juvenile’s supervisory parent, and the prosecuting attorney all portions of the disposition or other report pertaining to the amount of loss. MCL 780.795(3). See also MCL 771.14(3) (information in a PSIR must be disclosed to the parties).
K. Hearing Requirements and Burden of Proof

When ordering a defendant or juvenile to pay restitution, the court is not required to hold a hearing to determine the type or amount of restitution. *However, a hearing is required before ordering a juvenile’s parent to pay restitution. See Section 10.12(L), below.*

“Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence.” People v Grant, 455 Mich 221, 243 (1997). A trial judge is entitled to rely on the information in a presentence report, which is presumed to be accurate unless the defendant effectively challenges that information. Id. at 233–34. If an evidentiary hearing is held, the rules of evidence do not apply, other than those with respect to privileges. MRE 1101(b)(3).

MCL 780.795(4) states that “[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.” The prosecuting attorney must show “with some precision” the amount of loss resulting from uncharged offenses related to the conviction offense, and a defendant is entitled to decline to testify at a hearing to determine the proper amount of restitution without having that silence used against him or her. People v Alvarado, 142 Mich App 151, 164–65 (1984), overruled on other grounds 428 Mich 356, 363 n 7 (1987). The burden of demonstrating the financial resources of a juvenile’s supervisory parent and any other moral or legal financial obligation of the parent shall be on the supervisory parent. MCL 780.795(4).

The amount of loss for which restitution is ordered must be based on evidence. People v Guajardo, 213 Mich App 198, 200 (1995). The amount of loss may be shown by facts in a presentence report, in a victim impact statement, or adduced at sentencing. People v Hart, 211 Mich App 703, 706 (1995) (the amount of loss was adequately shown by the presentence report and victim impact statement), People v Sickles, 162 Mich App 344, 363–65 (1987) (the amount embezzled by the defendant was adequately shown by the presentence report and a consent judgment in a related civil suit), People v Tyler, 188 Mich App 83, 87 (1991) (where the presentence report was not included in the record on appeal, there was no means of determining whether the trial court arbitrarily ordered an amount of restitution to the victim of a sexual assault), and People v White, 212 Mich App 298, 316 (1995) (where the stalking victim’s statement that her financial losses “equaled hundreds or thousands of dollars” was unsubstantiated by other evidence, remand to the trial court for an evidentiary hearing was necessary).

Note: If a qualified “victim-offender reconciliation program” or “victim-offender mediation program” is available, and if victim participation in the program is completely voluntary, the amount of restitution may be established by the victim and offender rather than the court.
L. Hearings on Restitution Payable by Juvenile’s Parent

In juvenile delinquency cases, “traditional” waiver cases, and designated cases, the court may order the juvenile’s parent to pay some or all of the restitution owed to the victim. MCL 780.794(15) and MCL 780.766(15)(a).* The juvenile’s parent must be given an opportunity to be heard on the issue. The relevant statutory provisions state:

“If the court determines that a juvenile is or will be unable to pay all of the restitution ordered, after notice to the juvenile’s parent or parents and an opportunity for the parent or parents to be heard the court may order the parent or parents having supervisory responsibility for the juvenile at the time of the acts upon which an order of restitution is based to pay any portion of the restitution ordered that is outstanding. An order under this subsection does not relieve the juvenile of his or her obligation to pay restitution as ordered, but the amount owed by the juvenile shall be offset by any amount paid by his or her parent. As used in this subsection, ‘parent’ does not include a foster parent.” MCL 780.766(15) and MCL 780.794(15).

Note: If a victim of the juvenile’s offense is the juvenile’s parent, the court may choose not to order that parent to pay restitution under these provisions.

The court must “take into account the parent’s financial resources and the burden that the payment of restitution will impose, with due regard to any other moral or legal financial obligations the parent may have.” MCL 780.766(16) and MCL 780.794(16). If a parent is required to pay restitution, the court must order payment to be made in specified installments and within a specified period of time. *Id (emphasis added). When the juvenile is ordered to pay restitution in delinquency proceedings, the court may order payment in specified installments or within a specified period of time. MCL 780.794(10).

An order directed to a parent shall not be binding unless the parent has been given an opportunity for a hearing pursuant to the issuance of a summons or notice as provided in MCL 712A.12 and MCL 712A.13. MCL 712A.18(4). The order, bearing the seal of the court, must be served on the parent or other person as required by MCL 712A.13. *Id.

A parent who has been ordered to pay restitution may petition the court for a modification of the amount of restitution owed by that parent or for a cancellation of any unpaid portion of that parent’s obligation. The court must “cancel all or part of the parent’s obligation due if the court determines that payment of the amount due will impose a manifest hardship on the parent and if the court also determines that modifying the method of
payment will not impose a manifest hardship on the victim.” MCL 780.766(17) and MCL 780.794(17).

M. Orders for Services by Juvenile in Lieu of Money

“If the victim or victim’s estate consents, the order of restitution may require that the juvenile make restitution in services in lieu of money.” MCL 780.794(6).

N. Restitution Ordered As a Condition of Probation

If a juvenile is placed on probation, any restitution ordered by the court must be a condition of that probation. MCL 780.794(11).

Community service or employment. Where restitution is imposed as a condition of probation, the court must also order either community service or employment as a condition of probation. MCL 712A.18(8)(a)–(b) state as follows:

“If the court imposes restitution as a condition of probation, the court shall require the juvenile to do either of the following as an additional condition of probation:

(a) Engage in community service or, with the victim’s consent, perform services for the victim.

(b) Seek and maintain paid employment and pay restitution to the victim from the earnings of that employment.”

Wage assignment by employed defendant or juvenile as a condition of probation. As a condition of probation, the court may order any employed juvenile to execute a wage assignment to pay the restitution ordered by the court. MCL 780.794(18). See also MCL 771.3(2)(f), which authorizes wage assignments in criminal cases when probation is ordered.

Review of restitution as a condition of probation. MCL 780.794(18) provides that in each case in which payment of restitution is ordered as a condition of probation, the probation officer or caseworker assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. If the restitution was ordered to be paid within a specified period of time, the probation officer or caseworker must review the case at the end of the specified period of time to determine whether the restitution has been paid. A final review of restitution payment must be conducted not less than 60 days before the expiration of the probationary period. Id.
If the probation officer or caseworker determines at any of these required reviews that restitution is not being paid as ordered, he or she must file a written report of the violation with the court on a form prescribed by the State Court Administrative Office or petition the court for a probation violation. *Id.* The report or petition must include a statement of the amount of the arrearage and any reasons for the arrearage that are known by the probation officer or caseworker. The probation officer or caseworker must immediately provide a copy of the report or petition alleging a probation violation to the prosecuting attorney. If a petition or motion for probation violation is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance. *Id.*

If the court determines that restitution is not being paid or has not been paid as ordered, the court may revoke probation or modify the method of payment. In addition, the prosecuting attorney or a person named in the restitution order may begin proceedings to enforce the restitution order.*

**O. Revocation of Probation for Failure to Comply With Restitution Order**

A court may revoke probation if the juvenile fails to comply with the restitution order and has not made a good-faith effort to comply with the order. MCL 780.794(11).* The court must consider “the juvenile’s employment status, earning ability, and financial resources, the willfulness of the juvenile’s failure to pay, and any other special circumstances that may have a bearing on the juvenile’s ability to pay.” *Id.*

MCL 780.794(14) states that “a juvenile shall not be detained or imprisoned for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court determines that the juvenile has the resources to pay the ordered restitution and has not made a good-faith effort to do so.” MCL 712A.18(9) authorizes the court to revoke probation if the juvenile intentionally refuses to perform required community service. The required findings in the foregoing statutes are necessary to avoid an equal protection violation when a defendant or juvenile is incarcerated for failing to pay restitution. A sentence that exposes an indigent offender to incarceration unless he or she pays restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on ability to pay the restitution. *Tate v Short,* 401 US 395, 397–400 (1971), and *People v Baker,* 120 Mich App 89, 99 (1982). In *People v Collins,* 239 Mich App 125 (1999), the trial court sentenced defendant to 48 months of probation, including a year in jail. The sentence provided that 270 days of the jail time would be suspended if defendant paid
$31,505.50 in restitution. Defendant sought a hearing on his ability to pay the restitution, but the trial court denied defendant’s request. The trial court reasoned that defendant was not being jailed for failing to pay restitution; instead, he was being denied a suspension of the sentence for failing to meet a condition of the suspension. The Court of Appeals rejected the trial court’s distinction. Id. at 133. Defendant could not be required to serve the suspended portion of the sentence without findings by the trial court that defendant had the ability to pay the restitution and had wilfully defaulted. Id. at 136. The Court of Appeals remanded the case to the trial court for findings on these issues.

P. Payment of Restitution When Individual Is Remanded to Department of Corrections

MCL 780.794(19) states that if “an individual who is ordered to pay restitution under this section is remanded to the jurisdiction of the department of corrections, the court shall provide a copy of the order of restitution to the department of corrections when the court determines that the individual is remanded to the department’s jurisdiction.”

If a prisoner has been ordered to pay restitution to a crime victim and the court has sent the Department of Corrections a copy of the order of restitution, the Department of Corrections “shall deduct 50% of the funds received by the prisoner in a month over $50.00 for payment of restitution.” MCL 791.220h(1). The Department of Corrections must promptly forward to the victim restitution received when the amount received exceeds $100.00, or the entire amount received when the prisoner is paroled, transferred to a community program, or discharged on the maximum sentence. Id. The Department of Corrections must not alter these requirements through an agreement with the prisoner. MCL 791.220h(3).

Note: Prisoners may object to the deduction of money from their accounts under MCL 791.220h(1), on grounds that the money was not given to them but sent to them by family members for a prisoner’s use. However, the statute requires the Department of Corrections to deduct “funds received by the prisoner” and does not require the prisoner to “own” the money.

In White-Bey v Dep’t of Corrections, 239 Mich App 221 (1999), the trial court recommended that the plaintiff-prisoner pay the victim $140.00 in restitution as a condition of parole or discharge. While plaintiff-prisoner was still in prison, the defendant-Department of Corrections began to remove funds from plaintiff-prisoner’s account to satisfy the restitution order, and plaintiff-prisoner sought an injunctive order. The Court of Appeals upheld the removal of plaintiff-prisoner’s funds to pay the restitution. The Court of Appeals relied in part on the CVRA although the plaintiff-prisoner’s offense was committed before the CVRA was enacted. Under the version of MCL 780.766 in effect on the date of plaintiff-prisoner’s sentencing, restitution was payable immediately unless the
sentencing court ordered it payable within a specified period or in installments. Because there was no language in the judgment of sentence providing for payment within a specified period or in installments, restitution was payable immediately. Moreover, the sentencing court did not have authority to order a condition of parole because the Department of Corrections has exclusive jurisdiction over paroles. Thus, the portion of the judgment of sentence that conditioned parole or discharge upon payment of restitution could not be relied upon to prevent the Department of Corrections from removing funds from the plaintiff-prisoner’s account.

Q. Modification of Method of Payment of Restitution

Pursuant to the CVRA, a court may modify the method of payment of restitution imposed on a defendant or juvenile. MCL 780.794(12) states as follows:

“A juvenile who is required to pay restitution and who is not in willful default of the payment of the restitution may at any time petition the court to modify the method of payment. If the court determines that payment under the order will impose a manifest hardship on the juvenile or his or her immediate family, and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim, the court may modify the method of payment.”

At any time while a juvenile is under the Family Division’s jurisdiction, the court may amend or supplement a disposition order “within the authority granted to the court in [MCL 712A.18].” MCL 712A.19(1). MCL 712A.18(7) requires the court to order restitution pursuant to the CVRA and MCL 712A.30, and MCL 712A.30(12) allows the court to modify the method of payment of restitution. In criminal cases, the court has authority to alter and amend conditions of probation. MCL 771.2(2). Indeed, upon petition by the probationer, the court should conduct a hearing to determine whether the probation order should be modified. People v Ford, 95 Mich App 608, 612 (1980), rev’d on other grounds 410 Mich 902 (revocation of probation was proper for failure to pay child support and costs where the defendant failed to petition the court for modification of his probation conditions), and People v Lemon, 80 Mich App 737, 743 (1978) (sentencing court abused its discretion by refusing to modify the restitution condition of the probation order where the defendant petitioned for modification of the order).
The CVRA gives the court authority to modify or cancel the amount of restitution owed by a juvenile’s parent. MCL 780.794(17) and MCL 780.766(17). The CVRA does not contain a provision authorizing a court to modify or cancel the amount owed by a defendant or juvenile. See MCL 780.794(13) (restitution orders remain in effect until they are satisfied in full).*

R. Enforcement of Restitution Orders

MCL 780.794(13) states:

“An order of restitution entered under this section remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the individual ordered to pay restitution for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim’s estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien.”

Because an order of restitution may be enforced against a juvenile’s parent, MCL 780.794(13) provides that the restitution order is a lien against “all property of the individual ordered to pay restitution.”

A restitution order may be payable immediately, within a specified period, or in installments. MCL 780.794(10). There are no statutory time limits on payment of restitution. See 1996 PA 562 (eliminating requirements that restitution payments coincide with probation or parole periods) and United States v Rostoff, 956 F Supp 38, 43–44 (D Mass, 1997) (restitution orders under the federal Victim and Witness Protection Act are not time limited).*

**Proceedings to enforce a restitution order.** A person entitled to restitution cannot seek to enforce a restitution order in the same manner as a civil judgment until the person ordered to pay restitution fails to comply with the order. When the defendant or juvenile fails to comply with the order, proceedings to enforce the restitution order, which is a judgment against the person(s) ordered to pay, may be instituted. In such cases, the restitution order is enforced in the same manner as a civil judgment, not by filing a new civil action. Indesco Products, Inc v Novak, 735 NE 2d 1082, 1085–86 (Ill App Ct, 2000).

**Note:** A detailed discussion of the enforcement of civil judgments is beyond the scope of this manual. See MCR 2.621 and the statutes cited therein.

*See Section 10.12(L), above (orders of restitution directed to parents of juveniles) and 10.12(R), below (enforcement of restitution orders).

*The Michigan Supreme Court has referred to the VWPA when interpreting Michigan’s restitution provisions. See, e.g., People v Law, 459 Mich 419, 425 (1999), and People v Grant, 455 Mich 221, 230 (1997).
Section 10.12

*The Michigan Supreme Court has referred to the VWPA when interpreting Michigan’s restitution provisions. See, e.g., People v Law, 459 Mich 419, 425 (1999), and People v Grant, 455 Mich 221, 230 (1997).

In Lyndonville Savings Bank & Trust Co v Lussier, 211 F3d 697 (CA 2, 2000), a federal appellate court construed language in the federal Victim and Witness Protection Act similar to that in Michigan’s CVRA that allowed for enforcement of a restitution order “in the same manner as a judgment in a civil action.”* The Court held that the beneficiary of a restitution order cannot immediately seek a separate civil judgment to modify the payment terms of the restitution order, nor must the beneficiary of a restitution order seek a separate civil judgment before enforcing the restitution order. Id. at 702–04. The Court stated that the “statutory right to enforcement is part of the criminal sentencing process and may not be read to create a separate and independent civil cause of action . . . .” Id. at 699.

In all cases under the CVRA, the court must not impose a fee on a victim, victim’s estate, or prosecuting attorney for enforcing a restitution order. MCL 780.794(20).

Restitution order is not dischargeable in a bankruptcy proceeding. The United States Supreme Court has held that a restitution order is not dischargeable in bankruptcy proceedings. Kelly v Robinson, 479 US 36, 50 (1986). Under 11 USC 523(a)(7), any debt “for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and [which] is not compensation for actual pecuniary loss . . . .” is not dischargeable. The Court in Kelly noted that state criminal judgments—including restitution orders—have historically not been dischargeable in bankruptcy proceedings. Kelly, supra, at 44–48. The Court also noted that allowing discharge of restitution orders would compel state prosecuting attorneys to defend such orders in federal court. Id. at 48–49. The Court then stated its holding broadly: “. . . we hold that §523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.”

As stated above, 11 USC 523(a)(7), excepts from discharge any debt “for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and [which] is not compensation for actual pecuniary loss . . . .” Although Michigan’s restitution provisions require the sentencing court to order restitution for pecuniary losses suffered by victims,* the United States Supreme Court in Kelly, supra, at 51–52, stated that for purposes of bankruptcy proceedings there is no meaningful distinction between criminal fines and restitution:

“On its face, [11 USC 523(a)(7)] creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both ‘to and for the benefit of a governmental unit,’ and ‘not compensation for actual pecuniary loss.’ Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines. We must decide whether the result is altered by the two major differences between restitution and a traditional
fine. Unlike traditional fines, restitution is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused.

In our view, neither of the qualifying clauses of §523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment ‘for the benefit of’ the victim, the context in which it is imposed undermines that conclusion.”

S. No Remission of Restitution When Conviction or Adjudication Is Set Aside

If a juvenile or defendant successfully moves to set aside his or her adjudication or conviction, the juvenile or defendant “is not entitled to the remission of any fine, costs, or other sums of money paid as a consequence of an adjudication [or conviction] that is set aside,” including restitution. MCL 712A.18e(11)(a) and MCL 780.622(2).*

T. Required Set Offs for Damages or Compensation Received by Victims

If the victim recovers compensatory damages in a civil suit resulting from the offense, the amount of compensatory damages must be reduced by the amount of restitution received by the victim. In addition, an award of compensation from the Crime Victim Services Commission* must be reduced by the amount of restitution received by the victim. MCL 780.794(9) state as follows:

“Any amount paid to a victim or victim’s estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim’s estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim’s estate by an award from the crime victim services commission made after an order of restitution under this section.”

U. Unclaimed Restitution

If they are not claimed within two years after being ordered, restitution payments must be deposited in the “crime victim’s rights fund” via the court’s monthly transmittal. MCL 780.794(21).*
10.13 Crime Victim’s Rights Fund Assessment

When a defendant or juvenile offender is convicted or adjudicated of an enumerated offense, the trial court must order the defendant or juvenile to pay a “crime victim’s rights fund assessment.” This assessment is discussed in Sections 10.13(A), below. The court clerk must report monthly on the assessments collected and transmit the money to the Department of Treasury to fund crime victim services. See Section 10.13(C), below. In some circumstances, unclaimed restitution payments may be deposited in the “crime victim rights fund.” See Section 10.13(D), below.

A. Assessments of Convicted and Adjudicated Offenders

The court must order a “crime victim’s rights fund assessment” against each convicted defendant or adjudicated juvenile offender as follows:

- Each defendant convicted of a felony must pay an assessment of $60.00, MCL 780.905(1).
- Each person convicted of a “serious misdemeanor” or “specified misdemeanor” must pay an assessment of $50.00, MCL 780.905(1).
- Each juvenile for whom an order of disposition is entered for a “juvenile offense” must pay an assessment of $20.00, MCL 780.905(2).
- Each juvenile against whom a conviction is entered following designated case proceedings must be ordered to pay the assessment under the rules governing adults. MCL 712A.18(12) and MCL 780.901(f).

The court may only order one “crime victim’s rights fund assessment” per criminal or juvenile delinquency case. MCL 780.905(1) and (2). “If the court enters an order pursuant to the Crime Victim’s Rights Act, MCL 780.751, et seq., the court shall only order the payment of one assessment at any dispositional hearing, regardless of the number of offenses.” MCR 3.943(E)(5).

“Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.” MCR 1.110.

B. Felony, “Serious Misdemeanor,” “Specified Misdemeanor,” and “Juvenile Offense” Defined

For purposes of the “crime victim’s rights fund assessment,” a felony is an offense punishable by imprisonment for more than one year, or an offense expressly designated by law as a felony. MCL 780.901(d).
“Serious misdemeanors” are listed in MCL 780.811(1)(a). MCL 780.901(g). They are:

- assault and battery, MCL 750.81;
- aggravated assault, MCL 750.81a;
- breaking and entering or illegal entry, MCL 750.115;
- fourth-degree child abuse, MCL 750.136b(6);
- enticing a child for an immoral purpose, MCL 750.145a;
- discharge of a firearm intentionally aimed at a person, MCL 750.234;
- discharge of a firearm intentionally aimed at a person resulting in injury, MCL 750.235;
- indecent exposure, MCL 750.335a;
- stalking, MCL 750.411h(2)(a);
- leaving the scene of a personal-injury accident, MCL 257.617a;
- operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual’s property or physical injury or death to another individual;
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;
- operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or (3), if the violation involves an accident resulting in damage to another individual’s property or physical injury or death to any individual;
- a violation of a local ordinance substantially corresponding to a violation listed above; and
- A charged felony or serious misdemeanor that is subsequently reduced or pled to a misdemeanor.

“Specified misdemeanors” are listed in MCL 780.901(h). They are misdemeanor violations of any of the following:

- fleeing and eluding a police or conservation officer, MCL 257.602a;*

*All violations of MCL 257.602a are felonies.
- driving while intoxicated or visibly impaired, MCL 257.625(1) or (3);
- reckless driving, MCL 257.626;
- driving without a valid license, MCL 257.904;
- operating a snowmobile while intoxicated or visibly impaired, MCL 324.82127(1) or (3);
- operating an off-road vehicle while intoxicated, MCL 324.81134(1) or (2);
- operating an off-road vehicle while visibly impaired, MCL 324.81135;
- operating a vessel while intoxicated or visibly impaired, MCL 324.80176(1) or (3);
- operating an aircraft while under the influence of intoxicating liquor or controlled substance, MCL 259.185;
- controlled substance violations, MCL 333.7401 to 333.7461 and 333.17766a;
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701;
- operating a locomotive while under the influence of intoxicating liquor or controlled substance, MCL 462.353;
- operating a locomotive while visibly impaired, MCL 462.355;
- embezzlement, MCL 750.174;
- false pretenses, MCL 750.218;
- larceny, MCL 750.356;
- second-degree retail fraud, MCL 750.356d;
- larceny from a vacant dwelling, MCL 750.359;
- larceny by conversion or embezzlement, MCL 750.362;
- larceny of a rented vehicle, MCL 750.362a;
- malicious destruction of personal property, MCL 750.377a;
- malicious destruction of a building, MCL 750.380;
- fleeing and eluding a police or conservation officer, MCL 750.479a(6);
• receiving or concealing stolen, embezzled, or converted property, MCL 750.535;
• malicious use of telephone, MCL 750.540e; and
• a local ordinance substantially corresponding to a violation listed above.

For purposes of the “crime victim’s rights fund assessment,” a “juvenile offense” is defined as an offense that if committed by an adult would be a felony, “serious misdemeanor,” or “specified misdemeanor.” MCL 780.901(f).

In a criminal case, payment of the “crime victim’s rights fund assessment” must be a condition of probation or parole. MCL 780.905(1), MCL 771.3(1)(f), and MCL 791.236(7). In a juvenile delinquency case, the court must order payment of the assessment in its order of disposition. MCL 712A.18(12).

If a criminal defendant who is ordered to pay an assessment posted a cash bond or bail deposit, the court must order the “crime victim’s rights fund assessment” collected out of the bond or bail. MCL 780.905(4). However, if the defendant is subject to a combination of fines, costs, restitution, assessments, or other payments, the cash bond or bail must be distributed as described in Section 10.14, below. MCL 780.905(4) and (5).

C. Duties of the Court Clerk

MCL 780.905(6) prescribes duties for the clerk of the court regarding “crime victim’s rights fund assessments.” On the last day of each month, the clerk must transmit 90% of the assessments collected to the Department of Treasury; the clerk may retain 10% of the assessments collected to defray administrative costs and to provide crime victim rights services. MCL 780.905(6)(a). In addition, the clerk must transmit a monthly report to the Department of Community Health that contains the following information:

• the name of the court;
• the total number of criminal convictions or juvenile dispositions;
• the total number of defendants or juveniles against whom an assessment was imposed by that court;
• the total amount of assessments imposed by that court;
• the total amount of assessments collected by that court; and
• other information required by the Department of Community Health. MCL 780.905(6)(b).
The money collected from the assessments is deposited in the “crime victim’s rights fund” and is used to fund crime victim rights services and, in some circumstances, crime victim compensation. MCL 780.904 and MCL 780.905(3).

D. Depositing Unclaimed Restitution in the “Crime Victim’s Rights Fund”

If they are not claimed within two years of being ordered, restitution payments may be deposited in the “crime victim’s rights fund.” However, a person or entity entitled to the restitution payments may claim the money at any time after it has been deposited in the fund. If this occurs, the Crime Victim Services Commission must reimburse the court in the amount of the claimed restitution. The relevant provisions state as follows:

“If a person or entity entitled to restitution cannot be located or refuses to claim that restitution within 2 years after the date on which he or she could have claimed the restitution, the restitution paid to that person or entity shall be deposited in the crime victim’s rights fund created under . . . MCL 780.904, or its successor fund. However, a person or entity entitled to that restitution may claim that restitution any time by applying to the court that originally ordered and collected it. The court shall notify the crime victim services commission of the application and the commission shall approve a reduction in the court’s revenue transmittal to the crime victim rights fund equal to the restitution owed to the person or entity. The court shall use the reduction to reimburse that restitution to the person or entity.” MCL 780.794(21).

10.14 Allocation of Fines, Costs, Restitution, Fees, Assessments, and Other Payments

A defendant, juvenile, and parent or guardian may be ordered to pay court costs, penal fines, probation or parole supervision fees, and other payments or assessments. Typically, the defendant, juvenile, and parent or guardian make incremental payments to the trial court rather than paying all of the restitution, costs, fines, fees, and assessments at once. When the trial court receives a payment from the defendant, juvenile, and parent or guardian, the court must allocate the money pursuant to statute. The allocation of all monies received from the defendant, juvenile, and parent or guardian is discussed below.

MCL 600.1475 requires a court to pay back with interest amounts collected if the judgment under which collection is made is later reversed. The Court
of Appeals has held that a trial court acts “as a conduit in channeling [a] defendant’s restitution payments to the victim” and therefore has no statutory duty to refund such payments to a defendant if the order of restitution is reversed. People v Diermier, 209 Mich App 449, 451 (1995). A defendant, juvenile, or juvenile’s parent could seek restitution from a victim of the amount paid if the judgment were later reversed, however. See Moore v Baugh, 106 Mich App 815, 819 (1981) (when a judgment is reversed, the party who received any benefit under the judgment must restore that benefit to the other party).

MCL 780.905(5) states that “[i]f a person is subject to any combination of fines, costs, restitution, assessments, or payments arising out of the same criminal or juvenile proceeding,” the money collected from that person must be distributed as required by MCL 775.22 (criminal cases), and MCL 712A.29 (juvenile delinquency cases). See also MCL 712A.29(1) (money collected from a juvenile’s parents must be distributed according to MCL 712A.29). A recent amendment to the CVRA added provisions to all three articles of the CVRA for allocating payments that mirror those contained in MCL 775.22. See MCL 780.794a.

**Criminal cases.** Under MCL 775.22 and MCL 780.794a, each payment by the defendant or juvenile for victim payments, fines, costs, assessments, probation or parole supervision fees, or other payments must be allocated as follows:

- Fifty percent must be applied to victim payments. MCL 775.22(2) and MCL 780.794a(2). “Victim payments” mean restitution ordered to be paid to the victim or victim’s estate but not to an individual or entity that has reimbursed a victim for losses arising from the offense, and assessments paid to the Crime Victim’s Rights Fund. MCL 775.22(5) and MCL 780.794a(5).

- For violations of state law, the remaining money must be applied in the following descending order of priority:
  - costs;
  - fines;
  - probation or parole supervision fees;
  - assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 775.22(3) and MCL 780.794a(3). “Other payments” include payments to individuals or entities that have reimbursed a victim for losses arising from the offense. MCL 780.794a(3)(d).
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- For violations of local ordinances, the remaining money collected must be applied in the following descending order of priority:
  - payment of fines and costs;
  - payment of assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 775.22(4) and MCL 780.794a(4).

If any victim payments remain unpaid after all of the other fees have been paid, then all of the remaining money collected shall be applied to victim payments. Conversely, if all of the victim payments have been made, then all of the remaining money collected shall be applied to the other fees in the order of priority listed above. MCL 775.22(2) and MCL 780.794a(2).

**Juvenile delinquency cases.** Under MCL 712A.29, each payment made by a juvenile or his or her parents for victim payments, fines, costs, assessments, or other assessments or payments must be allocated as follows:

- Fifty percent of the money must be applied to victim payments. MCL 712A.29(2). “Victim payments” mean restitution ordered to be paid to the victim or victim’s estate but not to an individual or entity that has reimbursed a victim for losses arising from the offense, and assessments paid to the Crime Victim’s Rights Fund. MCL 712A.29(7).

- In cases involving orders of disposition for offenses that would be violations of state law if committed by an adult, the remaining money must be applied in the following descending order of priority:
  - payment of costs;
  - payment of fines;
  - payment of assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 712A.29(3).

- In cases involving orders of disposition for offenses that would be violations of local ordinances if committed by an adult, the remaining money must be applied in the following descending order of priority:
  - payment of fines and costs;
  - payment of assessments (other than the “crime victim’s rights assessment”) and other payments. MCL 712A.29(4).

If fines, costs, or other assessments or payments remain unpaid after all victim payments have been paid, additional money collected shall be
applied to payment of those fines, costs, or other assessments or payments. If victim payments remain unpaid after all fines, costs, or other assessments or payments have been paid, additional money collected shall be applied toward payment of those victim payments. MCL 712A.29(2).
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In this chapter. . .

This chapter contains discussion of the sources of funds used to pay the costs associated with court proceedings involving juveniles. After a brief discussion of the county, state, and federal funds that may be used to pay such costs, the chapter discusses in more detail juvenile and parental reimbursement of the costs of care and attorney fees. For liability for payment of expenses under the Interstate Compact on Juveniles, see MCL 3.701, Article VIII, and MCL 3.705.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

11.1 County, State, and Federal Sources of Funding

This section provides an overview of sources of county, state, and federal funding for the costs associated with juvenile proceedings. The following summary of sources is intended to orient the reader to the more specific discussion that follows.
• Intake, detention, probation, foster care, diagnostic evaluation and treatment, prevention, and diversion costs are paid out of a county’s Child Care Fund, with reimbursement by the Family Independence Agency (FIA) of 50% of eligible expenditures. MCL 400.117a(1)(c).

• If a juvenile is placed on court-supervised probation under MCL 712A.18(1)(b) or with a private agency or institution under MCL 712A.18(1)(d), the costs of care and service are paid from the county’s Child Care Fund. *Wayne Co v Michigan*, 202 Mich App 530, 535–36 (1993).

• If a juvenile is referred to the FIA for placement and supervision under MCL 400.55(h), the costs of care and service are paid out of the county’s Child Care Fund, with reimbursement by the FIA of 50% of eligible expenditures. MCL 400.117a(1)(c).

• If a juvenile is committed to the FIA under MCL 712A.18(1)(e) (delinquency or designated case proceedings) or MCL 769.1(3) or (4) (“automatic waiver” proceedings), the county must reimburse the FIA for 50% of the costs of care and service. MCL 803.305(1).

• If a juvenile and the placement ordered by the court are eligible for federal Aid to Dependent Children—Foster Care under Title IV-E of the Social Security Act, 42 USC 670 et seq., the county, state, and federal governments may share the costs of care and service, depending upon the placement ordered.

**Except as otherwise provided by law, expenses incurred in cases under the Juvenile Code are to be paid out of a county’s general fund.** MCL 712A.25(1) provides that expenses incurred in cases under the Juvenile Code are to be paid out of a county’s general fund except as otherwise provided by law. MCL 712A.25(1) states as follows:

“(1) Except as otherwise provided by law, expenses incurred in carrying out this chapter shall be paid upon the court’s order by the county treasurer from the county’s general fund.”

Although MCL 712A.25(1) requires a county to use general fund money to pay for expenses incurred in proceedings under the Juvenile Code, the county may use its Child Care Fund to pay, and may be reimbursed by the FIA for a portion of, such expenses, depending upon the placement ordered by the court and other factors.
**County Child Care Fund.** The Child Care Fund consists of funds appropriated by a county for “foster care” and “juvenile justice services.” MCL 400.117c(1) and (4). The Child Care Fund must be used to pay the costs of providing “foster care” for juveniles under the jurisdiction of the Family Division or a court of general criminal jurisdiction. MCL 400.117c(2). “Foster care’ means placement of a child outside the child’s parental home by and under the supervision of a child placing agency, the court, the [FIA], or the department of community health.” MCL 400.115f(k). The Child Care Fund may be used to pay for “juvenile justice services” pursuant to MCL 400.117a(4)(a) and 400.117c(4). “Juvenile justice service” is defined in MCL 400.117a(1)(c) as follows:

“(c) ‘Juvenile justice service’ means a service, exclusive of judicial functions, provided by a county for juveniles who are within or likely to come within the court's jurisdiction under [MCL 712A.2], or within the jurisdiction of the court of general criminal jurisdiction under [MCL 600.606], if that court commits the juvenile to a county or court juvenile facility under [MCL 764.27a].* A service includes intake, detention, detention alternatives, probation, foster care, diagnostic evaluation and treatment, shelter care, or any other service approved by the office or county juvenile agency, as applicable, including preventive, diversionary, or protective care services. A juvenile justice service approved by the office or county juvenile agency must meet all applicable state and local government licensing standards.

The FIA reimburses 50% of eligible annual expenditures from a county’s Child Care Fund. MCL 400.117a(4)(a).

In *In re Hoskins*, unpublished opinion per curiam of the Court of Appeals, November 6, 2001 (Docket No. 225381), the juvenile was made a court ward and referred to FIA for placement and care pursuant to MCL 400.55(h). The juvenile’s FIA caseworker filed a motion in the trial court indicating that the juvenile had been diagnosed as mentally ill by the community mental health department and requesting the court to order the community mental health department to pay for the juvenile’s “continuing and past mental health treatment.” The trial court ordered the community mental health department to take over the costs of the juvenile’s treatment and to reimburse the county for the costs of the juvenile’s care. The Court of Appeals reversed, finding that the trial court erred by ordering the community mental health department to pay the costs of the juvenile’s care. The Court noted that a community mental health program may be required to provide mental health services to individuals, with the county paying 10% and the state 90% of the costs of such services. However, the Court held that the trial court’s referral of the juvenile to FIA for placement and care...
obligated the county to pay 100% of the costs of such care, with possible reimbursement by FIA. The Court stated:

“Nowhere in the Revised Probate Code, MCL 700.1 et seq., or the Social Welfare Code, MCL 400.1 et seq., has the Legislature given the counties permission to transfer this obligation, with the exception of the fifty-percent reimbursement. Moreover, while the state is obligated to provide mental health services for individuals needing them, . . . the Mental Health Code does not obligate the Department of Community Health or CMH programs to provide foster care—even for minors diagnosed with mental illness. . . . That responsibility lies with the counties. MCL 712A.25. Under the statutes, once a family court deems a juvenile to be a court or state ward, the county bears the financial burden of that ward’s foster care, at least fifty percent. Thus, the lower court committed plain error in transferring financial obligation for Hoskins’ care to [the community mental health department].”

County Juvenile Agency. The Child Care Fund is used only by counties that are not “county juvenile agencies.” “County juvenile agency” is defined in the “County Juvenile Act,” MCL 45.621 et seq. MCL 400.117a(1)(a). Because the act applies only to a county that is eligible for transfer of federal Title IV-E funds under a 1997 waiver, the act only applies to Wayne County. Thus, this discussion pertains only to Wayne County.

MCL 712A.25(2) states as follows:

“(2) A county that is a county juvenile agency shall pay expenses for county juvenile agency services incurred in carrying out this chapter from the block grant distributed under [MCL 400.117a], and other funds made available for that purpose and is not obligated under subsection (1) to pay for juvenile justice services other than county juvenile agency services as required by [MCL 400.117a]. As used in this subsection, ‘county juvenile agency services’ and ‘juvenile justice service’ mean those terms as defined in [MCL 400.117a].”

Wayne County receives a block grant from the FIA pursuant to MCL 400.117a(4)(b) and 400.117g. As noted above, Wayne County is responsible for the costs of “county juvenile agency services,” which are defined in MCL 400.117a(1)(b) as follows:
“(b) ‘County juvenile agency services’ means all juvenile justice services for a juvenile who is within the court’s jurisdiction under [MCL 712A.2(a) or (d)], or within the jurisdiction of the court of general jurisdiction under [MCL 600.606], if that court commits the juvenile to a county or court juvenile facility under [MCL 764.27a*]. If a juvenile who comes within the court’s jurisdiction under [MCL 712A.2(a) or (d)], is at that time subject to a court order in connection with a proceeding for which the court acquired jurisdiction under section [MCL 712A.2(b) or (c) (child abuse or neglect proceedings and waiver of court jurisdiction in divorce proceedings)], juvenile justice services provided to the juvenile before the court enters an order in the subsequent proceeding are not county juvenile agency services, except for juvenile justice services related to detention.”

The FIA is responsible for “juvenile justice services” other than “county juvenile agency services.” MCL 400.117a(5).

Public wards. If a juvenile is committed to the FIA under MCL 712A.18(1)(e) or MCL 769.1(3) or (4), the FIA pays the entire cost of a juvenile’s care and service, but the county is charged back 50% of that cost. MCL 803.305(1). To recover 50% of the costs, the FIA may either bill the county or offset the amount due in the FIA’s reimbursement of the county’s Child Care Fund. MCL 400.117a(4)(a).

In Wayne County, juveniles are committed to the county juvenile agency. “A county that is a county juvenile agency is liable for the entire cost of a public ward’s care while he or she is committed to the county juvenile agency.” MCL 803.305(3).

Transfer of a juvenile delinquency or designated case proceeding to a juvenile’s county of residence. In juvenile delinquency proceedings, if any juvenile is brought before the Family Division in a county other than the county in which he or she resides, the court may, before a hearing and with the consent of the Family Division judge of the juvenile’s county of residence, enter an order transferring jurisdiction over the matter to the court of the county of residence. MCL 712A.2(d) adds that if the juvenile’s county of residence is a “county juvenile agency” and satisfactory proof of residency is furnished to the court in that county, consent to transfer the case is not required. MCL 712A.2(d), MCR 3.926(B) and 3.926(E). MCR 3.926(C) provides that when disposition is ordered by a Family Division other than the Family Division in a county where the juvenile resides, the court ordering disposition is responsible for any costs incurred in connection with the order unless:
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- the court in the county where the juvenile resides agrees to pay such dispositional costs, or
- the juvenile is made a public ward and the county of residence withholds consent to transfer of the case.

MCR 3.926(C) applies to both delinquency and designated case proceedings.

MCL 803.305(1) states that “[t]he county of residence of the public ward is liable to the state, rather than the county from which the youth was committed, if the . . . family division of circuit court of the county of residence withheld consent to a transfer of proceedings under [MCL 712A.2(d)], as determined by the [FIA].”

**Aid to Dependent Children—Foster Care.** This source of funds may be used for court or public wards who meet eligibility requirements and are in eligible placements. Michigan is one of a few states that have used Title IV-E funds to pay for out-of-home placements for some juveniles who have been adjudicated delinquent. Title IV-E of the Social Security Act, 42 USC 670 et seq., sets forth requirements for distributing federal funds to states’ child protection and foster care systems. Pursuant to 42 USC 672(a), to be eligible for funding under Title IV-E, the following conditions must be met:

- the juvenile must be a United States citizen or qualified alien;
- the juvenile must have been continuously eligible for former Aid to Dependent Children funds in the home from which the juvenile was removed;
- jurisdiction must be established under the Juvenile Code, not the Code of Criminal Procedure;
- FIA must be responsible for the juvenile’s placement and care;
- the court must make the findings outlined below; and
- the juvenile must be in a licensed foster home, a private non-profit child-caring institution, or a public institution having a security classification of “low” or “community-based.”

In order to retain Title IV-E eligibility for placement, the court is required to make a finding that reasonable efforts to achieve permanency are being made in juvenile justice cases every 12 months (just as in child protective cases). Conducting permanency planning hearings (where these findings are usually made) are a requirement of the State Plan process, however, and are not related to Title IV-E eligibility for placement funds. Michigan law requires permanency planning hearings in child protective cases but does not require them in juvenile justice cases. In order for FIA to comply with the general requirements of ASFA and retain their Title IV-E administrative funding, they are required to insure that permanency planning hearings are

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*In Michigan, state-operated community justice centers and the Arbor Heights facility meet these requirements for public institutions.*
conducted every 12 months. These hearings must be on the record and cannot be “paper” reviews. Procedures for permanency planning hearings in juvenile justice cases need to be discussed by courts and local county FIA offices.

Court requirements include the following:

- **In the very first court order which authorizes removal, the court must make and document a judicial determination that remaining in the home is “contrary to the child’s welfare or best interest.”** All judicial determinations must specify on what basis the determination is being made. Check boxes alone are not adequate. If the court does not make this determination in its first order following the child’s removal from home, the child will be ineligible for Title IV-E funding for the remainder of that “placement episode.” A placement episode begins when a child goes from his or her own or the home of a legal guardian to an out-of-home living arrangement, and a placement episode ends when the child is placed back in his or her own home or the home of a legal guardian. Amended or *nunc pro tunc* orders* are not permitted. If the court issues an ex-parte order removing the child, the “contrary to the child’s welfare” finding must appear in that order; otherwise, it must appear in the first order following removal, which will usually be the order following the preliminary hearing.

- **The determination that remaining in the home is “contrary to the child’s welfare or best interest” must be based upon parental failure rather than the juvenile’s behavior.** A general determination that removal is in “the public’s best interest” is insufficient, as is a general reference in the removal order to the allegations contained in the petition. Some suggested language for removal orders is as follows: “It is contrary to the welfare of the child to remain in the home because:

  — the parents have failed to adequately supervise the minor child regarding the petition that has been filed alleging __________.

  — the parents have failed to control the minor child’s behavior resulting in the petition that has been filed alleging __________.

  — the home environment is unfit due to alcohol and/or substance abuse in the family home by __________, mother/father/custodian.

  — the home environment is unfit due to criminality in the home as evidenced by __________.”

*Amended orders include provisions that should have been included previously in an order but were omitted. *Nunc pro tunc* orders include provisions in orders that were addressed at a previous proceeding but were omitted from the order. In other words, *nunc pro tunc* orders correct the record. *Nunc pro tunc* orders are also effective retroactively.
• Within 60 days of the child’s removal from home, the court must find that “the agency has made reasonable efforts to prevent removal from the home.” The court may also find that reasonable efforts are not required if aggravated circumstances apply which generally are the conditions set forth in MCL 722.638 of the Michigan Child Protection Law. If the determination regarding reasonable efforts to prevent removal is not made in the time required, the child will be ineligible for Title IV-E funding for the remainder of that placement episode. *Nunc pro tunc* orders are not permitted. In order to meet this requirement, it is suggested that courts make this determination at the preliminary hearing. According to FIA, if the agency determines that efforts to prevent removal or reunify a family are not reasonable and the court agrees, the court can make a finding that not making efforts is reasonable. However, whenever it is determined that no reasonable efforts to reunite are necessary, a permanency planning hearing must be held within 30 days. MCL 712A.19a(2) addresses this requirement.

• Every 12 months it is required that the court determine that reasonable efforts are being made to finalize the permanency plan whether that be return home or some other plan. The requirement for a judicial finding of reasonable efforts to finalize the permanency plan also applies to those cases where parents have voluntarily released their rights under the Adoption Code (subsequent to a child protective proceeding), and to cases where the finalization of an adoption placement is delayed beyond 12 months. FIA has agreed to notify the courts of cases where time to a finalized adoption has exceeded 12 months and a new SCAO form (PCA 351) can be used to summarize the results of review hearings on these cases.

• If a child is placed in foster care after being home for 6 months or more, even if the return home was a “trial home visit,” new determinations for Title IV-E eligibility must be made. A return to care after the child has been home for 6 months is considered to be a new removal.

### 11.2 Orders for Reimbursement of the Costs of Care or Services When a Juvenile Is Placed Outside of Home

“An order of disposition placing a juvenile in or committing a juvenile to care outside of the juvenile’s home and under state, county juvenile agency, or court supervision shall contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of care or service.” MCL 712A.18(2).
“An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in sections 12 and 13 of [the Juvenile Code] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in section 13 of [the Juvenile Code].” MCL 712A.18(4).

Similarly, in “automatic waiver” proceedings, a judgment entered by the court that places the juvenile on probation and commits the juvenile to FIA must provide for reimbursement to the court by the juvenile or those responsible for the juvenile’s support, or both, for the cost of care or service. MCL 769.1(7). An order assessing such cost against a person responsible for the support of the juvenile shall not be binding on the person unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first-class mail to the person’s last-known address. MCR 6.931(F)(1) and MCL 769.1(9).

In In re Juvenile Commitment Costs, 240 Mich App 420, 439–42 (2000), the Court of Appeals held that MCL 769.1(9) satisfied due-process requirements. The Court also noted the applicability of MCR 2.612(C)(1)(f), which allows a court to relieve a party of a final judgment “for any reason justifying relief from the operation of the judgment.” In re Juvenile Commitment Costs, supra at 441. See also In re Reiswitz, 236 Mich App 158, 173 (1999), where the Court of Appeals asserted that MCR 2.612(C)(1)(f) applied to delinquency proceedings and provided a parent a possible avenue of relief from a reimbursement order. See, however, MCR 3.901(A).

The State Court Administrative Office’s “Guidelines for Court Ordered Reimbursement and Procedures for Reimbursement Program Operations” (1990), pp 12–13, states as follows:

“4. Amendment of the Order

“Changed circumstances may result in a need to amend the order of reimbursement. The affected party(ies) or a representative of the court may request reconsideration of the order. The Motion and Order (JC 15), is used to request opportunity to be heard on changed circumstances.

“The judge should make it clear to the affected parties at disposition that the order can be amended, and by whom. Because the court often discovers financial information after entry of the order of disposition, there must be flexibility for adjustments based on new information. The parent, guardian or custodian can request changes in the order based on changes in income or circumstances. In either case, the court should require completion of a
revised Financial Statement (JC 34), with instructions that the changes be noted. The revised statement should be clearly marked and dated to distinguish it from previous statements.

“The court can include a provision in the original order of reimbursement requiring the parent, guardian or custodian to notify the Court of any increase or decrease within 7 days of occurrence. The Court should also reserve the right to amend the order if the party fails to notify the court.

“5. Review of the Order

“The court can, at any time, order a review of the parent, guardian or custodian’s compliance with the order of reimbursement. Notice must [be] given for hearing.

“If the court orders reimbursement of the full cost-of-care/service with an interval payment amount, a review should be required prior to the release of the child from the court’s jurisdiction. This review provides an opportunity for the Judge to look at compliance with the order, payment history, arrearage, enforcement efforts needed and other factors. The court can then determine whether to:

1. Forgive the entire debt
2. Forgive any part of the debt
3. Continue the original/last order as entered
4. Seek voluntary or involuntary wage assignment
5. Amend an existing order.” See In re Juvenile Commitment Costs, supra at 442, n 6.

A. Amount of Reimbursement

A reimbursement order “shall be reasonable, taking into account both the income and resources of the juvenile, parent, guardian, or custodian.” MCL 712A.18(2). The amount may be based upon the guidelines and model schedule created by the State Court Administrator. MCL 712A.18(2) and (6).

If the juvenile is receiving an adoption support subsidy pursuant to MCL 400.115j, the amount of reimbursement ordered shall not exceed the amount of the support subsidy. MCL 712A.18(2).
Similarly, in “automatic waiver” proceedings, “[t]he amount of reimbursement ordered shall be reasonable, taking into account both the income and resources of the juvenile and those responsible for the juvenile’s support.” The amount may be based upon the guidelines and model schedule prepared by the State Court Administrator under MCL 712A.18(6). MCL 769.1(7).

B. Duration of Reimbursement Order

“The reimbursement provision applies during the entire period the juvenile remains in care outside of the juvenile’s own home and under state, county juvenile agency, or court supervision, unless the juvenile is in the permanent custody of the court.” MCL 712A.18(2). Similarly, in “automatic waiver” proceedings, “[t]he reimbursement provision applies during the entire period the juvenile remains in care outside the juvenile’s own home and under court supervision.” MCL 769.1(7).

These provisions do not establish an unqualified mandate that a parent reimburse the state for the entire cost it incurs in caring for the parent’s child. The amount need only be reasonable, considering the criteria enumerated in the statute. *In re Brzezinski*, 454 Mich 889 (1997) (reversing by summary disposition the Court of Appeals and adopting the dissent by Griffin, PJ, at 214 Mich App 652, 675 (1995)). However, because the reimbursement order is included in an order of disposition or commitment to the FIA, the court must necessarily order reimbursement before it is aware of the total amount of expenses that the state will incur in caring for the child. Thus, the provisions of MCL 712A.18(2) and MCL 769.1(7) that state that the “reimbursement provision applies during the entire period the juvenile remains in care outside of the juvenile’s own home” provide a mechanism by which the court may determine the total amount of the parent’s reimbursement obligation. *Id.* at 677. Moreover, MCL 712A.18(2) and MCL 769.1(7) provide that collection of the balance due on reimbursement orders may be made after the juvenile is released or discharged from care.

In *In re Reiswitz*, 236 Mich App 158, 163 (1999), the Court of Appeals held that where the court entered a reimbursement order while it had jurisdiction over a juvenile and parent, the parent could not avoid paying reimbursement after the trial court’s jurisdiction over the juvenile and parent had terminated. Approving the use of installment payments, the Court of Appeals concluded that the “juvenile court” may order and collect reimbursement both before and after the juvenile reaches “the age of majority.” *Id.* at 167–69. A court that orders reimbursement under MCL 712A.18(2) while it has jurisdiction over a juvenile and parent may enforce that order through its contempt powers after such jurisdiction has terminated. *Id.* at 172, citing *Wasson v Wasson*, 52 Mich App 91 (1974) (child support arrearages may be collected through use of contempt power following termination of jurisdiction) and MCL 712A.30 (restitution orders remain in effect until satisfied in full). The Court of Appeals also rejected
the parent’s argument that the order was unreasonable under MCL 712A.18(2). The order was reasonable even though it required installment payments by the parent after the juvenile reached adulthood. *Id.* at 174–76.

The amount of reimbursement ordered may include costs of care or service incurred after the juvenile reaches age 18. In *In re Juvenile Commitment Costs*, 240 Mich App 420 (2000), the juvenile pled guilty to unarmed robbery in “automatic waiver” proceedings and was committed to FIA. The juvenile’s parents were ordered to pay the expenses of the juvenile’s confinement pursuant to MCL 769.1(7). The Circuit Court terminated the parents’ reimbursement obligation after the juvenile reached age 18, but the Court of Appeals reversed. The Court of Appeals first noted that although the term “juvenile” is not defined in MCL 769.1(7) by reference to age, it appears to refer to a person who remains under court supervision since MCL 769.1b provides for commitment review hearings before a juvenile’s 19th or 21st birthdays. *Id.* at 430–31. The Court also read MCL 769.1(7) *in pari materia* with several provisions of the Juvenile Code, including MCL 712A.2a, which allows for continuing jurisdiction over juveniles until age 19 or 21. *Id.* at 431–37. The Circuit Court mistakenly relied on statutes addressing a minor’s right to parental support until he or she reaches the “age of majority,” as MCL 769.1(7) deals with a county’s and the state’s rights to recover the costs of rehabilitating a parent’s child. *Id.* at 437–39. The Court of Appeals concluded that the term “juvenile” does not refer only to a person under age 18. *Id.* at 437.

**C. Collection and Disbursement of Amounts Collected**

MCL 712A.18(2) states as follows:

“The court shall provide for the collection of all amounts ordered to be reimbursed and the money collected shall be accounted for and reported to the county board of commissioners. Collections to cover delinquent accounts or to pay the balance due on reimbursement orders may be made after a juvenile is released or discharged from care outside the juvenile’s own home and under state, county juvenile agency, or court supervision. Twenty-five percent of all amounts collected under an order entered under this subsection shall be credited to the appropriate fund of the county to offset the administrative cost of collections. The balance of all amounts collected pursuant to an order entered under this subsection shall be divided in the same ratio in which the county, state, and federal government participate in the cost of care outside the juvenile’s own home and under state, county juvenile agency, or court supervision.”

MCL 769.1(7) contains substantially similar provisions.
The court may also collect benefits paid by the government of the United States to the parent of a juvenile for the cost of care of a court or public ward. MCL 712A.18(2) and MCL 769.1(7).

“Money collected for juveniles placed by the court with or committed to the Family Independence Agency or a county juvenile agency shall be accounted for and reported on an individual juvenile basis.” MCL 712A.18(2). MCL 769.1(7) contains a substantially similar provision.

D. Delinquent Accounts

MCL 712A.18(2) states as follows:

“In cases of delinquent accounts, the court may also enter an order to intercept state or federal tax refunds of a juvenile, parent, guardian, or custodian and initiate the necessary offset proceedings in order to recover the cost of care or service. The court shall send to the person who is the subject of the intercept order advance written notice of the proposed offset. The notice shall include notice of the opportunity to contest the offset on the grounds that the intercept is not proper because of a mistake of fact concerning the amount of the delinquency or the identity of the person subject to the order. The court shall provide for the prompt reimbursement of an amount withheld in error or an amount found to exceed the delinquent amount.”

MCL 769.1(7) contains substantially similar provisions.

E. Copy of Reimbursement Order to Department of Treasury

MCL 712A.28(3) requires a court that enters a reimbursement order under MCL 712A.18(2) to mail a copy of the order to the Michigan Department of Treasury. MCL 712A.28(3) states:

“If the court issues an order in respect to payments by a parent under [MCL 712A.18(2)], a copy shall be mailed to the department of treasury. Action taken against parents or adults shall not be released for publicity unless the parents or adults are found guilty of contempt of court. The court shall furnish the family independence agency and a county juvenile agency with reports of the administration of the court in a form recommended by the [Michigan Probate Judges Association]. Copies of these reports shall, upon request, be made available to other state departments by the family independence agency.”
11.3 Orders for Reimbursement of the Costs of Care When a Juvenile Is Placed on Probation in the Juvenile’s Own Home

An order of disposition placing a juvenile on probation in the juvenile’s own home may contain a provision for the reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of service. If an order is entered under this subsection, an amount due shall be determined and treated in the same manner provided for an order under MCL 712A.18(2), dealing with reimbursement for cost of care outside the juvenile’s own home. MCL 712A.18(3).*

The guidelines and model schedule developed by the State Court Administrative Office pursuant to MCL 712A.18(6) may be used for determining the amount of reimbursement.

11.4 Using Governmental Benefits to Reimburse the Costs of Care

MCL 712A.18(1)(e) states as follows:

“Except for commitment to the family independence agency or a county juvenile agency, an order of commitment under this subdivision to a state institution or agency described in [MCL 803.301 et seq.] . . . , the court shall name the superintendent of the institution to which the juvenile is committed as a special guardian to receive benefits due the juvenile from the government of the United States. An order of commitment under this subdivision to the family independence agency or a county juvenile agency shall name that agency as a special guardian to receive those benefits. The benefits received by the special guardian shall be used to the extent necessary to pay for the portions of the cost of care in the institution or facility that the parent or parents are found unable to pay.”

11.5 Using Bail Money to Pay Reimbursement Orders

If a disposition imposes reimbursement or costs, the bail money posted by a juvenile’s parent must first be applied to the amount of reimbursement and costs, and the balance, if any, returned. MCR 3.935(F)(4)(a).
11.6 Using Wage Assignments to Pay Reimbursement Orders

MCL 712A.18b provides that whenever the court enters a reimbursement order and the parent or other adult legally responsible for the care of the child fails or refuses to obey and perform the order, and has been found guilty of contempt of court for such failure or refusal, the court making the order may order an assignment to the county or state of the salary, wages, or other income of the person responsible for the care of the child, which assignment shall continue until the support is paid in full. The order of assignment shall be effective one week after service upon the employer of a true copy of the order by personal service or by registered or certified mail.

Thereafter the employer shall withhold from the earnings due to the employee the amount specified in the order of assignment for transmittal to the county or state until notified by the court that the support arrearage is paid in full.* An employer shall not use the assignment as a basis, in whole or in part, for the discharge of the employee or for any other disciplinary action against an employee. Compliance by an employer with an order of assignment operates as a discharge of the employer’s liability to the employee as to that portion of the employee’s earnings so affected. MCL 712A.18b.

11.7 Orders for Reimbursement of Attorney Fees

If the court appoints an attorney to represent a party, the court may enter an order requiring the party or the person responsible for the support of the party to reimburse the court for attorney fees. MCR 3.915(E). See also MCL 712A.18(5), which allows the court to order a parent, guardian, or custodian who was appointed counsel to reimburse the court for attorney fees. MCL 712A.17c(8) states as follows:

“If an attorney or lawyer-guardian ad litem is appointed for a party under this act, after a determination of ability to pay the court may enter an order assessing attorney costs against the party or the person responsible for that party’s support, or against money allocated from marriage license fees for family counseling services under . . . MCL 551.103. An order assessing attorney costs may be enforced through contempt proceedings.”

See also MCR 3.916(D) (reimbursement for costs of guardian ad litem may also be ordered).

Similarly, in “automatic waiver” proceedings, if the court appoints an attorney to represent a juvenile, the court may require the juvenile or person responsible for the juvenile’s support, or both, to reimburse the court for attorney fees. MCL 769.1(8). See also People v Nowicki, 213 Mich App 383, 385–88 (1995), where the Court of Appeals held that an order for
reimbursement of fees for a court-appointed attorney was not a part of the judgment of sentence and thus did not represent “costs,” which may only be imposed pursuant to statutory authority. The Court of Appeals found that a trial court has the independent authority to order a defendant to defray the public cost of representation.
Chapter 12: Review of Referee’s Recommended Findings and Conclusions

12.1 Hearings a Judge Must Conduct

MCR 3.912(A) lists the hearings that a judge must conduct:

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).
“(1) a jury trial;

“(2) a waiver proceeding under MCR 3.950 [“traditional waiver” proceeding];

“(3) the preliminary examination, trial, and sentencing in a designated case;

“(4) a proceeding on the issuance, modification, or termination of a minor personal protection order.”

*There is no right to jury trial on an alleged violation of a minor personal protection order. See Section 15.21(C). For discussion of judge or jury trial demands, see Section 7.10.

Demand for judge to preside at a bench trial in delinquency and minor personal protection order proceedings. A judge may conduct a nonjury trial in a delinquency or minor personal protection order proceeding if a proper demand has been made. Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines “formal calendar” as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding. The right to have a judge sit as factfinder is not absolute, however. A party who fails to make a timely demand* for a judge to serve as factfinder may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived. MCR 3.913(B) provides that unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase.

12.2 Hearings a Referee May Conduct

MCL 712A.10 sets forth the hearings that an attorney referee or non-attorney referee may conduct in proceedings under the Juvenile Code. MCL 712A.10(2) states as follows:

“(2) If a child is before the court under [MCL 712A.2(a)(1)], a probation officer or county agent who is not licensed to practice law in this state shall not be designated to act as a referee in any hearing for the child, except the preliminary inquiry or preliminary hearing. This subsection shall not apply to a probation officer or county agent who has been designated to act as a referee by the probate judge prior to January 1, 1988 and who is acting as a referee as of January 1, 1988.”

MCR 3.913, the court rule governing referees in proceedings under the Juvenile Code, provides more detail concerning the types of hearings that a referee may conduct. MCR 3.913(A)(1) states that “the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than [a hearing listed in Section 12.1, immediately above, which a judge must conduct], and to make recommended findings and conclusions.” In addition,
MCR 3.913(A)(2)(a), (c), and (d) provide more detail concerning the types of hearings that attorney referees and non-attorney referees may conduct. Those rules state as follows:

“(a) *Delinquency Proceedings.* Except as otherwise provided by MCL 712A.10, only a person licensed to practice law in Michigan may serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing, if the juvenile is before the court under MCL 712A.2(a)(1).

“(c) *Designated Cases.* Only a referee licensed to practice law in Michigan may preside at a hearing to designate a case or to amend a petition to designate a case and to make recommended findings and conclusions.

“(d) *Minor Personal Protection Actions.* A nonattorney referee may preside at a preliminary hearing for enforcement of a minor personal protection order. Only a referee licensed to practice law in Michigan may preside at any other hearing for the enforcement of a minor personal protection order and make recommended findings and conclusions.”

Thus, to summarize MCL 712A.10 and MCR 3.913(A), the Family Division may assign an attorney referee or non-attorney referee to conduct the following types of proceedings discussed in this benchbook:

- If a status offense is alleged, an attorney referee or non-attorney referee may conduct any hearing other than a jury trial.

- If a violation of a municipal ordinance or state law is alleged, an attorney referee or non-attorney referee may conduct a preliminary inquiry or preliminary hearing, but only an attorney referee may conduct a pretrial motion hearing, a non-jury trial, a dispositional hearing, an annual review or review hearing, or a probation violation hearing.

- Neither an attorney referee nor a non-attorney referee may conduct a “traditional waiver” proceeding under MCL 712A.4 and MCR 3.950.

- In designated case proceedings, a non-attorney referee may conduct an arraignment, but only an attorney referee may conduct a designation hearing or a hearing to amend a petition to designate a case, a pretrial motion hearing, an annual review or review hearing, or a probation violation hearing.
A non-attorney referee may conduct a preliminary hearing to enforce a minor personal protection order, but only an attorney referee may conduct all other hearings to enforce a minor personal protection order.

An attorney referee may conduct a contempt hearing but may not issue an order holding a person in contempt of court. In re Contempt of Steingold (In re Smith), 244 Mich App 153, 157 (2000), and MCL 712A.10(1).

## 12.3 Referees’ Authority

MCL 712A.10(1) sets forth the authority of a referee in proceedings under the Juvenile Code, MCL 712A.1 et seq. MCL 712A.10(1) states as follows:

“(1) Except as otherwise provided in subsection (2),* the judge of probate may designate a probation officer or county agent to act as referee in taking the testimony of witnesses and hearing the statements of parties upon the hearing of petitions alleging that a child is within the provisions of this chapter, if there is no objection by parties in interest. The probation officer or county agent designated to act as referee shall do all of the following:

(a) Take and subscribe the oath of office provided by the constitution.

(b) Administer oaths and examine witnesses.

(c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge of probate* containing a summary of the testimony taken and a recommendation for the court’s findings and disposition.”

In In re AMB, 248 Mich App 144 (2001), the Court of Appeals emphasized that referees do not have authority to enter orders:

“Neither the court rules nor any statute permits a hearing referee to enter an order for any purpose. In fact, that a hearing referee must make and sign a report summarizing testimony and recommending action for a judge reveals that the Legislature specifically denied referees the authority to enter orders, no matter their substance.

“To paraphrase the Michigan Supreme Court in Campbell v Evans,[ 358 Mich 128, 131 (1959)], we do not doubt that hearing referees play an extremely
valuable role in the operation of the family courts, especially when attempting to handle emergency cases. However, a hearing referee’s recommendations and proposed order cannot be accepted without judicial examination. ‘They are a helpful time-saving crutch and no more. The responsibility for the ultimate decision and the exercise of judicial discretion in reaching it still rests squarely upon the trial judge’ and may not be delegated. Consequently, when it is apparent that someone other than a judge made the substantive legal decision in a case, the only appropriate appellate response is to reverse.” AMB, supra at 217–18. (Footnotes omitted; emphasis in original.)

**Note:** It is unclear whether a referee’s recommendation to a judge has the force and effect of an order prior to a judge’s review and entry of an order.

A chief referee is not required to review a hearing referee’s recommended findings and conclusions, nor may a chief referee alter a hearing referee’s recommendations prior to review by a judge. In re Chambers, unpublished opinion per curiam of the Court of Appeals, September 29, 2000 (Docket No. 223128).


### 12.4 Required Summary of Testimony and Recommended Findings and Conclusions

MCL 712A.10(1)(c) provides that if a case requires a hearing and the taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court’s findings and disposition. Similarly, MCR 3.913(A)(1) and (A)(2)(c) and (d) require a referee to “make recommended findings and conclusions.”

### 12.5 Advice of Right to Seek Review of Referee’s Recommended Findings and Conclusions

MCR 3.913(C) provides that a referee must advise the parties of the right to request that a judge review a referee’s recommended findings and conclusions. That rule states as follows:

“(C) **Advice of Right to Review of Referee’s Recommendations.** During a hearing held by a referee,
12.6 Judicial Review of Referee’s Recommended Findings and Conclusions

MCR 3.991(A)(1) states that “[b]efore signing an order based on a referee’s recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party in the manner provided by [MCR 3.991(B)].”

The 1988 Staff Comment following MCR 3.993 states that MCR 3.991 should not be read as giving the petitioner the right to request a review of findings and orders issued after jeopardy has attached in a delinquency proceeding. In other words, a petitioner does not have a right to request review of a “not guilty verdict” rendered by a referee following a bench trial in a delinquency proceeding.

12.7 Procedural Requirements

MCR 3.991(B) and (C) contains the procedural requirements for filing and serving a request for review of a referee’s recommendations and a response to a request for review. These subrules state as follows:

“(B) Form of Request; Time. A party’s request for review of a referee’s recommendation must:

(1) be in writing,
(2) state the grounds for review,
(3) be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee’s written recommendations, whichever is later, and
(4) be served on the interested parties by the person requesting review at the time of filing the request for review with the court. A proof of service must be filed.

“(C) Response. A party may file a written response within 7 days after the filing of the request for review.”

“If no . . . request [for review] is filed within the time provided by subrule (B)(3), the court may enter an order in accordance with the referee’s recommendations.” MCR 3.991(A)(2).
12.8 Time Requirement for Judge’s Consideration of Request

MCR 3.991(A)(3)–(4) provide a mechanism for immediate review of a referee’s recommendations. Those rules state:

“(3) Nothing in this rule prohibits a judge from reviewing a referee’s recommendation before the expiration of the time for requesting review and entering an appropriate order.

“(4) After entry of an order under subrule (A)(3), a request for review may not be filed. Reconsideration of the order is by motion for rehearing under MCR 3.992.”*

There are time limits for a judge’s consideration of a request for review only if the juvenile is detained or in placement. If the juvenile remains in his or her own home, there is no time limit for consideration of the request. “Absent good cause for delay, the judge shall consider the request within 21 days after it is filed if the minor is in placement or detention. The judge need not schedule a hearing to rule on a request for review of a referee’s recommendations.” MCR 3.991(D). See also MCR 3.991(F), which assigns a court discretion to hold a hearing before ruling on a request for review.

12.9 Stay of Proceedings and Grant of Bail

MCR 3.991(G) provides that the court may stay an order or grant bail to a detained juvenile, pending its decision on review of a referee’s recommendations.

12.10 Standard of Review

MCR 3.991(E) sets forth the standard of review of a request for review of a referee’s recommended findings and conclusions. That rule states:

“(E) Review Standard. The judge must enter an order adopting the referee’s recommendation unless:

(1) the judge would have reached a different result had he or she heard the case; or

(2) the referee committed a clear error of law which

(a) likely would have affected the outcome, or

(b) cannot otherwise be considered harmless.”
12.11 Remedies

MCR 3.991(F) states that “[t]he judge may adopt, modify, or deny the recommendation of the referee, in whole or in part, on the basis of the record and the memorandums prepared, or may conduct a hearing, whichever the court in its discretion finds appropriate for the case.”
### Chapter 13: Probation Violations in Cases Involving a Juvenile Disposition

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**In this chapter. . .**

The rules in this chapter govern probation violations in delinquency cases, in minor personal protection order cases in which a juvenile has been placed on probation following a violation of the personal protection order, MCL 712A.18(17) and MCR 3.989, and in designated case proceedings in which the court has imposed a juvenile disposition following conviction, MCL 712A.18(1)(n). The rules in this chapter do not govern probation violations in designated case proceedings in which the court has delayed imposition of an adult sentence or probation violations in “automatic waiver” cases (see Sections 22.5–22.7).

For discussion of the following related topics, see:

- Section 10.9(K) (probation revocation for failure to pay costs);
- Section 10.12(O) (probation revocation for failure to pay restitution);
- Section 3.7 (detaining or jailing juveniles);
- Section 2.12 (procedures governing contempt proceedings involving juveniles); and
- Section 14.4 (hearing requirements before moving a juvenile to a more restrictive placement).

**Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered...
13.1 Due Process Requirements

Although probation violation hearings are summary and not subject to the same rules of pleading and evidence as apply to criminal trials, probationers are entitled to certain due process protections because of the potential loss of liberty. *People v Pillar*, 233 Mich App 267, 269 (1998). The particular due process protections applicable to probation revocation proceedings were set forth in *Gagnon v Scarpelli*, 411 US 778 (1973):

“‘(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body...; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.’” *Id.* at 786, quoting *Morrissey v Brewer*, 408 US 471, 486 (1972).

In determining the applicable standard of proof at a juvenile probation violation hearing, the Court of Appeals in *In re Belcher*, 143 Mich App 68, 71–72 (1985), cited *Gagnon* and noted that the “status of a juvenile probationer is analogous to that of an adult probationer.” See also *In re Scruggs*, 134 Mich App 617, 621–22 (1984), where the Court of Appeals concluded that, as in cases involving adults, probation under MCL 712A.18 is a matter of grace, not a matter of right, and the court is free to revoke probation upon a finding of a violation of its terms. In this chapter, in the absence of case law prescribing the procedures required in juvenile probation violation proceedings, reference is made to case law involving adult probation violation proceedings.

13.2 Initiating Probation Violation Proceedings

MCR 3.944(A) sets forth the procedure for initiating probation violation proceedings. MCR 3.944(A)(1) states that the following options are available to initiate such proceedings:
“(A) Petition; Temporary Custody.

“(1) Upon receipt of a sworn supplemental petition alleging that the juvenile has violated any condition of probation, the court may:

(a) direct that the juvenile be notified pursuant to MCR 3.920 to appear for a hearing on the alleged violation, which notice must include a copy of the probation violation petition and a notice of the juvenile’s rights as provided in subrule (C)(1)*; or

(b) order that the juvenile be apprehended and brought to the court for a detention hearing, which must be commenced within 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2).”

Issuance of summons or notice of hearing. MCR 3.944(A)(1)(a) provides for a notice to appear for a hearing pursuant to MCR 3.920 but does not specify whether a summons or notice of hearing must be used. Compare MCR 6.445(A)(1), which requires use of a summons rather than a notice of hearing in adult probation violation proceedings. Under the court rule applicable to juvenile proceedings, a summons may be issued and served on a petitioner or juvenile before any proceeding in “juvenile court.” MCR 3.920(B)(1). Thus, a summons may be used to direct the juvenile to appear for a hearing on the alleged probation violation. If the juvenile is not in custody, at least 7 days’ notice in writing or on record must be given to juvenile, custodial parent or guardian, or legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner. A copy of the probation violation petition and notice of juvenile’s rights must be provided. MCR 3.944(A)(1)(a), 3.920(C)(1) and 3.921(A)(1).*

Time requirements for initiating proceedings. If the Family Division has exercised jurisdiction over a juvenile for an offense that would be a criminal offense if committed by an adult or a status offense, the court may retain jurisdiction over the juvenile until age 19 or, for certain serious criminal offenses, the court may extend jurisdiction until age 21. MCL 712A.2a(1) and (2). In criminal cases, the sentencing court retains jurisdiction to revoke a probationer’s probation if revocation proceedings are commenced within the probation period and are pending when the probation period expires. People v Ritter, 186 Mich App 701, 706 (1991). See also People v Valentin, 220 Mich App 401, 407 (1996), aff’d 457 Mich 1 (1998) (rule applied to a commitment review hearing in an “automatic waiver” proceeding). Revocation proceedings commence upon the court’s issuance of a warrant or summons. See Ritter, supra at 708–09. When a probationer absconds from probationary supervision, the probation period is tolled from the time
Section 13.3

an arrest warrant is issued until the time the probationer is returned to the court’s supervision. *Id.* at 711–12.

**Procedure for juveniles violating conditional release orders.** MCR 3.945(D) provides that “[t]he procedures set forth in MCR 3.944 apply to juveniles committed under MCL 712A.18 who have allegedly violated a condition of release after being returned to the community on release from a public institution.”

### 13.3 Issuing an Order to Apprehend a Juvenile and Conducting a Detention Hearing

Instead of issuing a summons directing a juvenile to appear for a hearing, the Family Division may issue an order to apprehend a juvenile and bring him or her before the court for a detention hearing. Like an arrest warrant for an adult, the Family Division’s order may only issue upon probable cause and must specify the juvenile and the place where the juvenile may be found. MCL 712A.2c states as follows:

> “The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who . . . has violated probation . . . . The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes with the lawful attempt to execute an order issued under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both.”

If the juvenile is detained, notice of the hearing may be given to the juvenile and his or her parent as soon as the hearing is scheduled, in person, in writing, on record, or by phone. MCR 3.920(C)(2)(a).

MCR 3.944(A)(2) contains instructions to an officer who apprehends a juvenile who has allegedly violated a probation condition. That rule, which contains instructions that are substantially similar to those governing apprehension following an offense by a juvenile, states as follows:

> “(2) When a juvenile is apprehended pursuant to court order as provided in subrule (A)(1)(b), the officer must:

(a) forthwith take the juvenile

(i) to the court for a detention hearing, or
(ii) to the place designated by the court pending the scheduling of a detention hearing; and

(b) notify the custodial parent, guardian, or legal custodian that the juvenile has been taken into custody, of the time and place of the detention hearing, if known, and of the need for the presence of the parent, guardian, or legal custodian at the detention hearing.”

Detention hearings. MCR 3.944(B) sets forth the required procedures at a detention hearing. These procedures are similar to those required for a preliminary hearing. MCR 3.944(B) states in part that at a detention hearing:

“(1) The court must determine whether a parent, guardian, or legal custodian has been notified and is present. If a parent, guardian, or legal custodian has been notified, but fails to appear, the detention hearing may be conducted without a parent, guardian, or legal custodian if a guardian ad litem or attorney appears with the juvenile.

“(2) The court must provide the juvenile with a copy of the petition alleging probation violation.

“(3) The court must read the petition to the juvenile, unless the attorney or the juvenile waives the reading.

“(4) The court must advise the juvenile of the juvenile’s rights as provided in subrule (C)(1) and of the possible dispositions.*

“(5) The juvenile must be allowed an opportunity to deny or otherwise plead to the probation violation. If the juvenile wishes to admit the probation violation or plead no contest, the court must comply with subrule (D) before accepting the plea.”

A juvenile may be detained without bond pending a probation violation hearing if the court finds probable cause to believe that the juvenile violated a condition of probation. MCR 3.944(B)(5)(b).

13.4 Advice of Rights in the Summons or at a Detention Hearing

In a notice to appear for a probation violation hearing or at the detention hearing, the juvenile must be provided a copy of the supplemental petition and advised of his or her rights. MCR 3.944(A)(1)(a) and 3.944(B)(2) and
(4). MCR 3.944(C)(1) list a juvenile’s rights at a probation violation hearing. A juvenile has the right:

“(a) the right to be present at the hearing,

“(b) the right to an attorney pursuant to MCR 3.915(A)(1),

“(c) the right to have the petitioner prove the probation violation by a preponderance of the evidence,

“(d) the right to have the court order any witnesses to appear at the hearing,

“(e) the right to question witnesses against the juvenile,

“(f) the right to remain silent and not have that silence used against the juvenile, and

“(g) the right to testify at the hearing, if the juvenile wants to testify.”

**Notifying a juvenile of the right to a contested hearing.** In criminal cases, the record must reflect that the probationer was made aware of his or her right to a contested hearing as an alternative to pleading guilty. *People v Ealey*, 411 Mich 987 (1981), and *People v Adams*, 411 Mich 1070 (1981), citing Judge Bronson’s dissents in *People v Hooks*, 89 Mich App 124, 133–34 (1979), and *People v Darrell*, 72 Mich App 710, 714–16 (1976). Thus, the use of the terms “hearing” or “pending violation hearing” in a notice of violation or bench warrant does not alone sufficiently notify the probationer of the right to a contested hearing. There must be evidence in the record that the probationer was served with these documents or otherwise made aware of the right. *People v Stallworth*, 107 Mich App 754, 755 (1981).

The failure to explicitly tell an unrepresented probationer of his or her right to a contested hearing is error. *People v Radney*, 81 Mich App 301, 303 (1978), and *People v Brown*, 72 Mich App 7, 14 (1976). The Court of Appeals has held that use of the word “hearing” when asking whether the probationer wants appointed counsel is insufficient notice of the right to a contested hearing. *People v Moore*, 121 Mich App 452, 459 (1982).

### 13.5 Plea Procedures

MCR 3.944(D) sets forth the required procedures for accepting a plea of admission or no contest to an alleged probation violation. The required procedures are similar to those required for accepting a plea from a juvenile who has allegedly committed an offense, and the reader should consult
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Chapter 8 for detailed discussion of the procedures listed below. MCR 3.944(D) states:

“(D) Pleas of Admission or No Contest. If the juvenile wishes to admit the probation violation or plead no contest, before accepting the plea, the court must:

(1) tell the juvenile the nature of the alleged probation violation;

(2) tell the juvenile the possible dispositions;*

(3) tell the juvenile that if the plea is accepted, the juvenile will not have a contested hearing of any kind, so the juvenile would give up the rights that the juvenile would have at a contested hearing, including the rights as provided in subrule (C)(1);*

(4) confirm any plea agreement on the record;

(5) ask the juvenile if any promises have been made beyond those in the plea agreement and whether anyone has threatened the juvenile;

(6) establish support for a finding that the juvenile violated probation,

(a) by questioning the juvenile or by other means when the plea is a plea of admission, or

(b) by means other than questioning the juvenile when the juvenile pleads no contest. The court must also state why a plea of no contest is appropriate;

(7) inquire of the parent, guardian, legal custodian, or guardian ad litem whether there is any reason why the court should not accept the juvenile’s plea. Agreement or objection by the parent, guardian, legal custodian, or guardian ad litem to a plea of admission or no contest by a juvenile shall be placed on the record if the parent, guardian, legal custodian, or guardian ad litem is present; and

(8) determine that the plea is accurately, voluntarily and understandingly made.”

At a plea hearing, the court must specifically inform a probationer that, as an alternative to pleading guilty, he or she has the right to a hearing at which he or she will have the opportunity to contest the charges. Failure to so
Section 13.6

inform the probationer requires reversal absent “direct and affirmative proof” that the probationer was aware of this right and that it would be waived by pleading guilty. *People v Edwards*, 125 Mich App 831, 833 (1983), and *People v Moore*, 121 Mich App 452, 457 (1983). Absent “direct and affirmative proof” that the probationer read a notice of violation containing notice of the right to a contested hearing, the probationer’s receipt of such a notice does not constitute adequate advice of the right. *Edwards, supra* at 835. Notice of the right to a contested hearing as an alternative to pleading guilty is especially important when the probationer has waived the right to counsel. *People v Alame*, 129 Mich App 686, 690 (1983).

However, in criminal cases, advice of the right to a contested hearing is not required where the plea proceeding immediately follows an arraignment at which the probationer was fully advised of his right to a contested probation revocation hearing and the rights incident thereto. *People v Terrell*, 134 Mich App 19, 23 (1984). An arraignment in a criminal proceeding is the functional equivalent of a preliminary hearing in a juvenile delinquency proceeding. *In re Wilson*, 113 Mich App 113, 121 (1982).

13.6 Time Requirements for Probation Violation Hearings

If the juvenile denies the allegations or remains silent, the court must schedule a probation violation hearing, which must commence within 42 days after a detention hearing. If a probation violation hearing is not commenced within 42 days and the delay is not attributable to the juvenile, the juvenile must be released without bail. MCR 3.945(B)(5)(b).

See *In re Madison*, 142 Mich App 216, 222 (1985), citing *In re Scruggs*, 134 Mich App 617, 621 (1984) (a requirement under a previous court rule that the adjudicative phase be docketed and heard within 42 days after conclusion of a preliminary hearing did not apply to probation violation hearings, as jurisdiction has already been determined).

13.7 Procedures at Probation Violation Hearings

A probation violation hearing is a dispositional hearing, not an adjudicative hearing. A probation violation hearing is conducted to determine whether a juvenile violated a condition of probation, not whether a juvenile committed an underlying offense. *In re Scruggs*, 134 Mich App 617, 622 (1984). Nonetheless, a juvenile has rights—contained in applicable court rules and required by due process—at a probation violation hearing.

MCR 3.944(C)(1) lists a juvenile’s rights at a probation violation hearing. A juvenile has a right:

“(a) the right to be present at the hearing,
“(b) the right to an attorney pursuant to MCR 3.915(A)(1),*

“(c) the right to have the petitioner prove the probation violation by a preponderance of the evidence,

“(d) the right to have the court order any witnesses to appear at the hearing,

“(e) the right to question witnesses against the juvenile,

“(f) the right to remain silent and not have that silence used against the juvenile, and

“(g) the right to testify at the hearing, if the juvenile wants to testify.”

In addition, MCR 3.944(C)(2) provides that the following procedural and substantive rules apply at a probation violation hearing:

• the Michigan Rules of Evidence, other than those with respect to privileges, do not apply at a probation violation hearing, and

• there is no right to a jury at a probation violation hearing.

“Neutral and detached hearing body,” probation officers, and referees. Unless a party demanded a trial by judge or jury on the offense that led to placement of the juvenile on probation, a referee will have conducted the trial and the initial dispositional hearing. If a referee tries a case, that same referee may conduct a probation violation hearing even if the juvenile requests that a judge preside at such a hearing. MCR 3.913(B).

Many juvenile probation officers are also hearing referees. See MCL 712A.10(1), which allows a court to assign a juvenile probation officer or county agent as a referee. If the juvenile probation officer who submits a supplemental petition alleging a probation violation is a referee, he or she should not serve as factfinder at the hearing on the alleged violation. Gagnon v Scarpelli, 411 US 778, 786 (1973) held that a probationer is entitled to a “neutral and detached hearing body” as a matter of due process. “The ‘neutral and detached hearing body’ requirement is aimed at preventing revocation by one who was directly involved in bringing the charges against the defendant, such as a probation officer, or one who has personal knowledge of an event upon which the charge is based, such as a judge who orders revocation because of a failure to appear before him.” People v Nesbitt, 86 Mich App 128, 139 (1978).

Appearance of prosecuting attorney. If the court requests, the prosecuting attorney must review the petition for legal sufficiency and appear at any delinquency proceeding. MCR 3.914(A) and MCL 712A.17(4). See also People v Rocha (After Remand), 99 Mich App 654, 656 (1980) (“where
probation proceedings are contested, it is preferable that the interrogation of the defendant be conducted by the prosecutor, so as to avoid the potential or the appearance of bias”).

Violation of probation based on finding of responsibility for an offense. A juvenile may be found to have violated probation based upon a prior finding of responsibility for an offense at a plea or trial. MCR 3.944(C)(3). See also In re Belcher, 143 Mich App 68, 69 (1985) (juvenile probationer violated condition of probation prohibiting subsequent violations of law). In a criminal case, probation may not be revoked solely on the basis that the probationer was arrested for an alleged new criminal offense. People v Pillar, 233 Mich App 267, 269–70 (1998). Nonetheless, because of different standards of proof in criminal or juvenile delinquency proceedings and probation revocation proceedings, a conviction or adjudication of a new offense is not a prerequisite for revocation of probation based on the conduct underlying that offense. People v Buckner, 103 Mich App 301, 303 (1980).

It is not necessary to delay a probation revocation hearing because proceedings involving the underlying offense against the probationer are pending and involve the same conduct for which revocation is sought. People v Nesbitt, 86 Mich App 128, 136 (1978). However, if a probation revocation hearing is conducted prior to a trial involving the same facts, the probationer’s testimony at the hearing and any evidence derived from it are inadmissible—except for purposes of impeachment or rebuttal—against the probationer at the subsequent trial if a timely objection is made at that trial. People v Rocha, 86 Mich App 497, 512–13 (1978). The probationer must be advised before he takes the stand at the revocation hearing that his testimony and its fruits will not be admissible against him at the subsequent trial. Id. at 513.

“Because the standard of proof [in a probation revocation hearing] is lower than the reasonable doubt standard employed in a criminal trial, probation may be revoked before the trial on the substantive offense, and a decision to revoke probation will be valid even if the defendant is ultimately acquitted of the substantive crime.” People v Tebedo, 107 Mich App 316, 321 (1981).

A probationer is not twice placed in jeopardy for the same criminal offense where the same criminal activity is the subject of both probation revocation and criminal proceedings. People v Buelow, 94 Mich App 46, 49 (1979). Because jeopardy does not attach at a probation revocation hearing, subsequent criminal proceedings do not violate double jeopardy prohibitions. People v Johnson, 191 Mich App 222, 226 (1991).

Constitutional limitations on use of evidence at probation revocation proceedings. The Michigan Court of Appeals has held that the privilege against self-incrimination contained in the federal and Michigan constitutions applies to probation revocation proceedings. Thus, a probationer cannot be compelled to testify against himself or herself at a probation revocation hearing. People v Manser, 172 Mich App 485, 488
(1988). Compare *Minnesota v Murphy*, 465 US 420, 435, n 7 (1984) (“Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer”).

“[E]vidence of a defendant’s failure to respond to an accusation of wrongdoing is inadmissible to prove guilt even if the defendant had, prior to his silence, waived his right to remain silent.” *People v Staley*, 127 Mich App 38, 41–42 (1983), relying on *People v Bobo*, 390 Mich 355 (1973). This rule applies to probation revocation hearings. *Staley, supra.*

Involuntary confessions are inadmissible in probation revocation hearings. *Id.* at 43–44. However, statements made to a probation officer during an interview are admissible in revocation or subsequent criminal proceedings even absent *Miranda* warnings. *People v Hardenbrook*, 68 Mich App 640, 644–46 (1976), and *Murphy, supra* 465 US at 429–31. See also *Fare v Michael C*, 442 US 707, 717 n 4, 725 (1979) (assuming without deciding that *Miranda* applies to cases involving juveniles, a juvenile’s request to speak with his probation officer did not constitute an invocation of the juvenile’s rights to counsel and to remain silent), and *People v Anderson*, 209 Mich App 527, 530–35 (1995) (juvenile corrections officer is not a law enforcement officer for *Miranda* purposes).

In *People v Perry*, 201 Mich App 347 (1993), lv den 445 Mich 926 (1994), the Court of Appeals addressed the applicability of the exclusionary rule to probation revocation proceedings, but no majority opinion resulted. Fitzgerald, J, would have held that the exclusionary rule applies in probation revocation proceedings. *Id.* at 359. Shepherd, J, would have held that the exclusionary rule applies when the police know or have reason to know that “they were targeting a probationer.” *Id.* at 351. Griffin, J, would have held that the exclusionary rule would apply to probation revocation where, examining the totality of the circumstances (1) the exclusion of the evidence would substantially further the deterrent purpose of the exclusionary rule, and (2) the need for deterrence would outweigh the harm to the probation system. *Id.* at 353. The United States Supreme Court has held that “the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees’ Fourth Amendment rights.” *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998).

**Calling additional witnesses or ordering production of additional evidence.** The court has authority to call or examine witnesses and to order production of additional evidence or witnesses. MCR 3.923(A)(1) states:

“(A) Additional Evidence. If at any time the court believes that the evidence has not been fully developed, it may:

(1) examine a witness,
(2) call a witness, or

(3) adjourn the matter before the court, and

(a) cause service of process on additional witnesses, or

(b) order production of other evidence.’’

See *In re Alton*, 203 Mich App 405, 407–08 (1994) (court properly allowed additional testimony that directly addressed key conflicts between the testimony of the complainant and juvenile).

**Juvenile may not attack underlying order of disposition at probation violation proceeding.** In a juvenile delinquency case, the juvenile may not attack the underlying order of disposition at a probation revocation hearing, and appeals following revocation of probation are limited to matters related to the revocation hearing. *In re Madison*, 142 Mich App 216, 219 (1985), relying on *People v Pickett*, 391 Mich 305, 316 (1974), and *People v Irving*, 116 Mich App 147, 150 (1982).

13.8 Dispositions Following a Finding of Probation Violation

If a court accepts a juvenile’s plea of admission or no contest to a probation violation, or if the court finds a probation violation following a violation hearing, the court may modify the existing probation order or order any other disposition under MCL 712A.18 or 712A.18a. MCR 3.944(B)(5)(a) and 3.944(E)(1).

**Supplemental orders of disposition.** At any time while a juvenile is under the Family Division’s jurisdiction, the court may terminate jurisdiction or amend or supplement a disposition order “within the authority granted to the court in [MCL 712A.18].” MCL 712A.19(1). MCR 3.943(E)(2) requires the court to consider imposing “graduated sanctions” upon a juvenile when making second and subsequent dispositions in delinquency cases.” That rule states as follows:

(2) In making second and subsequent dispositions in delinquency cases, the court must consider imposing increasingly severe sanctions, which may include imposing additional conditions of probation; extending the term of probation; imposing additional costs; ordering a juvenile who has been residing at home into an out-of-home placement; ordering a more restrictive placement; ordering state wardship for a child who has not previously been a state ward; or any other conditions deemed appropriate by the court. Waiver of jurisdiction to adult criminal court, either by authorization of a
warrant or by judicial waiver, is not considered a sanction for purposes of this rule.”

**Recording probation violations based on underlying offense.** MCR 3.944(E)(2) provides that a finding of probation violation based upon the juvenile’s responsibility for an offense must be recorded as a probation violation only, not a finding of responsibility for the underlying offense. That rule states:

“If, after hearing, the court finds that a violation of probation occurred on the basis of the juvenile having committed an offense, that finding must be recorded as a violation of probation only and not a finding that the juvenile committed the underlying offense. That finding must not be reported to the State Police or the Secretary of State as an adjudication or a disposition.”

13.9 **Recording Probation Violation Hearings**

MCR 3.925(B) states that “[a] record of all hearings must be made.” That subrule also requires that a record of all proceedings on the formal calendar be made and preserved by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded. “Formal calendar” means all judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing. MCR 3.903(A)(10). Thus, detention hearings, plea hearings, and violation hearings must be recorded.
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In this chapter . . .

The rules in this chapter govern review of dispositions in delinquency cases and, when the juvenile is under age 18, in minor personal protection order proceedings. The rules in this chapter also apply in designated case proceedings in which the court has imposed a juvenile disposition following conviction; however, MCL 712A.18d(6) states that §18d, which governs commitment review hearings, “does not apply to a juvenile convicted under [the Juvenile Code] for committing a crime.” It is unclear what statute or court rule governs commitment review hearings in such cases. For an explanation of review proceedings in designated cases in which the court has delayed imposition of adult sentence and imposed a juvenile disposition, see Chapter 22. Review proceedings in “automatic waiver” cases are discussed in Chapter 22 as well.
All of the progress reports and review hearings discussed in this chapter occur after the judge or referee has chosen one or more of the dispositional options available in MCL 712A.18(1).* These reports and hearings are as follows:

- Periodic review hearings at intervals designated by the court or when requested by a party, probation officer, or caseworker. MCR 3.945(A)(1).*
- Dispositional review hearings required before a juvenile may be moved to a more physically restrictive placement. MCR 3.945(A)(2)(b).*
- Dispositional review hearings every 182 days for all juveniles who have been placed into out-of-home care. MCR 3.945(A)(2)(a).*
- Progress reports every six months for juveniles committed to private institutions. MCL 712A.24.*
- Commitment review hearings at age 19 to determine whether the Family Division should continue jurisdiction over a court-committed juvenile until age 21. MCR 3.945(B).*
- Dispositional review hearings every 182 days after a commitment review hearing. MCR 3.945(C)(1).*
- Commitment review hearings at any age that are initiated by the institution to which the juvenile has been committed. MCR 3.945(C)(2).*

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

14.1 Extension of Family Division Jurisdiction Beyond a Juvenile’s 17th Birthday

The Family Division has jurisdiction over juveniles under 17 years old who violate a law or ordinance or commit a status offense. MCL 712A.2(a)(1)–(4). MCL 712A.2a provides for extension of Family Division jurisdiction. If the court has exercised jurisdiction under MCL 712A.2(a), the court shall
extend jurisdiction until the juvenile reaches age 19, unless the court terminates jurisdiction sooner by order. MCL 712A.2a(1). However, if the court has exercised jurisdiction over a juvenile for an enumerated serious offense and committed the juvenile to a public institution or agency, jurisdiction may be extended, following a hearing, until the juvenile reaches age 21. MCL 712A.2a(2).*

If the court has issued a minor personal protection order under MCL 712A.2(h), the court’s jurisdiction continues until the PPO expires, but any action regarding the PPO after the juvenile reaches age 18 is not governed by the procedures contained in the Juvenile Code.*

MCL 712A.2a(5) provides that the terms “child,” juvenile,” or “minor” when used in the Juvenile Code apply to persons under age 18 and over whom the Family Division has continuing jurisdiction. That statute states as follows:

“As used in [the Juvenile Code], “child”, “juvenile”, “minor”, or any other term signifying a person under the age of 18 applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction pursuant to [MCL 712A.2a(1) or (3)].”

**Family Division jurisdiction following a commitment to a public or private institution or agency.** MCL 712A.18c(2) provides that the court retains jurisdiction over a juvenile committed to a public institution or agency under MCL 712A.18(1)(e). MCL 712A.5 states that “[c]ommitments to a private or incorporated institution or agency do not divest the court of jurisdiction unless the juvenile has been adopted in a manner provided by law.”

**Family Division authority to amend or supplement orders of disposition.** MCL 712A.19(1) states in part that “if a child remains under the jurisdiction of the court, a cause may be terminated or an order may be amended or supplemented, within the authority granted to the court in [MCL 712A.18].”

### 14.2 No Right to Jury Trial at Dispositional Review Hearings

(1974) (no right to jury trial exists during the dispositional phase of child protective proceedings, even where a supplemental petition is filed containing new allegations of abuse or neglect).

14.3 Periodic Dispositional Review Hearings

MCR 3.945(A)(1) gives the court authority to conduct periodic hearings to review dispositional orders in juvenile delinquency cases. The court may establish the interval between such hearings, or a party may request a review hearing at any time. MCR 3.945(A)(1) sets forth the required procedures:

“The court must conduct periodic hearings to review the dispositional orders in delinquency cases in which the juvenile has been placed outside the home. Such review hearings must be conducted at intervals designated by the court, or may be requested at any time by a party or by a probation officer or caseworker. The victim has a right to make a statement at the hearing or submit a written statement for use at the hearing, or both. At a disposition review hearing, the court may modify or amend the dispositional order or treatment plan to include any disposition permitted by MCL 712A.18 and MCL 712A.18a or as otherwise permitted by law. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.”

14.4 Review Hearing Before Moving a Juvenile to a More Physically Restrictive Placement

MCR 3.945(A)(2)(b) requires the court to conduct a review hearing before moving a juvenile to a more physically restrictive placement, unless the juvenile and his or her parent consent in a writing filed with the court.* MCR 3.945(A)(2)(b) states as follows:

“A review hearing is required before a juvenile is moved to a more physically restrictive type of placement, unless the court in its dispositional order has provided for a more physically restrictive type of placement. A review hearing is not required if the juvenile and a parent consent to the new placement in a writing filed with the court. A juvenile, who has been ordered placed in a juvenile facility, may be released only with the approval of the court.”

*See SCAO Form JC 57.
14.5 Dispositional Review Hearings for Juveniles Placed in Out-of-Home Care

The Juvenile Code defines “foster care” to include care provided to a child in a foster family home or group home, a child caring institution, or a relative’s home pursuant to a court order. MCL 712A.13a(1)(d). MCR 3.945(A)(2)(a) provides that if the juvenile is in out-of-home care, the court shall hold a dispositional review hearing no later than every 182 days after initial disposition as provided in MCL 712A.19(2). That provision, in turn, states that:

“(2) Except as otherwise provided in this section, if a child is placed in foster care, the cause shall be reheard not more than 182 days after entry of the order of disposition. The showing shall be recorded stenographically at a hearing held by the judge or referee. If the child remains in foster care in the temporary custody of the court following the hearing, the cause shall be further reheard not more than 182 days after the hearing. In conducting the review hearing, the court shall review the performance of the child, the child’s parents, guardian, or custodian, the juvenile worker, and other persons providing assistance to the child and his or her family.”

A. Notice of Hearing

Prior to a dispositional review hearing, the court must ensure that the following persons are notified in writing:

- the agency responsible for the care and supervision of the child, which shall advise the child of the hearing if the child is 11 years of age or older;
- the child’s foster parent or custodian;
- if parental rights have not been terminated, the child’s parents;
- a guardian of the child;
- a guardian ad litem of the child;
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• a “nonparent adult” if he or she is required to comply with the case service plan;*

• an elected leader of an Indian tribe (if tribal affiliation has been determined);

• the child’s attorney, the attorneys for each party, and the prosecuting attorney (if she or he has appeared);

• the child (if 11 years of age or older); and

• other persons as the court may direct. MCL 712A.19(5)(a)–(j).

B. Information That Must Be Reviewed

MCL 712A.19(11) sets forth certain evidence that must be offered and considered at the hearing:

“An agency report filed with the court shall be accessible to all parties to the action and shall be offered into evidence. The court shall consider any written or oral information concerning the child from the child’s parent, guardian, custodian, foster parent, child caring institution, relative with whom a child is placed, attorney, lawyer-guardian ad litem, or guardian ad litem, in addition to any other evidence, including the appropriateness of parenting time, offered at the hearing.”

At a review hearing, the court must review, on the record, all of the following:

“(a) Compliance with the case service plan with respect to services provided or offered to the child and the child’s parent, guardian, custodian, or “nonparent adult” if the “nonparent adult” is required to comply with the case service plan* has complied with and benefited from those services.

“(b) Compliance with the case service plan with respect to parenting time with the child. If parenting time did not occur or was infrequent, the court shall determine why parenting time did not occur or was infrequent.

“(c) The extent to which the parent complied with each provision of the case service plan, prior court orders, and an agreement between the parent and the agency.

“(d) Likely harm to the child if the child continues to be separated from the child’s parent, guardian, or custodian.
“(e) Likely harm to the child if the child is returned to the child’s parent, guardian, or custodian.” MCL 712A.19(6)(a)–(e).

After reviewing the case service plan, the court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care. MCL 712A.19(7). The court may modify any part of the case service plan, including, but not limited to, prescribing additional services that are necessary to rectify the conditions that caused the child to be placed in foster care or to remain in foster care, and prescribing additional actions to be taken by the parent, guardian, “nonparent adult,” or custodian to rectify such conditions. MCL 712A.19(7)(a)–(b).

C. Required Decisions

The court must determine the continuing necessity and appropriateness of the child’s placement at the dispositional review hearing. The court shall order the return of the child to the custody of the parent, continue the dispositional order, modify the dispositional order, or enter a new dispositional order. MCL 712A.19(8).

D. Waiver of Hearing If Juvenile Is Returned Home

If the requisite seven days’ notice prior to a review hearing was given to all parties, or if proper notice of hearing is waived,* and if no party requests a hearing within the seven days, the court may issue an order without holding a review hearing permitting the agency to return the child home. MCL 712A.19(10).

14.6 Progress Reports Every Six Months for Juveniles Committed to Private Institutions

When a placement is made to a private institution or agency under MCL 712A.18(1)(d), the court must require that a progress report be made at least every six months. MCL 712A.24.

14.7 Commitment Review Hearings to Extend Jurisdiction Until Age 21 for Juveniles Committed to Public Institutions

If the Family Division has exercised jurisdiction over the juvenile for a criminal offense or status offense, the court shall retain jurisdiction over the juvenile until age 19, unless the juvenile is released earlier by court order, or unless the court has extended jurisdiction until age 21 for certain serious
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offenses as provided in §18d of the Juvenile Code. MCL 712A.2a(1) and (2), and MCL 712A.18c(4).

Inapplicability of §18d of the Juvenile Code to criminal convictions. MCL 712A.18d(6) states that §18d “does not apply to a juvenile convicted under [the Juvenile Code] for committing a crime.” In designated case proceedings under the Juvenile Code, a juvenile may be convicted of a crime following plea or trial. MCL 712A.2d(7). The court may order a juvenile disposition following conviction, including commitment to a public institution or agency. MCL 712A.18(1)(n). It is unclear what statute or court rule governs commitment review hearings in such cases. However, it appears that the court may conduct review hearings in such cases at any time during the period when the court has jurisdiction over the juvenile.

A. Offenses Allowing Extension of Jurisdiction Until Age 21

MCL 712A.2a(2) and MCL 712A.18d(1) provide that the court may extend jurisdiction until age 21 if the juvenile is committed to a public institution under MCL 712A.18(1)(e) for an offense that would be a violation or attempted violation of any of the following:

- burning a dwelling house, MCL 750.72;
- assault with intent to murder, MCL 750.83;
- assault with intent to do great bodily harm less than murder, MCL 750.84;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while unarmed, MCL 750.88;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree home invasion, MCL 750.110a(2);
- escape or attempted escape from a juvenile facility, MCL 750.186a;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
• assault with intent to commit criminal sexual conduct, MCL 750.520g;
• armed robbery, MCL 750.529;
• unarmed robbery, MCL 750.530;
• bank, safe, or vault robbery, MCL 750.531;
• carjacking, MCL 750.529a; and
• possession of, or manufacture, delivery, or possession with intent to manufacture or deliver, 650 grams or more of any Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(i) and MCL 333.7403(2)(a)(i).

B. Time Requirements for Hearings

“Unless adjourned for good cause, a commitment review hearing must be held as near as possible to, but before, the juvenile’s 19th birthday.” MCR 3.945(B)(1)(a).

C. Notice Requirements for Hearings

Notice of the hearing must be given to the prosecuting attorney, the agency or the superintendent of the institution or facility to which the juvenile has been committed, the juvenile, and the juvenile’s parent, guardian, or legal custodian if his or her address or whereabouts are known, at least 14 days prior to the hearing. MCR 3.945(B)(1)(b) and MCL 712A.18d(4).*

The notice must clearly indicate that the court may extend jurisdiction over the juvenile until age 21, and advise the juvenile and his or her parent, guardian, or legal custodian that the juvenile has the right to an attorney. MCR 3.945(B)(1)(b) and MCL 712A.18d(4).

D. Right to Counsel at Hearings

The court must appoint an attorney to represent the juvenile at the required review hearing unless legal counsel has been retained. MCR 3.945(B)(2) and MCL 712A.18d(4). The court may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile’s support, or both, if the persons to be assessed are financially able to comply. MCL 712A.18d(4).

E. Factors to Consider at Hearings

The purpose of the required commitment review hearing is to determine whether the juvenile has been rehabilitated or still presents a serious risk to public safety.* If the court determines at the required review hearing that the
juvenile has not been rehabilitated or that the juvenile does present a serious risk to public safety, jurisdiction over the juvenile shall be continued until the juvenile reaches age 21. MCL 712A.18d(1).

In making these determinations, the court must consider all of the following factors:

“(a) The extent and nature of the juvenile’s participation in education, counseling, or work programs.

“(b) The juvenile’s willingness to accept responsibility for prior behavior.

“(c) The juvenile’s behavior in his or her current placement.

“(d) The juvenile’s prior record and character and his or her physical and mental maturity.

“(e) The juvenile’s potential for violent conduct as demonstrated by prior behavior.

“(f) The recommendations of the institution, agency, or facility charged with the child’s care for the juvenile’s release or continued custody.

“(g) Other information the prosecuting attorney or juvenile may submit.” MCL 712A.18d(1)(a)–(g). MCR 3.945(B)(4)(a)–(g) contain substantially similar criteria.

F. Burden of Proof at Hearings

The juvenile has the burden of proving by a preponderance of the evidence that he or she has been rehabilitated and does not present a serious risk to public safety. MCR 3.945(B)(4) and MCL 712A.18d(2).

G. Evidence and Reports at Hearings

MCR 3.945(B)(3) provides that the Michigan Rules of Evidence, other than rules governing privileges, do not apply.

MCL 712A.18d(5) provides that the institution charged with the care of the juvenile shall prepare for the court commitment reports as provided in MCL 803.225 of the Juvenile Facilities Act. See also MCR 3.945(B)(3). These reports must contain a description of:
“(a) The services and programs currently being utilized by, or offered to, the juvenile and the juvenile’s participation in those services and programs.

“(b) Where the juvenile currently resides and the juvenile’s behavior in his or her current placement.

“(c) The juvenile’s efforts toward rehabilitation.

“(d) Recommendations for the juvenile’s release or continued custody.” MCL 803.225(1)(a)–(d).

MCR 3.945(B)(3) provides that the court must consider the information in a commitment report when deciding whether to extend jurisdiction. In addition, the court may also consider the annual progress reports created pursuant to MCL 803.223. MCL 803.225(3).

H. Subsequent Review Hearings

If the court extends jurisdiction over the juvenile until the juvenile turns age 21, the court must hold a dispositional review hearing every 182 days after the hearing to extend jurisdiction if the juvenile is placed outside the home. MCR 3.945(C)(1). In addition, “[i]f the institution, agency, or facility to which the juvenile was committed believes that the juvenile has been rehabilitated and does not present a serious risk to public safety, the institution, agency or facility may petition the court to conduct a review hearing at any time before the juvenile becomes 21 years of age.” MCR 3.945(C)(2).

I. Release of Juvenile at Age 21

If the court continues jurisdiction over the juvenile, the juvenile shall be automatically discharged upon reaching the age of 21. MCL 712A.18d(1) and MCL 803.307(1)(a) and (2). See also MCL 712A.5, which provides that a commitment to a public institution is invalid after the juvenile reaches the maximum jurisdictional age under MCL 712A.2a.
14.8 Requirements of the Crime Victim’s Rights Act

A. Notice of Juvenile’s Transfer From One Facility to Another

Upon written request by the victim in a juvenile delinquency proceeding, the agency to which a juvenile has been committed must make a “good-faith effort” to notify the victim before the juvenile is transferred from one juvenile facility to another. MCL 780.798(1)(b).* If the agency to which a juvenile has been committed is unsuccessful in notifying the victim before the transfer, it must notify the victim as soon as possible after the transfer occurs. MCL 780.798(2).

B. Notice of Review Hearings and the Right to Make a Statement

After a juvenile has been committed to an institution for an offense, the crime victim is entitled to request that he or she be notified of review hearings conducted in juvenile delinquency cases and in designated case proceedings in which the juvenile was not sentenced to imprisonment at the initial sentencing or dispositional hearing. If the victim requests, the prosecuting attorney must give the victim notice of a review hearing conducted pursuant to §18 of the Juvenile Code. MCL 780.798(9). “The victim has the right to make a statement at the hearing or submit a written statement for use at the hearing, or both.” Id.

C. Notice of Juvenile’s Dismissal From Court Jurisdiction or Discharge From Commitment to Juvenile Agency

In juvenile delinquency and designated cases, if the victim requests in writing, the court or the agency to which a juvenile was committed must provide the victim notice of the juvenile’s dismissal or discharge. MCL 780.798(1)(a) requires the court, Family Independence Agency, or county juvenile agency, as applicable, to make a “good-faith effort” to notify the victim before “[t]he juvenile is dismissed from court jurisdiction or discharged from commitment to the family independence agency or county juvenile agency.” If the court, FIA, or county juvenile agency is unsuccessful in notifying the victim before the dismissal or discharge, it must notify the victim as soon as possible after the dismissal or discharge occurs. MCL 780.798(2).

14.9 Recording Dispositional Review Hearings

MCR 3.925(B) states that [a] record of all hearings must be made.” That subrule also requires that a record of all proceedings on the formal calendar be made and preserved by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. “Formal calendar” means judicial proceedings other than a preliminary inquiry or a preliminary hearing. MCR 3.903(A)(6). Thus, a record of a review hearing
must be made. See also MCL 712A.19(2) ("rehearing" or "review hearing" required under this provision must be recorded stenographically).
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This chapter contains discussion of the substantive and procedural rules governing personal protection order (PPO) proceedings involving a minor respondent. For a more complete discussion of PPO laws and procedures, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings, Second Edition* (MJI, 2001), Chapters 6–8. A PPO is a court order that prohibits or requires certain actions by a respondent and provides penalties for its violation. Personal protection orders are enforced in contempt proceedings. For a detailed discussion of contempt of court, see *Contempt of Court Benchbook—Revised Edition* (MJI, 2000). Conduct that violates a PPO may also violate a criminal law. In such cases, a juvenile who commits an offense that would be a criminal offense if committed by an adult may also be subject to delinquency or criminal proceedings as discussed in other portions of this benchbook.

Rules governing appeals in minor PPO proceedings are discussed in Section 24.4. Fingerprinting and reporting requirements are discussed in Sections 25.11–25.14.

**Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of
15.1 Rules Applicable to Minor PPO Proceedings

Issuance, dismissal, modification, and termination of a PPO. If the respondent is under age 18, issuance of a PPO is subject to the Juvenile Code. MCL 600.2950(28) and MCL 600.2950a(26). Issuance, dismissal, modification, and termination proceedings in PPO actions under the Juvenile Code are governed by subchapter 3.700 of the Michigan Court Rules. See MCR 3.701(A) and MCR 3.981.

PPO actions with a petitioner under age 18 are generally subject to the same issuance procedures that apply in actions with an adult petitioner, although MCR 3.703(F)(1) requires a minor petitioner or a legally incapacitated individual to proceed through a next friend.

Enforcement of a PPO. Proceedings to enforce a PPO against a respondent under age 18 are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A), MCR 3.708(A)(2), and MCR 3.982(B). The rules exclusively applicable to such proceedings are set forth at MCR 3.982–3.989. See MCR 3.901(B)(5). If the respondent is 18 years old or older when an alleged violation occurs, enforcement proceedings are governed by MCR 3.708. MCR 3.708(A)(2).

Appeals. Procedures on appeals related to minor PPOs are governed by MCR 3.709 and 3.993. MCR 3.981.*

Rules inapplicable to PPO proceedings. The provisions of MCR 3.310 (regarding injunctions) and MCR 2.119 (regarding motions) do not apply to any type of PPO action. See MCR 3.701(A) and 3.702(2).

15.2 Jurisdiction of Minor PPO Proceedings

MCL 712A.2(h) gives the Family Division jurisdiction over minor respondents between the ages of 10 and 18 years old in personal protection order (PPO) proceedings under both the domestic relationship PPO statute, MCL 600.2950, and the non-domestic relationship stalking PPO statute, MCL 600.2950a. See MCL 712A.1(1)(f) (“[p]ersonal protection order’ means a personal protection order issued under [MCL 600.2950 or 600.2950a], and includes a valid foreign protection order”).* MCL 712A.2(h) states, in part:
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“[The Family Division has] jurisdiction over a proceeding under . . . MCL 600.2950 and 600.2950a, in which a minor less than 18 years of age is the respondent, or a proceeding to enforce a valid foreign protection order issued against a respondent who is a minor less than 18 years of age. A personal protection order shall not be issued against a respondent who is a minor less than 10 years of age.”

If the court exercises its jurisdiction under this provision, jurisdiction continues until the order expires, even if the respondent reaches adulthood during that time. MCL 712A.2a(3). However, “action regarding the personal protection order after the respondent’s eighteenth birthday shall not be subject to [the Juvenile Code].” Id. Instead, the court would apply adult PPO laws and procedures to actions regarding the PPO after the respondent’s 18th birthday. MCR 3.708(A)(2). Although they are subject to the enforcement procedures for minor respondents, violations committed on or after the respondent’s 17th birthday are subject to adult penalties. MCL 600.2950(11)(a)(i) and MCL 600.2950a(8)(a)(i). Moreover, 17 year olds are subject to adult arrest procedures and incarceration. MCL 600.2950(11)(a)(ii) and (23), MCL 600.2950a(8)(a)(ii) and (20), MCL 764.15b(1)(c), MCL 712A.14(1), MCL 712A.15(5), MCR 3.706(A)(3), MCR 3.984(C), and MCR 3.985(D)(2).

**Jurisdiction of contempt proceedings.** MCL 764.15b(6) provides that the Family Division has jurisdiction to conduct contempt proceedings based upon a violation of a PPO:

“The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued pursuant to [MCL 712A.2(h)] by the family division of circuit court in any county of this state or a valid foreign protection order issued against a respondent who is less than 18 years of age at the time of the alleged violation of the foreign protection order in this state.”

**Definition of “minor.”** “‘Minor’ means a person under the age of 18, and may include a person of age 18 or older over whom the court has continuing jurisdiction pursuant to MCL 712A.2a.” MCR 3.903(A)(15). See also MCR 3.702(6), which defines “minor” as a person under age 18.
15.3 Venue

Venue for the initial action is proper in the county of residence of either the petitioner or respondent. If the respondent does not live in this state, venue for the initial action is proper in the petitioner’s county of residence. MCL 712A.2(h) and MCR 3.703(E)(2).*

15.4 Prohibition Against Issuing PPO When Parent-Child Relationship Exists

A PPO may not be issued if the petitioner and respondent have a parent-child relationship and the child is an unemancipated minor. MCL 600.2950(27) and MCL 600.2950a(25). MCL 600.2950(27)(a)–(b) and MCL 600.2950a(25)(a)–(b) prohibit a court from issuing a PPO if either:

• the unemancipated respondent is the petitioner’s minor child, or
• the unemancipated petitioner is the respondent’s minor child.

Alternative remedies may be available in these situations. For example, if an unemancipated minor under 17 years old violates a criminal law or ordinance, jurisdiction may be proper under MCL 712A.2(a)(1). Jurisdiction may also be proper under MCL 712A.2(a)(3) if the minor is under 17 years old and “is repeatedly disobedient to the reasonable and lawful commands of his or her parent, guardian, or custodian and the court finds on the record by clear and convincing evidence that court-accessed services are necessary.”*

15.5 Mutual Orders Prohibited

The court may not issue mutual personal protection orders. However, correlative separate orders are permitted if both parties properly petition the court, and if the court makes separate findings that support an order against each party. MCL 600.2950(8), MCL 600.2950a(5), and MCR 3.706(B). The court has no authority under the Michigan PPO statutes to accept the parties’ stipulation to a mutual protection order.*

15.6 Required Procedures Where Prior Orders or Judgments Affect the Parties

MCR 3.703(D) and MCR 3.706(C) contain procedural requirements for situations where there are other pending actions or prior orders or judgments affecting the parties to the PPO petition:

• If the PPO petition is filed in the same court where the pending action was filed or the prior order or judgment was entered, the
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PPO petition shall be assigned to the same judge. MCR 3.703(D)(1)(a).

- If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court in which the PPO petition was filed should contact the other court, if practicable, to determine any relevant information. MCR 3.703(D)(1)(b).

- If a prior court action resulted in an order providing for continuing jurisdiction of a minor, and the petition requests relief with regard to the minor, the court considering the PPO petition must comply with the notice requirements of MCR 3.205. MCR 3.703(D)(2).

15.7 Transfer of Minor PPO Proceedings to Issuing Court for Enforcement

When a minor who has allegedly violated a PPO is apprehended in a county other than the county in which the PPO was issued, the case may be transferred to the issuing county for enforcement proceedings. MCR 3.984(E) allows an official in the apprehending jurisdiction to notify the issuing jurisdiction that it may request transfer of the minor to the issuing jurisdiction for enforcement proceedings. That rule states as follows:

“Subject to MCR 3.985(H), if a minor is apprehended for violation of a minor personal protection order in a jurisdiction other than the jurisdiction where the minor personal protection order was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request that the respondent be returned to the issuing jurisdiction for enforcement proceedings.”

MCR 3.985(H) requires the apprehending jurisdiction to notify the issuing jurisdiction that it may request transfer of the case. This notice must be provided after the apprehending jurisdiction conducts a preliminary hearing if it hasn’t provided such notification before that time. Id.

Although the agency that must provide the notification is not specified in the court rules, MCL 764.15b(6) suggests that the court must provide the notification. That statute states in relevant part:

“The family division of circuit court that conducts the preliminary inquiry shall notify the court that issued the personal protection order or foreign protection order that the issuing court may request that the respondent be returned to that county for violating the personal protection order or foreign protection order. If the court...
that issued the personal protection order or foreign protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county.”

15.8 Authority of Referees to Conduct Proceedings

A non-attorney referee may conduct a preliminary hearing on an alleged violation of a PPO, and an attorney referee may conduct any hearing to enforce a PPO. MCR 3.913(A)(2)(d) states:

“(5) Minor Personal Protection Actions. A nonattorney referee may preside at a preliminary hearing for enforcement of a minor personal protection order. Only a referee licensed to practice law in Michigan may preside at any other hearing for the enforcement of a minor personal protection order and make recommended findings and conclusions.”

Demand for judge to preside at a non-jury trial in minor PPO proceeding. A judge may conduct a nonjury trial in a minor PPO proceeding if a proper demand has been made. Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines “formal calendar” as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding. The right to have a judge sit as factfinder is not absolute, however. A party who fails to make a timely demand* for a judge to serve as factfinder may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived. MCR 3.913(B) provides that unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase.

15.9 Domestic Relationship PPOs Under MCL 600.2950

The Legislature has created two types of personal protection orders, distinguished by the categories of persons who may be restrained:

- “Domestic relationship PPOs” under MCL 600.2950 are available to restrain behavior (including stalking) that interferes with the petitioner’s personal liberty, or that causes a reasonable apprehension of violence, if the respondent is involved in certain domestic relationships with the petitioner as defined by the statute.
• “Non-domestic stalking PPOs” under MCL 600.2950a are available to enjoin stalking behavior by any person, regardless of that person’s relationship with the petitioner.

This section addresses the substantive prerequisites for issuing domestic relationship PPOs. The substantive prerequisites for issuing non-domestic stalking PPOs are discussed in Section 15.10. Procedures for issuing both types of PPOs are the subject of Sections 15.11–15.12.

A. Persons Who May Be Restrained

If the respondent falls into any one of the following categories described in MCL 600.2950(1), a domestic relationship PPO is appropriate (even if the offensive behavior amounts to stalking):

• The petitioner’s spouse or former spouse.
• A person with whom the petitioner has had a child in common.
• A person who resides or who has resided in the same household as the petitioner.
• A person with whom the petitioner has or has had a “dating relationship.”

The statute puts no time limitation on the foregoing domestic relationships that have occurred in the petitioner’s past.

“Dating relationship” is defined in the statute as “frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.” MCL 600.2950(30)(a).

Residents of the petitioner’s household. MCL 600.2950(1) permits the court to restrain “an individual residing or having resided in the same household as the petitioner.” Although the statute specifically prohibits issuance of a domestic relationship PPO if the petitioner and respondent have a parent-child relationship and the child is an unemancipated minor, MCL 600.2950(27),* it contains no other limitations as to the nature of the relationship between a petitioner and respondent living in the same household.

The Court of Appeals has addressed the scope of similar language in the criminal domestic assault statute, MCL 750.81(2).* In In re Lovell, 226 Mich App 84 (1997), the prosecutor filed a petition charging a 16-year-old girl with assaulting her mother under MCL 750.81(2). The probate court refused to issue the petition, holding that the statute did not apply to assaults by children against parents. The prosecutor appealed to the circuit court,

*See Section 15.4, above.

*The domestic assault statute applies to a person who assaults “a resident or former resident of his or her household.”
which also affirmed. The Court of Appeals reversed the lower courts’ decision, holding that:

“When a statute is clear and unambiguous, judicial interpretation is precluded. . . . Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. . . . [The statute] applies to offenders who resided in a household with the victim at or before the time of the assault . . . regardless of the victim’s relationship with the offender.” Lovell, supra at 87.

In so holding, the Court expressed no opinion as to whether its holding would permit application of the statute to assaulive behavior between college roomates who were not romantically involved. The dissenting judge on the Lovell panel would have required residence in the household plus a romantic involvement to trigger coverage under MCL 750.81(2).

B. Prohibited Conduct

Under MCL 600.2950(1)(a)–(j), a domestic relationship PPO may enjoin one or more of the following acts:

“(a) Entering onto premises.

“(b) Assaulting, attacking, beating, molesting, or wounding a named individual.*

“(c) Threatening to kill or physically injure a named individual.

“(d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

“(e) Purchasing or possessing a firearm.

“(f) Interfering with petitioner’s efforts to remove petitioner’s children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.

“(g) Interfering with petitioner at petitioner’s place of employment or education or engaging in conduct that impairs petitioner’s employment or educational relationship or environment.
“(h) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner’s minor child or about petitioner’s employment address.

“(i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i [i.e., stalking and aggravated stalking].

“(j) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.”

Under MCL 600.2950(5), the court may not restrain the respondent from entering onto premises if all of the following apply:

“(a) The individual to be restrained or enjoined is not the spouse of the moving party.

“(b) The individual to be restrained or enjoined or the parent, guardian, or custodian of the minor to be restrained or enjoined has a property interest in the premises.

“(c) The moving party or the parent, guardian, or custodian of a minor petitioner has no property interest in the premises.”

C. Standard for Issuing a Domestic Relationship PPO

The burden of proof that a domestic relationship PPO should issue is on the petitioner because the court must make a positive finding of prohibited behavior by the respondent before issuing a PPO. Kampf v Kampf, 237 Mich App 377, 386 (1999).

MCL 600.2950(4) articulates the standard for issuing a domestic relationship PPO as follows:

“The court shall issue a personal protection order under this section if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in [MCL 600.2950(1)].* In determining whether reasonable cause exists, the court shall consider all of the following:
“(a) Testimony, documents, or other evidence offered in support of the request for a personal protection order.

“(b) Whether the individual to be restrained or enjoined has previously committed or threatened to commit 1 or more of the acts listed in [MCL 600.2950(1)].” [Emphasis added.]

In a criminal case, “reasonable cause” is shown by facts leading a fair-minded person of average intelligence and judgment to believe that an incident has occurred or will occur. See People v Richardson, 204 Mich App 71, 79 (1994), construing the term “reasonable cause” in the warrantless arrest statute, MCL 764.15(1)(c). In a case involving a warrantless arrest for violation of a PPO, the Court of Appeals noted that “reasonable cause” to make an arrest means “having enough information to lead an ordinarily careful person to believe that the defendant committed a crime. CJI2d 13.5(4).” People v Freeman, 240 Mich App 235, 236 (2000).

Under MCL 600.2950(6), the court may not refuse to issue a PPO solely due to the absence of:

- a police report;
- a medical report;
- an administrative agency’s finding or report; or
- physical signs of abuse or violence.

MCL 600.2950(12) sets forth the following standard for cases in which the petition requests an ex parte PPO:

“An ex parte personal protection order shall be issued and effective without written or oral notice to the individual restrained or enjoined or his or her attorney if it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued.”*

The mandatory language in the above provision differs from the corresponding standard for issuing an ex parte PPO under the non-domestic stalking PPO statute. See MCL 600.2950a(9), cited in Section 15.10(D), below, which provides that an ex parte stalking PPO “shall not be issued . . . unless it clearly appears from specific facts . . . that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued.”

*See also MCR 3.703(G), which contains similar language.
The Michigan Court of Appeals has held that an ex parte personal protection order issued under MCL 600.2950(12) does not violate due process. *Kampf*, *supra* at 383–85.

15.10 Non-Domestic Stalking PPOs Under MCL 600.2950a

The Legislature has created two types of personal protection orders, distinguished by the categories of persons who may be restrained:

- “Non-domestic stalking PPOs” under MCL 600.2950a are available to enjoin stalking behavior by any person, regardless of that person’s relationship with the petitioner.
- “Domestic relationship PPOs” under MCL 600.2950 are available to enjoin behavior (including stalking) that interferes with the petitioner’s personal liberty, or that causes a reasonable apprehension of violence if the respondent is involved in certain domestic relationships with the petitioner as defined by the statute.

This section addresses the substantive prerequisites for issuing non-domestic stalking PPOs. The substantive prerequisites for issuing domestic relationship PPOs are discussed in Section 15.9. Procedures for issuing both types of PPOs are addressed in Section 15.11–15.12.

A. Persons Who May Be Restrained

MCL 600.2950a authorizes the Family Division of Circuit Court to issue a PPO restraining stalking as defined in MCL 750.411h, or aggravated stalking as defined in MCL 750.411i. This relief is available without the need to establish a prior relationship between the petitioner and the respondent. A non-domestic stalking PPO is thus available to restrain anyone who is stalking, including a stranger to the petitioner.

B. Petitioner May Not Be a Prisoner

A court must not enter a non-domestic stalking PPO if the petitioner is a prisoner. MCL 600.2950a(28). A “prisoner” is a “person subject to incarceration, detention, or admission to a prison who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of federal, state, or local law or the terms and conditions of parole, probation, pretrial release, or a diversionary program.” MCL 600.2950a(29)(d).

If a PPO is issued in violation of the foregoing prohibition, the court must rescind the PPO upon notification and verification that the petitioner is a prisoner. MCL 600.2950a(28).
C. Prohibited Conduct—Stalking and Aggravated Stalking

MCL 600.2950a permits the circuit court to restrain stalking and aggravated stalking as defined in the criminal stalking statutes. The respondent need not have been convicted or adjudicated of a violation of the criminal stalking statutes. MCL 600.2950a(1).

“Stalking” is a misdemeanor under MCL 750.411h. Subsection (1)(d) of this statute defines “stalking” as:

- “[A] willful course of conduct involving repeated or continuing harassment of another individual”;
- “[T]hat would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested”; and,
- “[T]hat actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” In a criminal prosecution for stalking, evidence that the defendant continued to make unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(4).

The following definitions further explain this offense:

- A “course of conduct” involves “a series of 2 or more separate, non-continuous acts evidencing a continuity of purpose.” MCL 750.411h(1)(a).
- “Harassment” means conduct including, but not limited to, “repeated or continuing unconsented contact, that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.” MCL 750.411h(1)(c).
- Under MCL 750.411h(1)(e), “unconsented contact” means “any contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or
discontinued.” Unconsented contact includes, but is not limited to:

— Following or appearing within the victim’s sight.

— Approaching or confronting the victim in a public place or on private property.

— Appearing at the victim’s workplace or residence.

— Entering onto or remaining on property owned, leased, or occupied by the victim.

— Contacting the victim by phone, mail, or electronic communications.

— Placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.

• “Emotional distress” means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling. MCL 750.411h(1)(b).

Under MCL 750.411i(2), a person who engages in stalking is guilty of the felony of aggravated stalking if the violation involves any of the following circumstances:

• At least one of the actions constituting the offense is in violation of a restraining order of which the offender has actual notice, or at least one of the actions is in violation of an injunction or preliminary injunction. There is no language in the aggravated stalking statute stating that the order violated must have been issued by a Michigan court — violations of sister state or tribal protection orders may also constitute aggravated stalking.

• At least one of the actions constituting the offense is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal.

• The person’s conduct includes making one or more credible threats against the victim, a family member of the victim, or another person living in the victim’s household. Under MCL 750.411i(1)(b), a “credible threat” is a threat to kill or to inflict physical injury on another person, made so that it causes the person hearing the threat to reasonably fear for his/her own safety, or for the safety of another.

• The offender has been previously convicted of violating either of the criminal stalking statutes.
In addition to conduct prohibited under the criminal stalking and aggravated stalking statutes, a non-domestic stalking PPO may enjoin an individual from purchasing or possessing a firearm. MCL 600.2950a(23). Special procedural requirements apply where the restrained party is issued a license to carry a concealed weapon and is required to carry a firearm as a condition of his or her employment.*

A non-domestic stalking PPO is not an appropriate method for dealing with disputes between neighbors or coworkers in which the parties’ behavior is not of the type described in the criminal stalking and aggravated stalking statutes. Community dispute resolution and district court peace bonds are better ways of addressing such disputes.

**D. Standard for Issuing a Non-Domestic Stalking PPO**

Relief under the non-domestic stalking PPO statute shall *not* be granted *unless*:

> “the petition alleges facts that constitute stalking as defined in section 411h or 411i of the Michigan penal code . . . MCL 750.411h and 750.411i. Relief may be sought and granted under this section whether or not the individual to be restrained or enjoined has been charged or convicted under section 411h or 411i of the Michigan penal code.” MCL 600.2950a(1).

MCL 600.2950a(9) sets forth the following standard for cases in which the petition requests an ex parte PPO:

> “An ex parte personal protection order shall not be issued and effective without written or oral notice to the individual enjoined or his or her attorney unless it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued.”*

This standard does not contain the mandatory language that appears in the corresponding provision of the domestic relationship PPO statute. See MCL 600.2950(12), cited in Section 15.9(C), above.
15.11 Procedures for Issuing PPOs

A. Next Friends and Guardians ad Litem

A petitioner is not required to hire an attorney to obtain a PPO. MCL 600.2950(b)(1). If the petitioner is a minor or a legally incapacitated individual, MCR 3.703(F)(1) provides that he or she “shall proceed through a next friend.” The petitioner must certify that the next friend is an adult who is not disqualified by statute. Id. MCR 3.703(F)(2) further provides that:

- “Unless the court determines appointment is necessary, the next friend may act on behalf of the minor or legally incapacitated person without appointment.”
- “[T]he court shall appoint a next friend if the minor is less than 14 years of age.” [Emphasis added.]
- “The next friend is not responsible for the costs of the action.”

In addition, a court may appoint a guardian ad litem for a minor involved as a respondent in a PPO proceeding under MCL 712A.2(h). Guardians ad litem are not attorney-advocates for respondents in juvenile proceedings.

Note: A problem may arise when a parent acting as next friend of his or her minor child petitions for a PPO in an effort to discourage a relationship between the child and the juvenile respondent. The minor child may not feel threatened by the juvenile respondent’s conduct. In such cases, the judge should assure that the standard for issuing a PPO has been met. See Sections 15.9(C) and 15.10(D), above.

B. Concurrent Proceedings

A petition for a PPO is filed in Family Division of Circuit Court. See MCL 712A.2(h). The petition must be filed as an independent action. MCR 3.702(2). A PPO action may not be commenced by filing a motion in an existing case or by joining a claim to an action. MCR 3.703(A). Because court rules supersede procedural rules set forth in statute, MCR 3.703(A) abrogates statutory provisions that would permit a PPO petition to be joined as a claim with another action or filed as a motion in a pending action. Treatment of the PPO petition as a separate action protects the petitioner by ensuring that the PPO will not automatically terminate upon conclusion of the separate matter in which it would otherwise have been filed or joined under the statutes.
C. **Filing Fee**

There is no fee for filing a PPO petition, and no summons is issued. MCL 600.2529(1)(a) and MCR 3.703(A). However, a petitioner may be responsible for fees for service of pleadings if he or she is not indigent.

D. **Distributing and Completing Forms**

Pursuant to MCL 600.2950b and MCR 3.701(B), the State Court Administrative Office has approved standardized PPO forms. See SCAO Form CC 375 et seq. These forms are intended for use by parties who wish to proceed without an attorney. Regarding distribution of the forms, MCL 600.2950b(4) provides as follows:

> “The court shall provide a form prepared under this section without charge. Upon request, the court may provide assistance, but not legal assistance, to an individual in completing a form prepared under this section and the personal protection order form if the court issues such an order, and may instruct the individual regarding the requirements for proper service of the order.”

MCR 3.701(B) similarly provides that PPO forms approved by the State Court Administrative Office “shall be made available for public distribution by the clerk of the circuit court.”

Courts are authorized by statute to provide domestic violence victim advocates to assist petitioners in obtaining a PPO. A court may use the services of a public or private agency or organization that has a record of service to victims of domestic violence to provide the assistance. MCL 600.2950c(1).

E. **Contents of the Petition**

MCR 3.703(B) and (D) address the contents of the petition. Under MCR 3.703(B), the petition must:

> “(1) be in writing;
>
> “(2) state with particularity the facts on which it is based;
>
> “(3) state the relief sought and the conduct to be restrained;
>
> “(4) state whether an ex parte order is being sought;
“(5) state whether a personal protection order action involving the same parties has been commenced in another jurisdiction; and

“(6) be signed by the party or attorney as provided in MCR 2.114. The petitioner may omit his or her residence address from the documents filed with the court, but must provide the court with a mailing address.”*

Under MCR 3.703(D)(1), the petitioner must notify the court about other pending actions, orders, or judgments affecting the parties to a personal protection action. The court rule provides:

“The petition must specify whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and the case number, if known.”*

Where the respondent is under age 18, MCR 3.703(C) additionally requires that the petition must list the respondent’s name, address and either age or date of birth. Moreover, the petition must list the names and addresses of the respondent’s parent or parents, guardian, or custodian, if this is know or can be easily ascertained.

Persons who knowingly and intentionally make false statements to the court in support of a PPO petition are subject to being held in contempt of court. MCL 600.2950(24) and MCL 600.2950a(21).

F. Ex Parte Proceedings

The court must rule on a request for an ex parte PPO within 24 hours of the filing the petition. MCR 3.705(A)(1).

If the court issues an ex parte PPO, MCR 3.705(A)(2) requires the following:

“In a proceeding under MCL 600.2950a [regarding non-domestic relations PPOs], the court must state in writing the specific reasons for issuance of the order. A permanent record or memorandum must be made of any nonwritten evidence, argument or other representations made in support of issuance of an ex parte order.”

If the court denies the petition for ex parte relief, the court must do the following:

- Immediately state specific reasons in writing for refusing to issue the PPO. If a hearing is held, the court shall also
immediately state on the record the specific reasons for refusing to issue a PPO. MCL 600.2950(7), MCL 600.2950a(4), and MCR 3.705(A)(5).

• Advise the petitioner of the right to request a hearing. The court is excused from giving this advice if it “determines after interviewing the petitioner that the petitioner’s claims are sufficiently without merit that the action should be dismissed without a hearing.” MCR 3.705(A)(5).

• Schedule a hearing as soon as possible if the petitioner requests one. MCR 3.705(B)(1)(b). If the petitioner does not request a hearing within 21 days of entry of the court’s order denying the request for an ex parte PPO, the court’s order is final. MCR 3.705(A)(5). The court does not have to schedule a hearing if it “determines after interviewing the petitioner that the claims are sufficiently without merit that the action should be dismissed without a hearing.” MCR 3.705(B)(1).


15.12 Procedures for Conducting a Hearing on the Issuance of a PPO

A. Scheduling a Hearing

Under MCR 3.705(B)(1), the court must schedule a hearing as soon as possible if:

• the petition does not request an ex parte order, or

• the court denies the petitioner’s request for an ex parte order and the petitioner requests a hearing.

In both of the above circumstances, the court is excused from scheduling a hearing if it “determines after interviewing the petitioner that the claims are sufficiently without merit that the action should be dismissed without a hearing.” MCR 3.705(B)(1).

B. Service of Notice of Hearing

After the court schedules a hearing, the petitioner must arrange for service of the petition and notice of the hearing on the respondent at least one day before the hearing. MCR 3.705(B)(2). The petitioner may not make service: service must be made by a legally competent adult who is not a party to the
action. MCR 2.103(A). Service on the respondent shall be made pursuant to MCR 2.105(A), which provides for service on a resident or nonresident by:

- delivery to the respondent personally, or
- delivery by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the respondent acknowledges receipt of the mail. A copy of the return receipt signed by the respondent must be attached to the proof showing service.

If the respondent is under age 18, and the whereabouts of the respondent’s parent or parents, guardian, or custodian is known, service must also be similarly made on one of these individuals. MCR 3.705(B)(2).

C. Making a Record

The court must hold any hearing on a PPO petition on the record. MCR 3.705(B)(3). At the conclusion of a hearing on a PPO petition, the court shall immediately state the reasons for granting or denying a personal protection order on the record and enter an appropriate order. In addition, the court shall immediately state its reasons for denying a personal protection order in writing. MCL 600.2950(7), MCL 600.2950a(4), and MCR 3.705(B)(6). If the petition sought a non-domestic relations stalking PPO, the court must state in writing the specific reasons for issuing the PPO. MCL 600.2950a(4), and MCR 3.705(B)(6).

D. Effect of a Party’s Failure to Attend a Scheduled Hearing

If the petitioner fails to attend a hearing scheduled on the PPO petition, the court may either adjourn and reschedule the hearing or dismiss the petition. MCR 3.705(B)(4).

If the respondent fails to appear at a hearing on a PPO petition and the court determines that the petitioner made diligent attempts to serve the respondent, whether the respondent was served or not, the PPO may be entered without further notice to the respondent if the court determines that the petitioner is entitled to relief. MCR 3.705(B)(5).

15.13 Required Provisions in a PPO

If the court grants a PPO petition, MCL 600.2950(11) and MCL 600.2950a(8) require that the resulting order contain the following information, in a single form “to the extent practicable”:

- A statement that the PPO has been entered. MCL 600.2950(11)(a) and MCL 600.2950a(8)(a).
• A statement regarding the penalties for violation of a PPO. *Id.*

— If the respondent is age 17 or older, the PPO must state that a violation will subject the respondent to immediate arrest and to the civil and criminal contempt powers of the court, and that if the respondent is found guilty of criminal contempt, he or she shall be imprisoned for not more than 93 days and may be fined not more than $500.00. MCL 600.2950(11)(a)(i), MCL 600.2950a(8)(a)(i), and MCR 3.706(A)(3)(a).

— If the respondent is less than 17 years of age, the PPO must state that a violation will subject the respondent to immediate apprehension or being taken into custody, and to the dispositional alternatives listed in MCL 712A.18.* MCL 600.2950(11)(a)(ii), MCL 600.2950a(8)(a)(ii), and MCR 3.706(A)(3)(b).

— If the respondent violates the PPO in a jurisdiction other than Michigan, he or she is subject to the enforcement procedures and penalties of the jurisdiction where the violation occurred. MCL 600.2950(11)(a)(iii) and MCL 600.2950a(8)(a)(iii).

• A statement that the PPO is “effective and immediately enforceable anywhere in Michigan when signed by a judge, and that, upon service, a personal protection order also may be enforced by another state, an Indian tribe, or a territory of the United States.” MCL 600.2950(11)(b) and MCL 600.2950a(8)(b). See also MCR 3.706(A)(2).

• A statement listing the type or types of conduct enjoined. MCL 600.2950(11)(c) and MCL 600.2950a(8)(c). See also MCR 3.706(A)(1). In listing the conduct enjoined, the following principles are helpful:

— The prohibited acts listed in MCL 600.2950(1) and in the criminal stalking statutes are not automatically incorporated into every PPO: a PPO restrains the respondent only from doing the particular acts specified in the order.*

— The most effective PPO provisions fully specify the precise conditions of relief granted to the petitioner. Highly specific orders are easier to enforce because they give clear notice of the behavior that is prohibited, thus discouraging manipulative behavior by the parties.

• An expiration date stated clearly on the face of the order. MCL 600.2950(11)(d), MCL 600.2950a(8)(d), and MCR 3.706(A)(4). The following rules apply with regard to the duration of a PPO:

— The statutes place no maximum limit on the duration of a PPO. Ex parte orders must be valid for at least 182 days.
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Statutes have no minimum time provision for the duration of orders entered after a hearing with notice to the respondent. MCL 600.2950(13) and MCL 600.2950a(10).

— If the respondent is under age 18, the issuing court’s jurisdiction continues over the respondent until the PPO expires, even if the expiration date is after the respondent’s 18th birthday. MCL 712A.2a(3). Violations committed on or after the respondent’s 17th birthday are subject to adult penalties, however. MCL 600.2950(11)(a)(i) and MCL 600.2950a(8)(a)(i). If a violation occurs after the respondent’s 18th birthday, adult enforcement procedures apply, as well as adult penalties. MCL 712A.2a(3) and MCR 3.708(A)(2).

— A specific expiration date is needed for LEIN entry.* Because orders of “permanent” or “99 years” duration are difficult for police to enforce, the order must state the specific month, day, and year of expiration.

• A statement that the PPO is “enforceable anywhere in Michigan by any law enforcement agency.” MCL 600.2950(11)(e), MCL 600.2950a(8)(e), and MCR 3.706(A)(5).

• The name of the law enforcement agency that the court has designated for entering the PPO into the LEIN network. MCL 600.2950(11)(f), MCL 600.2950a(8)(f), and MCR 3.706(A)(6).

• If the PPO was issued ex parte, a statement that the restrained person may move to modify or terminate it, and may request a hearing within 14 days after service or actual notice of the order.* The PPO must state that motion forms and filing instructions for this purpose are available from the court clerk. MCL 600.2950(11)(g), MCL 600.2950a(8)(g), and MCR 3.706(A)(7).

15.14 Entry of the Order Into the Law Enforcement Information Network (LEIN)

After issuance of a PPO, the clerk of the court has the following responsibilities to facilitate entry of the PPO and other related documents into the Law Enforcement Information Network (LEIN) system:

• Immediately upon issuance, and without requiring proof of service, the court clerk must file a true copy of the PPO with the court-designated law enforcement agency that will enter it into the LEIN network. MCL 600.2950(15)(a) and MCL 600.2950a(12)(a).
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• The court clerk must provide the petitioner with no less than two true copies of the PPO, and inform the petitioner that he or she may take a copy to the designated law enforcement agency for entry into the LEIN network. MCL 600.2950(15)(b) and (16) and MCL 600.2950a(12)(b) and (13). The fact that the petitioner may take a copy of the PPO to a law enforcement agency for LEIN entry does not relieve the court clerk of the responsibility for doing so.

• The court clerk must notify the designated law enforcement agency upon receipt of proof of service on the restrained person. MCL 600.2950(19)(a) and MCL 600.2950a(16)(a).

• The court clerk must notify the designated law enforcement agency if the court terminates, modifies, or extends the PPO.* MCL 600.2950(19)(b) and MCL 600.2950a(16)(b).

The PPO statutes do not specify any particular law enforcement agency that must be designated for purposes of LEIN entry. In choosing an agency, a court might consider the need for immediate enforcement of the PPO and ready access to information by police officers in the area where the petitioner is living.

The LEIN policy council recommends that the PPO contain the following information:

• Respondent’s name.

• The specific month, day, and year of expiration. PPOs with specific date provisions are more readily enforced than are orders of “permanent” or “99 years” duration.

• Physical description of the respondent, e.g., height, weight, race, sex, hair color, eye color. Although information regarding race and sex is required, most jurisdictions will accept approximate physical descriptions for LEIN entry.

• Date of birth or age of respondent. In most jurisdictions, an approximate age or date of birth will suffice for LEIN entry.

• Other identifying information, e.g., scars, tattoos, physical deformities, nicknames.

• The respondent’s social security and driver’s license numbers, if known. This information is helpful, but not required for LEIN entry.

Although the LEIN policy council discourages local agencies from requiring additional information for LEIN entry, some agencies may nonetheless do so.
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**Note:** In cases where the petitioner cannot provide the respondent’s address, some courts request local law enforcement agencies to look up this information in the Law Enforcement Information Network (LEIN) system. Because disclosure of any LEIN information to any non-criminal justice agency is a misdemeanor (MCL 28.214(3)), courts following this practice should take care not to include the respondent’s address in the petitioner’s copy of the PPO. Address information obtained from the LEIN system should only be included on the copy given to a law enforcement agency for purposes of LEIN entry or service of the PPO. The document containing the respondent’s address should then be designated non-public information and treated as such for purposes of public access.

15.15 Service of the Petition and Order

The petitioner is responsible to arrange for service of the PPO (and the underlying petition, if the PPO was issued ex parte) on the respondent. Service may be made by any legally competent adult who is not a party to the action. MCR 2.103(A). The petitioner is also responsible for filing the proof of service with the clerk of the court issuing the PPO. MCL 600.2950(18), MCL 600.2950a(15), MCR 3.705(A)(4), and MCR 3.706(D).*

**Note:** A PPO is effective and enforceable upon a judge’s signature without written or oral notice to the respondent, so that failure to make service does not affect the PPO’s validity or effectiveness. MCR 3.705(A)(4) and MCR 3.706(D). Nonetheless, the petitioner should have the respondent served with the PPO if at all possible because service facilitates its enforcement both in Michigan and in other states.

Pursuant to MCR 3.705(A)(4) and 3.706(D), service of the PPO may be made as provided in MCR 2.105(A):

- By delivery to the respondent personally, or
- By registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the respondent acknowledges receipt of the mail. A copy of the return receipt signed by the respondent must be attached to the proof showing service.

If the respondent is under age 18, and the whereabouts of the respondent’s parent or parents, guardian, or custodian is known, service must also be similarly made on one of these individuals. MCR 3.706(D).*
On an appropriate showing, the court may allow service of the petition and order in another manner as provided in MCR 2.105(I). MCR 3.705(A)(4) and MCR 3.706(D). MCR 2.105(I) provides:

“(1) On a showing that service of process cannot reasonably be made as provided . . . the court may by order permit service of process to be made in any other manner reasonably calculated to give the [respondent] actual notice of the proceedings and an opportunity to be heard.

“(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the [respondent’s] address or last known address, or that no address of the [respondent] is known. If the name or present address of the [respondent] is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.

“(3) Service of process may not be made under this subrule before entry of the court’s order permitting it.”

If the respondent has not been served, a law enforcement officer* or clerk of the court may make service as follows:

“If the individual restrained or enjoined has not been served, a law enforcement officer or clerk of the court who knows that a personal protection order exists may, at any time, serve the individual restrained or enjoined with a true copy of the order or advise the individual restrained or enjoined about the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order . . . .” MCL 600.2950(18) and MCL 600.2950a(15).

If the respondent has not been served and a law enforcement officer is called to the scene of an alleged violation of the PPO, MCL 600.2950(22) and MCL 600.2950a(19) provide that the officer may give the respondent oral notice of the PPO. If oral notice is made in this manner, the law enforcement officer must file proof of the notification with the court. MCR 3.706(E). To ensure LEIN entry, the court clerk must then notify the designated law enforcement agency upon receipt of the proof of service. MCL 600.2950(19)(a) and MCL 600.2950a(16)(a).

*State Police officers may serve a PPO. MCL 28.6(5).
15.16 Dismissal of a PPO Action

Dismissals of PPO actions are governed by MCR 3.704 and MCR 3.705(A)(5) and (B). These rules apply to:

- voluntary and involuntary dismissals of PPO actions,
- domestic relationship and non-domestic stalking petitions, regardless of the age of the petitioner, and
- actions with adult respondents and respondents under age 18.

A. Involuntary Dismissal

An involuntary dismissal of a PPO action can only be initiated by the court under the following circumstances:

- The court has determined after interviewing the petitioner that the petitioner’s claims are sufficiently without merit that the action should be dismissed without a hearing. MCR 3.705(A)(5) and (B)(1).
- The petitioner has failed to attend a hearing scheduled on the petition. In this situation, the court may either adjourn and reschedule the hearing or dismiss the petition. MCR 3.705(B)(4).

The respondent is not permitted to move for dismissal of a PPO action prior to issuance of the order. MCR 3.704.

PPO actions are not subject to dismissal for no progress or failure to serve a respondent under MCR 2.502 or MCR 2.102(E).* Moreover, the court rules governing PPO actions make no provision for court clerks to sign dismissals of PPO petitions prior to issuance of the order.

The inapplicability of the no progress court rules should not prevent the court from administratively closing PPO cases for statistical purposes. When the court administratively closes a case, any PPO issued will remain in effect until its expiration date, and if modification is necessary, the case may be reopened on the merits. See the following:

- The case may be closed 21 days after a PPO petition is denied, if no hearing is requested. MCR 3.705(A)(5).
- If a PPO petition is granted, the case may be closed 14 days after the date of service. See MCL 600.2950(13) and MCL 600.2950a(10), which give the respondent 14 days from the date of service or actual notice to file a motion to terminate or modify the PPO.

*Note that failure to serve the PPO does not affect its validity or effectiveness. MCR 3.705(A)(4) and MCR 3.706(D).
B. Voluntary Dismissal

MCR 3.704 permits the petitioner to move for dismissal of a PPO action prior to the issuance of an order. There is no fee for filing this motion. Id. Because most PPO petitions request ex parte relief, and because courts must take action on such petitions within 24 hours after filing (MCR 3.705(A)(1)), cases involving voluntary dismissal of the petition will be relatively rare. If the petition is set for hearing, however, a petitioner may move the court to dismiss the petition before the hearing takes place. MCR 3.704 makes no provision for the respondent to move for dismissal of a PPO action prior to issuance of the order.

Because MCR 3.704 provides that a PPO action “may only be dismissed upon motion by the petitioner,” the court should not permit:

- dismissal without a court order upon filing of a notice of dismissal as described in MCR 2.504(A)(1)(a), or
- stipulated dismissals without a court order as described in MCR 2.504(A)(1)(b).

15.17 Motion to Modify, Terminate, or Extend a PPO

Modification or termination of a PPO is governed by the PPO statutes and by MCR 3.707. These authorities apply to:

- Domestic relationship and non-domestic stalking petitions, regardless of the age of the petitioner, and
- Actions with adult parties and parties under age 18. However, petitioners who are minors or legally incapacitated individuals must proceed through a next friend. MCR 3.707(C). MCR 3.703(F) governs proceedings through a next friend, and is discussed in Section 15.11(A), above.

A. Time and Place to File Motion

The following timelines apply to motions to modify, terminate, or extend a PPO. There are no motion fees for filing any of these motions. MCR 3.707(D) and MCL 600.2529(1)(e).

Petitioner’s motion to modify or terminate. Under MCR 3.707(A)(1)(a), a petitioner may file a motion to modify or terminate a PPO and request a hearing at any time after the PPO is issued. Although an earlier version of MCR 3.707 required that a motion to modify or terminate a PPO had to be filed with the issuing court, the current version of MCR 3.707(A)(1)(a) does not specify where the motion must be filed.
**Petitioner’s motion to extend the PPO.** The petitioner may file an ex parte motion to extend the effectiveness of a PPO, without a hearing, by requesting a new expiration date. This motion must be filed with the court that issued the PPO no later than three days prior to the order’s expiration date. Failure to timely file this motion does not preclude the petitioner from commencing a new PPO action regarding the same respondent. MCR 3.707(B)(1).

The court must act on the petitioner’s motion to extend the PPO within three days after it is filed. *Id.*

**Respondent’s motion to modify or terminate the PPO.** Under MCR 3.707(A)(1)(b), the respondent may file a motion to modify or terminate a PPO and request a hearing within 14 days after receipt of service or actual notice of the PPO. This 14-day period may be extended upon good cause shown.* Unlike an earlier version of MCR 3.707 that required a motion to modify or terminate a PPO to be filed with the issuing court, the current version of MCR 3.707(A)(1)(a) does not specify where the respondent’s motion must be filed.

**Note:** As a practical matter, the court may have difficulty determining when the PPO was served, which in turn causes difficulty in determining whether the respondent’s motion for modification or termination was timely filed. Given the practical difficulties of determining when service occurs, and the “good cause” exception to the statutory 14-day limit, court clerks should be instructed to accept respondents’ motions for filing even if they are submitted more than 14 days after service. This practice will allow a judicial determination of whether “good cause” exists to extend the 14-day filing period.

**B. Time to Hold Hearings**

Under MCR 3.707(A)(2), the court must schedule and hold a hearing on a motion to terminate or modify a PPO within 14 days of the filing of the motion. See also MCL 600.2950(14) and MCL 600.2950a(11).

**C. Service of Motion Papers**

**Motion to modify or terminate a PPO.** MCR 3.707(A)(1)(c) requires the moving party to serve the motion and notice of hearing at least seven days before the hearing date.

MCR 3.707(A)(1)(c) further requires that service of the motion and notice of hearing be effected by registered or certified mail, return receipt requested, and delivery restricted to the addressee, pursuant to MCR 2.105(A)(2). On an appropriate showing, the court may allow service in another manner under MCR 2.105(I), which provides:
“(1) On a showing that service of process cannot reasonably be made as provided . . . the court may by order permit service of process to be made in any other manner reasonably calculated to give the [respondent] actual notice of the proceedings and an opportunity to be heard.

“(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the [respondent’s] address or last known address, or that no address of the [respondent] is known. If the name or present address of the [respondent] is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.

“(3) Service of process may not be made under this subrule before entry of the court’s order permitting it.”

In cases involving a respondent under age 18, a good practice might be to make service on both the respondent and the respondent’s parent or parents, guardian, or custodian, if practicable. See MCR 3.705(B)(2) (service of notice of hearing on issuance of PPO on respondent’s parent, guardian, or custodian) and MCR 3.706(D) (service of PPO on respondent’s parent, guardian, or custodian).

If the court grants modification or termination, the modified or terminated order must be served under MCR 2.107, which permits service by delivery to a party or an attorney for a party, or by first class mail. MCR 3.707(A)(3).

Notice of extension of a PPO. If the expiration date on a PPO is extended, an amended order must be entered. The order must be served on the respondent as provided in MCR 2.107, which permits service by delivery to a party or an attorney for a party, or by first class mail. MCR 3.707(B)(2).

D. Burden of Proof

In Pickering v Pickering, ___ Mich App ___, (2002), the Court of Appeals held that the burden of justifying the continuation of an ex parte PPO is on the petitioner. The court indicated that because the PPO statute and court rules governing motions to rescind or terminate PPOs are silent as to the burden of proof, MCR 3.310(B)(5) is controlling.

MCR 3.310(B)(5) provides, in part:

“. . . At a hearing on a motion to dissolve a restraining order granted without notice, the burden of justifying
continuation of the order is on the applicant for the restraining order whether or not the hearing has been consolidated with a hearing on a motion for a preliminary injunction or an order to show cause."

In Pickering, the Court of Appeals indicated that the burden of proof has two aspects: the “burden of persuasion” and the “burden of going forward with evidence.” Id at ___. In the context of a PPO granted ex parte, the “burden of persuasion” is the burden of justifying the continuation of the PPO. The “burden of persuasion” requires the petitioner to demonstrate that the PPO should continue because it is “just, right or reasonable.” Id. at ___. Regarding the “burden of going forward with the evidence,” the Court held that although it would “not offend MCR 3.310(B)(5) by placing the burden of first coming forward with evidence on defendant, we believe it would be more appropriate in these hearings to have the petitioner—who has the burden of justification throughout the proceedings—to also be the party to first come forward with evidence.” Id. at ___ n 1.

E. LEIN Entry

If the court modifies or terminates a PPO, or if the expiration date on a PPO is extended, the clerk must immediately notify the designated law enforcement agency of the court’s order for entry into the LEIN system. MCR 3.707(A)(3), MCR 3.707(B)(2), MCL 600.2950(19)(b), and MCL 600.2950a(16)(b).

15.18 Initiation of Proceedings to Enforce a Minor PPO

Requests for court action to enforce a PPO against a respondent under age 18 may be in writing by way of a supplemental petition containing a specific description of the facts constituting the alleged violation. MCR 3.983(A). The supplemental petition may be submitted only by the original petitioner, a law enforcement officer, a prosecuting attorney, a probation officer, or a caseworker. Id. The court rules set forth two scenarios for filing the supplemental petition:

- The person who originally petitioned for the PPO files a supplemental petition. In this case, the court may either issue a summons for the respondent to appear at a hearing on the petition or issue an order authorizing a peace officer to apprehend the respondent. MCR 3.983(A).

- The respondent is apprehended without a court order as authorized by MCL 712A.14(1). In this case, the apprehending officer must ensure that a supplemental petition is filed. MCR 3.984(B)(4).
A. Original Petitioner Initiates Proceeding by Filing a Supplemental Petition

If the original petitioner files the supplemental petition in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled “In the Matter of Contempt of [Respondent], a minor.” The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).

Upon receipt of the supplemental petition, MCR 3.983(B)(1)–(2) require the court to either:

- set a date for a preliminary hearing on the petition, to be held as soon as practicable, and issue a summons to appear, or
- issue an order authorizing a peace officer or other person designated by the court to apprehend the respondent.

Apprehension of the respondent. MCL 712A.2c authorizes a court to issue an order for apprehension of a minor who allegedly violates a PPO, as follows:

“The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is . . . alleged to have violated a personal protection order issued under [MCL 712A.2(h)], or is alleged to have violated a valid foreign protection order. The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes with the lawful attempt to execute an order issued under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both.”

If the court issues an order to apprehend the respondent, MCR 3.983(D)(a)–(b) provide that the order may include authorization to:

- “[E]nter specified premises as required to bring the minor before the court;” and
- “[D]etain the minor pending preliminary hearing if it appears there is a substantial likelihood of retaliation or continued violation.”

An officer who apprehends a minor respondent under a court order must immediately do the following:
• If the whereabouts of the respondent’s parent or parents, guardian, or custodian is known, inform them of the respondent’s apprehension and of his or her whereabouts, and of the need for them to be present at the preliminary hearing. MCR 3.984(B)(1).

• Take the respondent before the court for a preliminary hearing, or to a place designated by the court pending the scheduling of a preliminary hearing. MCR 3.984(B)(2).

• Prepare a custody statement for submission to the court. The statement must include a) the grounds for and the time and location of detention, and b) the names of persons notified and the times of notification, or the reason for failure to notify. MCR 3.984(B)(3).

While awaiting arrival of the parent or parents, guardian, or custodian, appearance before the court, or otherwise, a minor respondent under 17 years of age must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact with an adult prisoner. MCR 3.984(C).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent’s return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

MCR 3.984(E) does not specify which agency within the “apprehending jurisdiction” is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the court. MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent’s return from the jurisdiction where he or she was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6), the issuing jurisdiction bears this expense.

Service of supplemental petition and summons on respondent. MCR 3.920(B)(2)(c) states that “[i]n a personal protection order enforcement proceeding involving a minor respondent, a summons must be served on the minor. A summons must also be served on the parent or parents, guardian, or legal custodian, unless their whereabouts remain unknown after diligent inquiry.” If the court sets a date for a preliminary hearing after receipt of the supplemental petition filed by the original petitioner, the petitioner is responsible for service upon the respondent, and, if the relevant addresses are known or easily ascertainable upon diligent inquiry, on the respondent’s parent or parents, guardian, or custodian. Service must be made at least seven days before the preliminary hearing, in the manner provided in MCR 3.920.* MCR 3.983(C).
B. Proceedings Initiated by Apprehension of Respondent Without a Court Order

MCL 712A.14(1) authorizes apprehension of a minor respondent for an alleged violation of a PPO as follows:

“Any local police officer, sheriff or deputy sheriff, state police officer, county agent or probation officer of any court of record may, without the order of the court, immediately take into custody any child who is found violating any law or ordinance, or whose surroundings are such as to endanger his or her health, morals, or welfare, or for whom there is reasonable cause to believe is violating or has violated a personal protection order issued pursuant to [MCL 712A.2(h)] by the court under [MCL 600.2950 and MCL 600.2950a], or for whom there is reasonable cause to believe is violating or has violated a valid foreign protection order.”

MCL 712A.14(1) makes no mention of the PPO statutes’ provisions for oral notice at the scene of an alleged PPO violation in situations where a minor respondent has not been served with the PPO or received notice of it. The oral notice provisions in the PPO statutes refer to MCL 712A.14 as if it were a separate proceeding: MCL 600.2950(22) and MCL 600.2950a(19) state that “[t]his subsection does not preclude . . . a proceeding under [MCL 712A.14].” In the absence of alternative specific oral notice procedures for minor respondents, it is consistent with due process to apply the notice provisions of MCL 600.2950(22) and MCL 600.2950a(19) in cases involving minor respondents. A PPO is immediately enforceable anywhere in Michigan by any law enforcement agency that has verified the existence of the order. MCL 600.2950(21) and MCL 600.2950a(18). This immediate enforceability applies to PPOs issued against a minor respondent, regardless of whether the respondent or his or her parent, guardian, or custodian has received notice of the PPO. MCL 600.2950(18) and MCL 600.2950a(15). Thus, the oral notice provisions in the PPO statutes are necessary in all cases to give effect to the immediate enforceability of a PPO consistent with due process. On due process concerns with PPOs, see Kampf v Kampf, 237 Mich App 377, 383–85 (1999). See also MCR 3.982(A), which states that “[a] minor personal protection order is enforceable under MCL 600.2950(22), (25), and MCL 600.2950a(19), (22), MCL 764.15b, and MCL 600.1701 et seq.”

Once a minor respondent has been apprehended without a court order, the apprehending officer may warn and release the minor. MCR 3.984(A). If the minor is taken into custody, MCL 712A.14(1) provides for the following procedures:

- The apprehending officer shall immediately attempt to notify the parent or parents, guardian, or custodian.
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- While awaiting the arrival of the parent or parents, guardian, or custodian, a child under the age of 17 years shall not be held in any detention facility unless the child is completely isolated so as to prevent any verbal, visual, or physical contact with any adult prisoner.

- Unless the child requires immediate detention as provided for in the Juvenile Code, the officer shall accept the written promise of the parent or parents, guardian, or custodian to bring the child to the court at a time fixed therein. The child shall then be released to the custody of the parent or parents, guardian, or custodian. In the context of PPO enforcement proceedings, detention is authorized under the Juvenile Code when the respondent has “allegedly violated a personal protection order and . . . it appears there is a substantial likelihood of retaliation or continued violation.” MCL 712A.15(2)(f).

Further procedures appear in MCR 3.984(B)–(C), which state in part:

“(B) Custody; Detention. When an officer apprehends a minor in relation to a minor personal protection order pursuant to a court order that specifies that the minor is to be brought directly to court; or when an officer apprehends a minor for an alleged violation of a minor personal protection order without a court order, and either the officer has failed to obtain a written promise from the minor’s parent, guardian, or custodian to bring the minor to court, or it appears to the officer that there is a substantial likelihood of retaliation or violation by the minor, the officer shall immediately do the following:

“(1) If the whereabouts of the minor’s parent or parents, guardian, or custodian is known, inform the minor’s parent or parents, guardian, or custodian of the minor’s apprehension and of the minor’s whereabouts and of the need for the parent or parents, guardian, or custodian to be present at the preliminary hearing;

“(2) Take the minor

(a) before the court for a preliminary hearing, or

(b) to a place designated by the court pending the scheduling of a preliminary hearing;

“(3) Prepare a custody statement for submission to the court including:

(a) the grounds for and the time and location of detention, and
(b) the names of persons notified and the times of notification, or the reason for failure to notify.

“(4) Ensure that a supplemental petition is prepared and filed with the court.

“(C) While awaiting arrival of the parent, guardian, or custodian, appearance before the court, or otherwise, a minor under 17 years of age must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact with an adult prisoner.”

The court must designate a judge, referee or other person who may be contacted by the officer taking a minor under age 17 into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the minor pending preliminary hearing. MCR 3.984(D).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent’s return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

MCR 3.984(E) does not specify which agency within the “apprehending jurisdiction” is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the circuit court. MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent’s return from the jurisdiction where he or she was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6), the issuing jurisdiction bears this expense.

If the supplemental petition is filed in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled “In the Matter of Contempt of [Respondent], a minor.” The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).

15.19 Preliminary Hearings

A. Preliminary Hearing May Be Held in Jurisdiction Where Order Was Issued or Where Respondent Was Apprehended

A preliminary hearing (as well as a violation hearing) on an alleged PPO violation may take place in either the issuing jurisdiction or the jurisdiction where a minor respondent was apprehended. MCL 764.15b(6) provides:
“The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued pursuant to [MCL 712A.2(h)], by the family division of circuit court in any county of this state. The family division of circuit court that conducts the preliminary inquiry shall notify the family division of circuit court that issued the personal protection order that the issuing court may request that the respondent be returned to that county for violating the personal protection order. If the family division of circuit court that issued the personal protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county.”

A similar optional notice provision applies at the time the minor is apprehended. See MCR 3.984(E).

B. Time Requirements

If the minor respondent was not taken into court custody or jailed for an alleged PPO violation, “the preliminary hearing must commence as soon as practicable after the apprehension or arrest, or submission of a supplemental petition.” MCR 3.985(A)(1).

If the minor respondent was apprehended with or without a court order for an alleged PPO violation and was taken into court custody or jailed, “the preliminary hearing must commence no later than 24 hours after the minor was apprehended or arrested, excluding Sundays and holidays, as defined in MCR 8.110(D)(2), or the minor must be released.” MCR 3.985(A)(1).

The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or the minor’s parent, guardian, or custodian or for other good cause shown. MCR 3.985(A)(2).

C. Required Procedures

Presence of parent. The court shall determine whether the parent, guardian, or custodian has been notified and is present. The preliminary hearing may be conducted without a parent, guardian, or custodian if a guardian ad litem or attorney appears with the minor. MCR 3.985(B)(1).

Reading the allegations and advising the respondent of his or her rights. Unless waived by the respondent, the court shall read the allegations in the
supplemental petition and ensure that the respondent has received written notice of the alleged violation. MCR 3.985(B)(2). Immediately after reading the allegations, the court shall advise the respondent on the record in plain language of the following rights listed in MCR 3.985(B)(3):

- The respondent may contest the allegations at a violation hearing.
- The respondent has the right to an attorney at every stage in the proceedings. If the court determines that it might sentence the respondent to jail or place the respondent in secure detention, the court will appoint a lawyer at public expense if the respondent wants one and is financially unable to retain one.
- The respondent has the right to a non-jury trial.
- A referee may be assigned to hear the case unless demand for a judge is filed in accordance with MCR 3.912.*
- The respondent may have witnesses against him or her appear at a violation hearing. The respondent may question the witnesses.
- The respondent may have the court order that any witnesses for his or her defense must appear at the hearing.
- The respondent has the right to remain silent, and to not have his or her silence used against him or her.
- Any statement the respondent makes may be used against him or her.

**Authorization of the supplemental petition.** At the preliminary hearing, the court must decide whether to authorize the filing of the supplemental petition and proceed formally, or to dismiss the supplemental petition. MCR 3.985(B)(4).

*Note:* MCR 3.985(B)(4) does not mention proceedings on the consent calendar or under the Juvenile Diversion Act.* Compare MCR 3.935(B)(3), which provides for these options in delinquency proceedings.

If the court authorizes filing of the supplemental petition, MCR 3.985(B)(6) requires the following:

- The court must set a date and time for the violation hearing, or, following a plea, either enter a dispositional order, or set the matter for dispositional hearing; and
- The court must either release the respondent subject to conditions or order detention of the respondent pending the violation hearing.
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At the preliminary hearing, the court must state the reasons for its decision to release the minor, or to detain the minor, on the record or in a written memorandum. MCR 3.985(G).

**Opportunity to deny or otherwise plead to the allegations.** The court must allow the respondent the opportunity to deny or otherwise plead to the allegations of the supplemental petition. If the respondent wants to enter a plea of admission or nolo contendere, the court shall follow MCR 3.986.* MCR 3.985(B)(5).

If the respondent denies the allegations in the supplemental petition, the court must make the following notices after the preliminary hearing, as required by MCR 3.985(C):

- Notify the prosecuting attorney of the scheduled violation hearing.
- Notify the respondent, his or her attorney, if any, and his or her parent(s), guardian, or custodian of the scheduled violation hearing, and direct the parties to appear at the hearing and give evidence on the contempt charges.
- Cause notice of the hearing to be given by personal service or ordinary mail at least seven days before the violation hearing, unless the respondent is detained, in which case notice of hearing must be served at least 24 hours before the hearing.

**D. Release of Respondent With Conditions Pending Violation Hearing**

MCR 3.985(E) governs the conditional release of a respondent to a parent, guardian, or custodian pending the resumption of the preliminary hearing or pending the violation hearing. In setting release conditions, the court must consider available information on the following factors set forth in this court rule:

- Family ties and relationships.
- The respondent’s prior juvenile delinquency or minor PPO record, if any.
- the respondent’s record of appearance or nonappearance at court proceedings.
- The violent nature of the alleged violation.
- The respondent’s prior history of committing acts that resulted in bodily injury to others.
- The respondent’s character and mental condition.
- The court’s ability to supervise the respondent if placed with a parent or relative.
- The likelihood of retaliation or violation of the PPO by the respondent.
- Any other factors indicating the respondent’s ties to the community, the risk of nonappearance, and the danger to the respondent or the original petitioner if the respondent is released.

Bail procedure is the same as in juvenile delinquency proceedings.*

**E. Detention Pending Violation Hearing**

MCL 712A.15(2) provides as follows:

“Custody, pending hearing, is limited to the following children:

“(a) Those whose home conditions make immediate removal necessary.

“(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.

“(c) Those who have run away from home.

“(d) Those who have failed to remain in a detention or nonsecure facility or placement in violation of a court order.

“(e) Those whose offenses are so serious that release would endanger public safety.

“(f) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation.”

MCR 3.985(F)(1) prohibits removal of a minor from his or her parent, guardian, or custodian pending a PPO violation hearing or further court order unless the following circumstances exist:

“(a) probable cause exists to believe the minor violated the minor personal protection order; and

“(b) at the preliminary hearing the court finds one or more of the following circumstances to be present:

“(i) there is a substantial likelihood of retaliation or continued violation by the minor who
allegedly violated the minor personal protection order;

“(ii) there is a substantial likelihood that if the minor is released to the parent, with or without conditions, the minor will fail to appear at the next court proceeding; or

“(iii) detention pending violation hearing is otherwise specifically authorized by law.”

A minor in custody may waive the probable cause phase of a detention determination only if the minor is represented by an attorney. MCR 3.985(F)(2).

At the preliminary hearing, the respondent may contest the sufficiency of evidence to support detention by cross-examination of witnesses, presentation of defense witnesses, or other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses. A finding of probable cause may be based on hearsay evidence that possesses adequate guarantees of trustworthiness. MCR 3.985(F)(3).

A respondent who is detained must be placed in the least restrictive environment that will meet the needs of the respondent and the public, and that will conform to the requirements of MCL 712A.15 and MCL 712A.16. MCR 3.985(F)(4).

Regarding the environment for detention in cases involving alleged PPO violations, MCL 712A.15 provides as follows, in pertinent part:

“(3) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter [governing status offenses] shall not be detained in any secure facility designed to physically restrict the movements and activities of alleged or adjudicated juvenile offenders unless the court finds that the child willfully violated a court order and the court finds, after a hearing and on the record, that there is not a less restrictive alternative more appropriate to the needs of the child. This subsection does not apply to a child who is under the jurisdiction of the court pursuant to section 2(a)(1) of this chapter [governing delinquency cases] or a child who is not less than 17 years of age and who is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter [governing minor PPOs].*

“(5) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter [governing status offenses] .
. . shall not be detained in a cell or other secure area of any secure facility designed to incarcerate adults unless either of the following applies:

(a) A child is under the jurisdiction of the court pursuant to section 2(a)(1) of this chapter [governing delinquency cases] for an offense which, if committed by an adult, would be a felony.

(b) A child is not less than 17 years of age and is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter [governing minor PPOs]."

MCL 712A.15(5)(b) is consistent with provisions of the PPO statutes that impose adult penalties on persons age 17 and over who violate a PPO. See MCL 600.2950(23) and MCL 600.2950a(20). It is also consistent with provisions governing detention conditions for persons age 17 and over who have been apprehended without a court order for an alleged PPO violation.

MCL 712A.16 provides as follows:

“(1) If a juvenile under the age of 17 years is taken into custody or detained, the juvenile shall not be confined in any police station, prison, jail, lock-up, or reformatory or transported with, or compelled or permitted to associate or mingle with, criminal or dissolute persons. However, except as otherwise provided in section 15(3), (4), and (5) of this chapter, the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process.”*

MCL 712A.16(2) provides in pertinent part that the court or court-approved agency may arrange for the boarding of juveniles in any of the following:

- A child caring institution or child placing agency licensed by the department of consumer and industry services to receive for care juveniles within the court’s jurisdiction.

- If in a room or ward separate and apart from adult criminals, the county jail for juveniles over 17 years of age within the court’s jurisdiction.

*See also MCL 764.27a(2) (juveniles confined in a jail or other adult place of detention must be in a room or ward out of sight and sound of adults).
F. Respondent Fails to Appear at Preliminary Hearing

If the respondent was notified of the preliminary hearing and fails to appear for it, the court may issue an order to apprehend the respondent. MCR 3.985(D). This order is to be issued in accordance with MCR 3.983(D), which is discussed at Section 15.18(A), above. MCR 3.985(D) further provides that:

- If the respondent is under age 17, the court may order him or her to be detained pending a hearing on the apprehension order. If the court releases the respondent, it may set bond for the respondent’s appearance at the violation hearing.

- If the respondent is 17 years old, the court may order him or her to be confined to jail pending a hearing on the apprehension order. If the court releases the respondent, it must set bond for the respondent’s appearance at the violation hearing.

15.20 Pleas of Admission or No Contest

A minor may offer a plea of admission or no contest to the violation of a minor PPO with the court’s consent. The court shall not accept a plea to a violation unless it is satisfied that the plea is accurate, voluntary, and understanding. MCR 3.986(A).*

The court may accept a plea of admission or no contest conditioned on preservation of an issue for appellate review. MCR 3.986(B).

The court shall inquire of the parent, guardian, custodian, or guardian ad litem whether he or she knows any reason why the court should not accept the plea tendered by the minor respondent. Agreement or objection by the parent, guardian, custodian, or guardian ad litem to a minor’s plea of admission or no contest must be placed on the record if he or she is present. MCR 3.986(C).

The court may take a plea of admission or no contest under advisement. Before the court accepts the plea, the minor may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the minor to withdraw a plea. MCR 3.986(D).

15.21 Required Procedures at Violation Hearings

A. Time Requirements

MCR 3.987(A) provides that upon completion of the preliminary hearing, the court shall set a date and time for the violation hearing if the respondent
denies the allegations in the supplemental petition. This rule further provides the following limits for holding the violation hearing:

- If the respondent is detained, the hearing must be held within 72 hours of apprehension, excluding Sundays and holidays.
- If the respondent is not detained, the hearing must be held within 21 days.

**B. Role of Prosecuting Attorney at Violation Hearing**

MCR 3.914(E) states that “[t]he prosecuting attorney shall prosecute criminal contempt proceedings as provided in MCR 3.987(B).”

MCR 3.987(B) states that “[i]f a criminal contempt proceeding is commenced under MCL 764.15b, the prosecuting attorney shall prosecute the proceeding unless the petitioner retains an attorney to prosecute the criminal contempt proceeding. If the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation, the prosecuting attorney need not prosecute the proceeding."

**C. Preliminary Matters**

There is no right to a jury trial at PPO violation hearings with a minor respondent. MCR 3.987(D).

The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. MCR 3.987(E).

At the violation hearing, the court shall do all of the following:

- Determine whether all parties have been notified and are present. The respondent has the right to be present at the violation hearing along with a parent, guardian, or custodian, and with a guardian ad litem and attorney. The court may proceed in the absence of a parent properly noticed to appear, provided the respondent is represented by an attorney. The original petitioner also has the right to be present at the violation hearing. MCR 3.987(C)(1).
- Read the allegations in the supplemental petition, unless waived. MCR 3.987(C)(2).
- Inform the respondent of the right to the assistance of an attorney, unless legal counsel appears with the respondent. MCR 3.987(C)(3).
• Inform the respondent that if the court determines it might sentence the respondent to jail or place him or her in secure detention, the court will appoint a lawyer at public expense if the respondent wants one and is financially unable to retain one. If the respondent requests to proceed without the assistance of counsel, the court must advise him or her of the dangers and disadvantages of self-representation, and make sure the respondent is literate and competent to conduct the defense. *Id.*

D. Rules of Evidence and Burden of Proof

The rules of evidence apply to both criminal and civil contempt proceedings. MCR 3.987(F).

The petitioner or prosecuting attorney has the burden of proving the respondent’s guilt of criminal contempt beyond a reasonable doubt, and the respondent’s guilt of civil contempt by a preponderance of the evidence. *Id.*

E. Findings of Fact and Conclusions of Law

At the conclusion of the hearing, the court must make specific findings of fact, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record. MCR 3.987(G).

15.22 Dispositional Hearings

A. Time Requirements

MCR 3.988(A) provides the following time intervals between the entry of a judgment finding a violation of a minor PPO and any disposition:

- If the minor is not detained, the time interval may not be more than 35 days.
- If the minor is detained, the time interval may not exceed 14 days, except for good cause.
B. Required Procedures

The petitioner has the right to be present at the dispositional hearing. MCR 3.988(B)(2). The respondent may be excused from part of the dispositional hearing for good cause, but must be present when the disposition is announced. MCR 3.988(B)(1).*

At the dispositional hearing, the court may receive all relevant and material evidence, including oral and written reports. The court may rely on such evidence to the extent of its probative value, even though it may not be admissible at the violation hearing. MCR 3.988(C)(1).

The respondent or his or her attorney and the petitioner shall be afforded an opportunity to examine and controvert written reports received by the court. In the court’s discretion, they may also be allowed to cross-examine individuals making reports when such individuals are reasonably available. MCR 3.988(C)(2).

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 material prepared pursuant to a court-ordered examination, interview, or course of treatment. MCR 3.988(C)(3).

C. Possible Sentences or Juvenile Dispositions

**Respondent 17 years of age or older.** MCL 600.2950(23) and MCL 600.2950a(20) provide for criminal contempt sanctions as follows:

> “An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order issued under this section is subject to the criminal contempt powers of the court and, if found guilty of criminal contempt, shall be imprisoned for not more than 93 days and may be fined not more than $500.00.”

[Emphasis added.]

MCR 3.988(D)(1) states that the court “may” impose a 93-day prison sentence. Since the penalty for a PPO violation is not a matter of “practice and procedure,” the statutory provision should control. See MCR 1.103.

Respondents imprisoned under the foregoing provisions may be committed to a county jail within the adult prisoner population. MCR 712A.18(1)(e).

MCR 3.988(D)(2)(a) provides for civil contempt sanctions as follows:

> “(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall
“(a) impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721, if the respondent is at least 17 years of age.”

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

**Respondent under age 17.** MCL 600.2950(23) and MCL 600.2950a(20) provide for sanctions against respondents under age 17 who violate a PPO as follows:

> “An individual who is less than 17 years of age who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in [MCL 712A.18].”

MCR 3.988(D) makes no provision for criminal contempt sanctions against a minor respondent under age 17. Consistent with the PPO statutes, however, MCR 3.988(D)(2)(b) subjects such respondents to the dispositional alternatives under the Juvenile Code, as follows:

> “(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall

> “(b) subject the respondent to the dispositional alternatives listed in MCL 712A.18, if the respondent is under 17 years of age.”

Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26, which provides that “[t]he court shall have the power to punish for contempt of court under [MCL 600.1701 to 600.1745], any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter.”

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

**Dispositional alternatives under the Juvenile Code.** MCL 600.2950(23), MCL 600.2950a(20), and MCR 3.988(D)(2)(b) provide that a respondent under 17 years of age who violates a PPO is subject to the dispositional alternatives listed in MCL 712A.18.* MCL 712A.18(1)(c) (placement of a juvenile in “a suitable foster care home subject to the court’s supervision”) and MCL 712A.18(1)(e) (commitment of a juvenile to a “public institution, county facility, institution operated as an agency of the court or county, or agency authorized by law to receive juveniles of similar age, sex, and characteristics”) specifically mention PPO violations. Three of the dispositional alternatives listed in MCL 712A.18(1)(f)-(n) do not apply to PPO violators. These are boot camp, parental participation in treatment, and imposition of a sentence that could have been imposed on an adult for the same offense.

*See Section 10.9 for detailed discussion of these alternatives. For discussion of the costs of disposition and orders for reimbursement, see Chapter 11.
Orders for restitution. Under the general contempt provisions of the Revised Judicature Act, the court must order an individual convicted of contempt to pay compensation for the injury caused by his or her behavior. See MCL 600.1721. Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26.

Restitution provisions are also found in MCL 712A.18(7) and 712A.30 for “juvenile offense[s],” which are defined as “violation[s] by a juvenile of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine.” MCL 712A.30(1). The applicability of these provisions in PPO enforcement proceedings is unclear.*

MCL 769.1f allows a court to order a person convicted of an enumerated offense to reimburse the state or a local unit of government for law enforcement, emergency medical response, fire department, prosecutorial, and other expenses incurred in relation to the incident.

Probation violations and supplemental dispositions. MCR 3.989 provides that when a minor placed on probation for violation of a minor PPO has allegedly violated a condition of probation, the court shall follow the procedures for supplemental disposition outlined in MCR 3.944.*

15.23 Procedures for Enforcing Foreign Protection Orders

Jurisdiction to enforce valid foreign protection orders. The Family Division has jurisdiction to conduct proceedings to enforce a valid foreign protection order (FPO) against a respondent who is less than 18 years old. MCL 712A.2(h) and MCL 764.15b(6). “Foreign protection order” is defined in MCL 600.2950h. MCL 712A.1(1)(d). An FPO is:

“[A]n injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person’s violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.” MCL 600.2950h(a).
To be valid, an FPO must satisfy the conditions set forth in MCL 600.2950i. MCL 712A.1(1)(g). All of the following conditions must be met for an FPO to be valid:

“(a) The issuing court had jurisdiction over the parties and subject matter under the laws of the issuing state, tribe, or territory.

“(b) Reasonable notice and opportunity to be heard is given to the respondent sufficient to protect the respondent’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided to the respondent within the time required by state or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights. MCL 600.2950i(1)(a)–(b).

A valid FPO must be accorded full faith and credit and is subject to the same enforcement procedures and penalties as a PPO issued in this state. MCL 600.2950j(1). The invalidity of an FPO may be raised as an affirmative defense in an enforcement proceeding, but a law enforcement officer does not have to determine an order’s validity at an arrest scene. See MCL 600.2950i.

**Enforcement of a FPO.** Law enforcement officers, prosecuting attorneys, and courts must enforce FPOs using the same procedures used to enforce a PPO issued in Michigan. MCL 600.2950l.

MCL 600.2950l sets forth the procedures to be used at the scene of an alleged violation of a FPO. That statute states in relevant part:

“(3) A law enforcement officer may rely upon a copy of any protection order that appears to be a foreign protection order and that is provided to the law enforcement officer from any source if the putative foreign protection order appears to contain all of the following:

(a) The names of the parties.

(b) The date the protection order was issued, which is prior to the date when enforcement is sought.

(c) The terms and conditions against respondent.

(d) The name of the issuing court.
(e) The signature of or on behalf of a judicial officer.

(f) No obvious indication that the order is invalid, such as an expiration date that is before the date enforcement is sought.

“(4) The fact that a putative foreign protection order that an officer has been shown cannot be verified on L.E.I.N. or the NCIC national protection order file is not grounds for a law enforcement officer to refuse to enforce the terms of the putative foreign protection order, unless it is apparent to the officer that the putative foreign protection order is invalid. A law enforcement officer may rely upon the statement of petitioner that the putative foreign protection order that has been shown to the officer remains in effect and may rely upon the statement of petitioner or respondent that respondent has received notice of that order.

“(5) If a person seeking enforcement of a foreign protection order does not have a copy of the foreign protection order, the law enforcement officer shall attempt to verify through L.E.I.N., or the NCIC protection order file, administrative messaging, contacting the court that issued the foreign protection order, contacting the law enforcement agency in the issuing jurisdiction, contacting the issuing jurisdiction's protection order registry, or any other method the law enforcement officer believes to be reliable, the existence of the foreign protection order and all of the following:

(a) The names of the parties.

(b) The date the foreign protection order was issued, which is prior to the date when enforcement is sought.

(c) Terms and conditions against respondent.

(d) The name of the issuing court.

(e) No obvious indication that the foreign protection order is invalid, such as an expiration date that is before the date enforcement is sought.

“(6) If subsection (5) applies, the law enforcement officer shall enforce the foreign protection order if the existence of the order and the information listed under subsection (5) are verified, subject to subsection (9).
“(7) If a person seeking enforcement of a foreign protection order does not have a copy of the foreign protection order, and the law enforcement officer cannot verify the order as described in subsection (5), the law enforcement officer shall maintain the peace and take appropriate action with regard to any violation of criminal law.

“(8) When enforcing a foreign protection order, the law enforcement officer shall maintain the peace and take appropriate action with regard to any violation of criminal law. The penalties provided for under sections 2950 and 2950a and chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32, may be imposed in addition to a penalty that may be imposed for any criminal offense arising from the same conduct.

“(9) If there is no evidence that the respondent has been served with or received notice of the foreign protection order, the law enforcement officer shall serve the respondent with a copy of the foreign protection order, or advise the respondent about the existence of the foreign protection order, the name of the issuing court, the specific conduct enjoined, the penalties for violating the order in this state, and, if the officer is aware of the penalties in the issuing jurisdiction, the penalties for violating the order in the issuing jurisdiction. The officer shall enforce the foreign protection order and shall provide the petitioner, or cause the petitioner to be provided, with proof of service or proof of oral notice. The officer also shall provide the issuing court, or cause the issuing court to be provided, with a proof of service or proof of oral notice, if the address of the issuing court is apparent on the face of the foreign protection order or otherwise is readily available to the officer. If the foreign protection order is entered into L.E.I.N. or the NCIC protection order file, the officer shall provide the L.E.I.N. or the NCIC protection order file entering agency, or cause the L.E.I.N. or NCIC protection order file entering agency to be provided, with a proof of service or proof of oral notice. If there is no evidence that the respondent has received notice of the foreign protection order, the respondent shall be given an opportunity to comply with the foreign protection order before the officer makes a custodial arrest for violation of the foreign protection order. The failure to comply immediately with the foreign protection order is grounds for an immediate custodial arrest. This subsection does not preclude an arrest under section 15 or 15a of chapter
IV of the code of criminal procedure, 1927 PA 175, MCL 764.15 and 764.15a, or a proceeding under section 14 of chapter XIIA of the code of criminal procedure, 1927 PA 175, MCL 712A.14.”

**Mutual FPOs.** A mutual FPO is not enforceable against the person who petitioned for the order unless the petitioner’s spouse or intimate partner” filed a separate written pleading and the issuing court made specific findings supporting relief for both parties. MCL 600.2950k(2)(a)–(b). See MCL 600.2950k(3)(a)–(e) for the applicable definition of “spouse or intimate partner.”

### 15.24 Table of Time and Notice Requirements in Minor PPO Proceedings

<table>
<thead>
<tr>
<th>Type of Proceeding</th>
<th>Time and Notice Requirements</th>
<th>Authorities and Cross-References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ruling on Request for Ex Parte PPO</td>
<td>Within 24 hours of the filing of the petition.</td>
<td>MCR 3.705(A)(1). See Section 15.11(F)</td>
</tr>
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</table>
### Section 15.24

<table>
<thead>
<tr>
<th>Type of Proceeding</th>
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</thead>
<tbody>
<tr>
<td>Hearing on the Issuance of a PPO</td>
<td>If the petition does not request an ex parte order, or if the court denies petitioner’s request for an ex parte order and petitioner requests a hearing, a hearing must be held as soon as possible. If the petitioner does not request a hearing within 21 days of entry of the court’s order denying the request for an ex parte PPO, the court’s order is final. The court does not have to schedule a hearing if it determines after interviewing the petitioner that the claims are sufficiently without merit that the action should be dismissed without a hearing. The petitioner must arrange for service of the petition and notice of hearing to be served on the respondent at least one day before the hearing. Service must be personal service or by registered or certified mail, delivery restricted to addressee. If the whereabouts of respondent’s parent, guardian, or custodian is known, service must also be made on one of these individuals in the same manner.</td>
<td>MCR 3.705(A)(5) and (B)(1). See Section 15.12</td>
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*See Section 15.12(B)*
<table>
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<th>Type of Proceeding</th>
<th>Time and Notice Requirements</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Service of the Petition and Order</td>
<td>Service must be personal service or by registered or certified mail, delivery restricted to addressee. If the whereabouts of respondent’s parent, guardian, or custodian is known, service must also be made on one of these individuals in the same manner.</td>
<td>MCR 3.705(A)(4) and MCR 3.706(D). See Section 15.15</td>
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<td>On a showing that service of process cannot reasonably be made as required above, the court may order service in any other manner reasonably calculated to give the respondent actual notice of the proceedings and opportunity to be heard. A request for an order permitting alternate service must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the respondent’s address or last known address, or that no address of the respondent is known. If the name or present address of the respondent is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it.</td>
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<td>If the respondent has not been served, a law enforcement officer or clerk of the court may serve respondent at any time with a true copy of the order or advise respondent of the existence and content of the order.</td>
<td>MCL 600.2950(18) and MCL 600.2950a(15). See Section 15.15</td>
</tr>
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</table>
## Section 15.24

### Motions to Modify, Terminate, or Extend a PPO

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<tr>
<th>Type of Proceeding</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Motions to Modify, Terminate, or Extend a PPO</td>
<td>The petitioner may file a motion to modify or terminate a PPO and request a hearing at any time after the order is entered. The respondent may file a motion to modify or terminate a PPO and request a hearing within 14 days after receipt of service or actual notice of the PPO. This 14-day period may be extended for good cause shown. The court must hold a hearing within 14 days of the filing of the motion. The moving party must serve the motion and notice of hearing at least seven days before the hearing date. Service must be by registered or certified mail, delivery restricted to addressee. On a showing that service of process cannot reasonably be made as required above, the court may order service in any other manner reasonably calculated to give the respondent actual notice of the proceedings and opportunity to be heard. A request for an order permitting alternate service must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the respondent’s address or last known address, or that no address of the respondent is known. If the name or present address of the respondent is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it.</td>
<td>MCR 3.707(A)(1)(a)–(b) and 3.707(A)(2). See Section 15.17(A) MCR 3.707(A)(1)(c) and MCR 2.105(A)(2). See Section 15.17(C) MCR 2.105(I). See Section 15.17(C)</td>
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<td>Time and Notice Requirements</td>
<td>Authorities and Cross-References</td>
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<tr>
<td>Motions to Modify, Terminate, or Extend a PPO, continued</td>
<td>If the whereabouts of respondent’s parent, guardian, or custodian is known, service should also be made on one of these individuals in the same manner. A modified or terminated PPO must be served by delivery to a party or the party’s attorney, or by first-class mail. The petitioner may file an ex parte motion to extend the expiration date of a PPO. The motion must be filed no later than three days prior to the order’s expiration date. The court must act on the petitioner’s motion within three days after it is filed. If the expiration date is extended, the modified order must be served by delivery to a party or the party’s attorney, or by first-class mail.</td>
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<td></td>
<td>See MCR 3.705(B)(2) and MCR 3.706(B). See Section 15.17(C)</td>
<td>MCR 3.707(A)(3) and MCR 2.107. See Section 15.17(C) \nMCR 3.707(B)(1). See Section 15.17(A) \nMCR 3.707(B)(2) and MCR 2.107. See Section 15.17(C)</td>
</tr>
<tr>
<td>Preliminary Hearing (When Minor Is in Custody)</td>
<td>If the minor is in custody, the hearing must commence within 24 hours, excluding Sundays and holidays, or the minor must be released. The hearing may be adjourned for up to 14 days to secure attendance of minor’s parent or witnesses, or for other good cause shown.</td>
<td>MCR 3.985(A)(1)–(2). See Section 15.19(B)</td>
</tr>
</tbody>
</table>
### Section 15.24

#### Preliminary Hearing (When Minor Is Not in Custody)

If the minor is not in custody, the hearing must commence as soon as practicable after submission of a supplemental petition, or after the minor’s apprehension or arrest. The hearing may be adjourned for up to 14 days to secure attendance of minor’s parent or witnesses, or for other good cause shown.

Personal service of the supplemental petition and summons must be made on the respondent and, if the relevant addresses are know or are easily ascertainable upon diligent inquiry, respondent’s parent, guardian, or custodian, at least seven days before the preliminary hearing. A summons must be served on the minor. A summons must also be served on the parent or parents, guardian, or legal custodian, unless their whereabouts remain unknown after a diligent search.

#### Demand for Trial by Judge (Rather Than Referee)

Written demand for trial by judge rather than referee shall be filed within 14 days after court gives notice of the right to trial by a judge or 14 days after an appearance by an attorney, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice.

**Authorities and Cross-References**

- MCR 3.985(A)(1)–(2). See Section 15.19(B)
- MCR 3.983(B) and MCR 3.920(2)(c). See Section 15.19(C)
- MCR 3.912(B). See Section 7.10
<table>
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<tr>
<th>Type of Proceeding</th>
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</table>
| Violation Hearing                 | If the respondent is detained, the hearing must be held within 72 hours of apprehension, excluding Sundays and holidays. If the respondent is not detained, the hearing must be held within 21 days.  
|                                   | If the respondent is detained, the court must cause notice of the hearing to be given by personal service or ordinary mail at least 24 hours before the hearing. If the respondent is not detained, the court must cause notice of the hearing to be given by personal service or ordinary mail at least seven days before the hearing. The prosecuting attorney, the respondent, respondent’s attorney, and respondent’s parent, guardian, or custodian must be notified of the hearing. | MCR 3.987(A).  
|                                   | See Section 15.21(A)                                                                          | MCR 3.985(C).  
|                                   | See Section 15.21(A)                                                                          |                                                                                                |
| Dispositions                      | If the minor is detained, the hearing must be held within 14 days, except for good cause. If the minor is not detained, the hearing must be held within 35 days.  
|                                   | At least 7 days’ notice in writing or on record must be given to juvenile, custodial parent or guardian, or legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner. | MCR 3.988(A).  
|                                   | See Section 15.22(A)                                                                          | MCR 3.920(C)(1) and 3.921(A)(1).  
|                                   |                                                                                                | See Sections 6.3 and 6.7                                                                      |
| Review of Referee’s Recommended Findings and Conclusions | Request for review must be filed within 7 days after the inquiry or hearing or 7 days after issuance of referees’ recommendations, whichever is later, and served on interested parties, and a response may be filed within 7 days after the filing of the request for review.  
|                                   | Absent good cause for delay, the judge must consider the request within 21 days after it is filed if juvenile is in placement or detention. | MCR 3.991(B)(3), 3.991(B)(4), and 3.991(C).  
|                                   |                                                                                                | See Sections 12.7 and 12.8                                                                    |
|                                   |                                                                                                | MCR 3.991(D).  
|                                   |                                                                                                | See Section 12.8                                                                           |
Chapter 16: “Traditional Waiver” Proceedings

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In this chapter...

This chapter discusses the requirements for “traditional waiver” proceedings. In “traditional waiver” proceedings, the prosecuting attorney files a motion asking the Family Division to waive its delinquency jurisdiction over the juvenile. The motion may be filed with or subsequent to the filing of a delinquency petition. The court then conducts a two-phase hearing to determine whether there is probable cause that the juvenile committed a felony, and whether it is in the best interests of the juvenile and public to waive or retain jurisdiction over the juvenile. With the advent of “automatic waiver” and prosecutor-designated case proceedings, which allow prosecuting attorneys to proceed directly to a criminal trial of a juvenile, “traditional waiver” proceedings may be used less frequently. Nonetheless, a prosecuting attorney may utilize the “traditional waiver” proceeding when it desires the assistance of the court in determining
whether to proceed against a juvenile as though he or she were an adult, or where the court must make the waiver decision because a “specified juvenile violation” is not alleged.

For related topics, see the following:

- Comparison of waiver and designated case proceedings, Sections 1.6;
- Detention of juveniles subject to “traditional waiver” proceedings, Section 3.11;
- Table of time and notice requirements, including requirements applicable to “traditional waiver” proceedings, Section 6.12;
- Admissibility of confessions, Section 7.5;
- Ordering a psychiatric or psychological examination of a juvenile, Section 7.7.
- Determining a juvenile’s competency, Section 7.8;
- Sentencing, Chapter 23; and
- Appeals, Chapter 24.

**Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).

**16.1 Due Process Requirements Applicable to “Traditional Waiver” Proceedings**

Because the consequences of a decision to waive jurisdiction over a juvenile include imposition of a lengthy prison sentence, a hearing on the motion to waive jurisdiction, access to records and reports, a statement of reasons for the decision on the motion, and the effective assistance of counsel are necessary to satisfy the basic requirements of due process and fairness. *Kent v United States*, 383 US 541, 553–54 (1966). “Full investigation” of the circumstances surrounding the offender and offense is also necessary to satisfy the basic requirements of due process and fairness. *Id.* at 553.
Effective assistance of counsel. A juvenile has a federal constitutional right to be represented by counsel at a waiver hearing. Kent, supra, People v McGilmer, 95 Mich App 577, 580 (1980) (application of Kent in Michigan), and In re Gault, 387 US 1, 41 (1967) (right to notice of the right to counsel and appointment of counsel in appropriate cases). See also People v Whitfield, 214 Mich App 348, 353–55 (1995) (juvenile did not receive effective assistance of counsel, where juvenile’s attorney failed to appeal the decision to waive jurisdiction over the juvenile).

Voluntariness of a confession. The voluntariness of a juvenile’s confession must be established before it may be admitted during the first phase of a waiver hearing. People v Morris, 57 Mich App 573, 576 (1975), and People v Good, 186 Mich App 180, 185 (1990).*

Privilege against self-incrimination. In People v Hana, 443 Mich 202 (1993), cert den 510 US 1120 (1994), the Michigan Supreme Court addressed the applicability of the Fifth Amendment privilege against self-incrimination to “traditional waiver” proceedings. In Hana, the 16-and-a-half-year-old defendant was arrested on drug charges and made incriminating statements to police officers and a youth officer despite receiving and acknowledging that he understood his Miranda rights. The defendant’s statements were not admitted at the first-phase or “probable cause” hearing; however, the police officers, the youth officer, and a court psychologist who examined defendant testified at the second-phase or “best interests” hearing concerning defendant’s incriminating statements. During the second-phase hearing, the court also received testimony from persons who had allegedly purchased illegal drugs from defendant in the past. Id. at 205–08. Relying on In re Gault, 387 US 1 (1967), the Court of Appeals held that the constitutional protections applicable to criminal trials, including the privilege against self-incrimination, applied to the second-phase of “traditional waiver” proceedings. Id. at 209. The Supreme Court reversed and remanded for further proceedings, stating as follows:

“We conclude that the constitutional protections extended to juvenile proceedings in cases such as Kent and Gault apply in full force to the adjudicative phase of a juvenile waiver hearing. We also find that the statutes and court rules concerning phase I hearings, when properly applied, afford the appropriate protection. Thus, because none of the alleged confessions or admissions were introduced at the phase I adjudicative phase of the waiver hearing, there was no constitutional violation. We conclude further that the full panoply of constitutional rights asserted by defendant does not apply to the dispositional phase of a waiver hearing. The United States Supreme Court has confined its extension of Fifth and Sixth Amendment rights to the adjudicative and not the dispositional phase of waiver proceedings. Use of defendant’s alleged statements to the police and court

*See Section 7.5 for discussion of the admissibility of confessions.
psychologist at the phase II dispositional hearing, therefore, did not violate any constitutional provisions.”

_Hana, supra_ at 225. (Footnotes omitted.)

_Hana_ involved use of a juvenile’s confessions or admissions during the second-phase or “best interests” hearing. It appears that a juvenile may assert his or her privilege against self-incrimination _during_ the second-phase hearing. Both the state and federal constitutions prohibit compelled self-incrimination. US Const, Am V (no person “shall be compelled in any criminal case to be a witness against himself”), and Const 1963, art 1, § 17 (“[n]o person shall be compelled in any criminal case to be a witness against himself”). See also _Gault, supra_ at 55 (privilege against self-incrimination applies to juvenile delinquency proceedings). Despite its reference to criminal proceedings, US Const, Am V, “not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also ‘privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.’” _People v Wyngaard_, 462 Mich 659, 671–72 (2000), quoting _Minnesota v Murphy_, 465 US 420, 426 (1984).

**Double jeopardy.** In _Breed v Jones_, 421 US 519, 531 (1975), the United States Supreme Court held that jeopardy attaches when a juvenile court assumes jurisdiction over a juvenile as a delinquent. Therefore, requiring waiver proceedings to occur before the adjudicatory phase of a delinquency proceeding is constitutionally required and does not diminish the juvenile court’s ability to create flexible remedies. _Id._ at 535–41. See also _People v Saxton_, 118 Mich App 681, 688–89 (1982).

### 16.2 Initiating “Traditional Waiver” Proceedings by Filing a Motion to Waive Jurisdiction

MCL 712A.4(1) sets forth the requirements for initiating a “traditional waiver” proceeding. That provision states as follows:

“If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of the circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense.”

*See SCAO Form JC 18.*

MCR 3.950(C) sets forth the requirements for the prosecuting attorney’s motion.* That court rule states:
“A motion by the prosecuting attorney requesting that the family division waive its jurisdiction to a court of general criminal jurisdiction must be in writing and must clearly indicate the charges and that if the motion is granted the juvenile will be prosecuted as though an adult.”

“Felony” means an offense punishable by imprisonment for more than one year or an offense expressly designated by law as a felony. MCL 712A.4(11) and MCR 3.950(B).

16.3 Waiver Proceedings When Juvenile Is Over 17 Years of Age at Time of Waiver Hearing

MCL 764.27 provides for the transfer of a pending criminal case to the Family Division when it is discovered that the accused is under 17 years of age. If an alleged criminal offense was committed prior to the juvenile’s 17th birthday but a complaint is not filed until after the juvenile’s 17th birthday, the issue arises as to which court has jurisdiction. MCL 712A.3 addresses that issue by providing that proper jurisdiction is determined by the age of the accused at the time of the offense. That statute states as follows:

“(1) If during the pendency of a criminal charge against a person in any other court it is ascertained that the person was under the age of 17 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the person resides.

“(2) The court making the transfer shall order the child to be taken promptly to the place of detention designated by the family division of the circuit court or to that court itself or release the juvenile in the custody of some suitable person to appear before the court at a time designated. The court shall hear and dispose of the case in the same manner as if it had been originally instituted in that court.”

Thus, if a juvenile is under 17 years of age when the offense is committed but 17 years of age when charged with the offense, the court of general criminal jurisdiction must transfer the case to the Family Division. MCL 712A.5 states that the Family Division “does not have jurisdiction over a juvenile after he or she attains the age of 18 years, except as provided in [MCL 712A.2a],” which governs continuing jurisdiction.* Where the juvenile is under age 17 at the time of the offense but 18 years old or older

*See Section 14.1 for a discussion of continuing jurisdiction over a juvenile.
at the time of being charged, the Court of Appeals has held that the “juvenile
court” has jurisdiction for the limited purpose of holding a waiver hearing
pursuant to MCL 712A.4. If the Family Division declines to waive its
jurisdiction, the case must be dismissed. People v Schneider, 119 Mich App

The Court of Appeals has held that if the prosecuting attorney files a petition
in the Family Division and a motion to waive Family Division jurisdiction
under MCL 712A.4, that election constitutes a waiver of the alternative
option of authorizing a complaint and warrant under the “automatic waiver”
statutes. In re Fultz, 211 Mich App 299, 311–12 (1995). In Fultz, the
prosecuting attorney charged Mr. Fultz, then 23 years old, with committing
first-degree criminal sexual conduct when he was 16 years old. However,
the Michigan Supreme Court ordered that the Court of Appeals’ opinion on
this “election of forum” issue have no precedential force or effect. People v

16.4 Time Requirements for Filing Motions to Waive
Jurisdiction

A motion to waive jurisdiction must be filed within 14 days after the petition
has been authorized. Absent a timely motion and good cause shown, the
juvenile shall no longer be subject to waiver of jurisdiction on the charges.
MCR 3.950(C)(1).

16.5 Notice of Hearing and Service of Process

MCL 712A.4(2) states as follows:

“Before conducting a hearing on the motion to waive jurisdiction, the court shall give notice of the hearing in
the manner provided by supreme court rule to the juvenile and the prosecuting attorney and, if addresses
are known, to the juvenile’s parents or guardians. The notice shall state clearly that a waiver of jurisdiction to a
court of general criminal jurisdiction has been requested and that, if granted, the juvenile can be prosecuted for the
alleged offense as though he or she were an adult.”

Personal service of waiver motion. “A copy of the motion seeking waiver
must be personally served on the juvenile and the parent, guardian, or legal
custodian of the juvenile, if their addresses or whereabouts are known or can
be determined by exercise of due diligence.” MCR 3.950(C)(2).

Notice of hearing. MCR 3.950(D) explains that a “traditional waiver”
proceeding consists of two phases and provides that “[n]otice of the date,
time, and place of the hearings may be given either on the record directly to
the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual.”

**Victim’s right to be present during proceedings.** MCL 780.789 states:

“The victim has the right to be present throughout the entire contested adjudicative hearing or waiver hearing of the juvenile, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court, for good cause shown, may order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies.”*

### 16.6 Judge Must Preside Over “Traditional Waiver” Proceedings

MCL 712A.4(1) provides that a judge of the Family Division in the county in which the alleged offense occurred may waive jurisdiction over the juvenile. MCR 3.950(A) states that “[o]nly a judge assigned to hear cases in the family division of circuit court of the county where the offense is alleged to have been committed may waive jurisdiction pursuant to MCL 712A.4.” A judge, not a referee, must preside over “traditional waiver” proceedings conducted pursuant to MCR 3.950. MCR 3.912(A)(2).

### 16.7 Appointment of Attorney

MCL 712A.4(6) states as follows:

“If legal counsel has not been retained or appointed to represent the juvenile, the court shall advise the juvenile and his or her parents, guardian, custodian, or guardian ad litem of the juvenile’s right to representation and appoint legal counsel. If the court appoints legal counsel, the judge may assess the cost of providing legal counsel as costs against the juvenile or those responsible for his or her support, or both, if the persons to be assessed are financially able to comply.”

### 16.8 First-Phase or “Probable Cause” Hearings

MCL 712A.4(3) provides for a “probable cause” hearing in “traditional waiver” proceedings:

“Before the court waives jurisdiction, the court shall determine on the record if there is probable cause to
believe that an offense has been committed that if committed by an adult would be a felony and if there is probable cause to believe that the juvenile committed the offense.”

See also MCR 3.950(D)(1), which contains substantially similar language.

The determination to be made at a first-phase hearing is analogous to the determination made at the preliminary examination of a criminal proceeding. The court must only find that there is probable cause that the accused committed the charged offense. People v Burdin, 171 Mich App 520, 522 (1988). However, juveniles must be afforded the same constitutional protections during first-phase hearings as adults facing a preliminary examination. People v Hana, 443 Mich 202, 225, n 62 (1993), and cases cited therein.

Probable cause exists if the facts and circumstances are sufficient to warrant a prudent person in believing that the accused has committed an offense. Beck v Ohio, 379 US 89, 91 (1964).

16.9 Waiver of First-Phase or “Probable Cause” Hearings

The court need not conduct a “probable cause” hearing if the juvenile waives the hearing after being informed by the court on the record that the probable cause hearing is equivalent to and held in place of preliminary examination in district court pursuant to MCL 766.1 to 766.18. MCL 712A.4(3). The court must determine that the waiver of hearing is freely, voluntarily, and understandingly given and that the juvenile knows there will be no preliminary examination in district court if the Family Division waives jurisdiction. MCR 3.950(D)(1)(c)(ii).

16.10 Establishment of Probable Cause at a Preliminary Hearing

The court need not conduct the first phase of the waiver hearing if the court has found the requisite probable cause during the pretrial detention determination at a preliminary hearing under MCR 3.935(D)(1), provided that at the earlier hearing only legally admissible evidence was used to establish probable cause that the offense was committed and probable cause that the juvenile committed the offense. MCR 3.950(D)(1)(c)(i).*

16.11 Time Requirements for First-Phase or “Probable Cause” Hearings

“The probable-cause hearing shall be commenced within 28 days after the filing of the petition unless adjourned for good cause.” MCR 3.950(D)(1)(a). The first-phase or “probable cause” hearing must commence within 28 days of the filing, not the authorization, of the petition. People v Fowler, 193 Mich App 358, 361 (1992).

In People v Sweet, 124 Mich App 626 (1983), the juvenile court found probable cause at a preliminary hearing and ordered the juvenile detained. A hearing was scheduled to occur 30 days after the preliminary hearing. Although the prosecuting attorney filed a motion to waive jurisdiction before that hearing occurred, the hearing date was not changed. On the hearing date, the prosecuting attorney asked for an adjournment because the complainant was physically unable to testify. Finding good cause, the juvenile court granted the adjournment despite the fact that the waiver hearing had not been commenced within 28 days after the filing of the petition. The Court of Appeals found that the rule governing preliminary examinations in criminal cases, which then required dismissal of the complaint and release of the accused for failure to hold a preliminary examination within 12 days of the filing of the complaint, was inapplicable to waiver proceedings where a probable cause determination was made at a preliminary hearing. Id. at 628–29. In cases where no probable-cause determination has been made, the Court of Appeals stated that “the nature of the noncompliance [with the 28-day requirement] will dictate the nature of the remedy.” Id. at 629. The Court did add, however, that “a motion to adjourn must generally be brought within 28 days of the preliminary hearing.” Id.

If a petition and motion to waive jurisdiction are dismissed for lack of timeliness, the prosecutor may file a second petition, which resets the 14-day time limit in MCR 3.950(C)(1)* for a waiver motion unless the juvenile shows a violation of due process or prosecutorial bad faith. People v McCoy, 189 Mich App 201, 203 (1991), citing People v Weston, 413 Mich 371, 376 (1982).

16.12 Rules of Evidence at First-Phase or “Probable Cause” Hearings

MCR 3.950(D)(1)(b) states that “the prosecuting attorney has the burden to present legally admissible evidence to establish each element of the offense and to establish probable cause that the juvenile committed the offense.” The rules of evidence apply during the first phase of the waiver hearing. People v Williams, 111 Mich App 818, 822 (1981).
Section 16.13

16.13 Second-Phase or “Best Interests” Hearings

“Upon a showing of probable cause . . . , the court shall conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction.” MCL 712A.4(4). If the court finds the requisite probable cause at the first-phase hearing, or if there was no hearing pursuant to MCR 3.950(D)(1)(c),* the second-phase hearing shall be held to determine whether the interests of the juvenile and the public would best be served by granting the motion for waiver of jurisdiction. MCR 3.950(D)(2).

During the second phase of a waiver hearing, the court cannot accept a plea of admission from a juvenile to a lesser-included offense, thereby assuming jurisdiction over the juvenile as a delinquent, without the concurrence of the prosecutor. The court must allow the prosecuting attorney to present evidence supporting the motion for waiver and determine whether the best interests of the juvenile and public support waiver. In re Wilson, 113 Mich App 113, 121 (1982), citing Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672 (1972), and Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115 (1974) (in criminal cases, acceptance of plea to a lesser-included offense over prosecutor’s objection violates separation of powers doctrine).

16.14 Special Circumstances Where No Second-Phase Hearing Is Required

MCL 712A.4(5) provides special circumstances where the court may waive its jurisdiction over the juvenile without holding a second-phase or “best interests” hearing. That statutory provision states:

“If the court determines that there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and that the juvenile committed the offense, the court shall waive jurisdiction of the juvenile if the court finds that the juvenile has previously been subject to the jurisdiction of the circuit court under [MCL 712A.4 (‘traditional waiver’), MCL 600.606 (‘automatic waiver’), or MCL 725.10a (‘traditional’ or ‘automatic waiver’ to the former Recorder’s Court)].”*

See also MCR 3.950(D)(2), which explicitly states that the court shall not hold a second-phase hearing in such circumstances.
No “juvenile sentencing hearing” following “traditional waiver” proceedings and conviction. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense. MCL 712A.4(1). If convicted in a court of general criminal jurisdiction, the juvenile must be sentenced as an adult, and there will be no “waiver back” or “juvenile sentencing” proceeding. MCR 6.901(B) and People v Cosby, 189 Mich App 461, 464 (1991).*

In People v Williams, 245 Mich App 427, 429–30 (2001), the juvenile was charged with armed robbery and felony firearm. The prosecuting attorney filed a motion to waive jurisdiction. After a first-phase or “probable cause” hearing, the Family Division found probable cause that a felony had been committed and that the juvenile committed it. Because the juvenile previously had been tried for an offense as an adult in circuit court, the Family Division refused to hold a second-phase hearing and waived jurisdiction. Subsequently, the juvenile pled guilty to unarmed robbery in circuit court and was sentenced to imprisonment. The circuit court did not hold a “juvenile sentencing hearing” pursuant to MCL 769.1(3) and MCR 6.931 prior to sentencing the juvenile.

On appeal, the juvenile argued that because the Family Division did not conduct a second phase or “best interests” hearing, he was entitled to a “juvenile sentencing hearing” under MCL 769.1(3) and MCR 6.931. The Court of Appeals disagreed, holding that the plain language of MCR 6.901(B) precludes a “juvenile sentencing hearing” pursuant to MCR 6.931 in all “traditional waiver” proceedings. Id. at 433–35. The Court noted that since MCL 712A.4(5) does not require that a juvenile be convicted in the previous proceeding, application of that provision in a subsequent proceeding where an adult sentence is mandatory may lead to unfair results. Id. at 437. The Court allowed for the possibility that the Legislature and Michigan Supreme Court intended to preclude a “juvenile sentencing hearing” only where the juvenile previously had been convicted of an offense as an adult, but the Court concluded that the plain language of the relevant statute and court rules did not provide for such a procedure. Id. at 438.

In Williams, the Court of Appeals explained that a previous panel of that court had stated in dicta that the circuit court retains discretion to impose a “juvenile sentence” following “traditional waiver” proceedings and conviction. See People v Thenghkam, 240 Mich App 29, 38–39 (2000). In Williams, the Court concluded that the Thenghkam dicta was erroneous. See Williams, supra at 435–36. The Thenghkam dicta also contradicts MCR 6.901(B) and Cosby, supra.

*See Chapter 21 for a discussion of “juvenile sentencing hearings” in “automatic waiver” cases.
16.15 Time Requirements for Second-Phase or “Best Interests” Hearings

The second-phase hearing must commence within 28 days after the conclusion of the first-phase or “probable cause” hearing, or within 35 days after the filing of the petition if there was no first-phase hearing pursuant to MCR 3.950(D)(1)(c),* unless adjourned for good cause. MCR 3.950(D)(2)(a).

16.16 Burden of Proof at Second-Phase or “Best Interests” Hearings

MCL 712A.4(4) is silent on the burden of proof during a second-phase or “best interests” hearing. MCR 3.950(D)(2)(c) states that “[t]he prosecuting attorney has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by waiver.”

16.17 Rules of Evidence at Second-Phase or “Best Interests” Hearings

“The Michigan Rules of Evidence, other than those with respect to privileges, do not apply to the second phase of the waiver hearing.” MCR 3.950(D)(2)(b).

Inadmissible evidence, including a juvenile’s prior criminal acts not resulting in conviction, may be introduced at the second phase or “best interests” hearing, as long as the evidence is relevant and material and the juvenile has an opportunity to refute the allegations. People v Williams, 111 Mich App 818, 822–23 (1981).

16.18 Defense Counsel Access to Records and Reports

MCL 712A.4(7) states as follows:

“Legal counsel shall have access to records or reports provided and received by the judge as a basis for decision in proceedings for waiver of jurisdiction. A continuance shall be granted at legal counsel’s request if any report, information, or recommendation not previously available is introduced or developed at the hearing and the interests of justice require a continuance.”
16.19 Criteria to Consider at Second-Phase or “Best Interests” Hearings

MCL 712A.4(4) requires the court “to conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction.” The court must consider and make findings on all of the following criteria, giving greater weight to the seriousness of the alleged offense and the juvenile’s prior delinquency record than to the other criteria. Id. MCL 712A.4(4)(a)–(f) set forth the following criteria:

“(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

“(b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile’s participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

“(c) The juvenile’s prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

“(d) The juvenile’s programming history, including, but not limited to, the juvenile’s past willingness to participate meaningfully in available programming;

“(e) The adequacy of the punishment or programming available in the juvenile justice system.

“(f) The dispositional options available for the juvenile.”

See also MCR 3.950(D)(2)(d)(i)–(vi), which contain the same requirements as MCL 712A.4(4).

The criteria listed above are also used to decide whether to designate the case for criminal trial within the Family Division, to decide whether to impose an adult sentence or juvenile disposition following conviction in designated case proceedings, and to decide whether to impose an adult sentence following conviction of certain “specified juvenile violations” in “automatic waiver” cases. However, in “traditional” waiver cases and in designation hearings in designated case proceedings, the court must consider the best interests of both the juvenile and the public; whereas, in
“automatic waiver” cases and at sentencing hearings in designated case proceedings, the court must consider only the best interests of the public.

MCL 712A.4(4) requires a court to give “greater weight” to the seriousness of the offense and the juvenile’s prior delinquency record than to the other criteria listed in that statute. In a case decided under a previous version of this statute, the Michigan Supreme Court held that the seriousness of the offense does not by itself justify waiving jurisdiction over a juvenile. People v Dunbar, 423 Mich 380, 387 (1985), citing People v Schumacher, 75 Mich App 505, 512 (1977). Because, when Dunbar was decided, MCL 712A.4(4) required a court to weigh the applicable criteria “as appropriate to the circumstances,” Dunbar’s continued validity on this point is uncertain.* See also In re LeBlanc, 171 Mich App 405, 412 (1988) (under Dunbar, juvenile court judge retained discretion to waive jurisdiction over “an intelligent first-time offender who commits a premeditated murder. . . .”).

Although the court must consider the criteria in MCL 712A.4(4) and MCR 3.950(D)(2)(b) when deciding whether to waive jurisdiction over a juvenile, the court “retains the discretion to make the ultimate decision whether to waive jurisdiction over the juvenile.” People v Williams, 245 Mich App 427, 432 (2001).

The court may consider any stipulation by the defense to a finding that the best interests of the juvenile and the public support waiver. MCR 3.950(D)(2)(e).

16.20 Court Procedures When Waiver Is Ordered

MCL 712A.4(8) and MCR 3.950(E)(1)(a), (b), and (d)* provide that if the court determines that it is in the best interests of the juvenile and the public to waive jurisdiction over the juvenile, the court must:

- enter a written order granting the motion to waive jurisdiction and transferring the matter to the appropriate court having general criminal jurisdiction for arraignment of the juvenile on an information;

- make findings of fact and conclusions of law forming the basis for entry of the waiver order. The findings and conclusions may be incorporated in a written opinion or stated on the record; and

- send a copy of the order waiving jurisdiction and the transcript of the court’s findings or a copy of the written opinion to the court of general criminal jurisdiction.

MCL 712A.4(4) requires the court to consider and make findings on all of the criteria listed in MCL 712A.4(4)(a)-(f). The court’s findings of fact and conclusions of law must refer specifically to evidence of record. People v
In *Spytma v Howes*, __ F3d ___ (CA 6, 2002), the United States Court of Appeals for the Sixth Circuit determined whether due process requires a judge to make specific findings on the record regarding all of the criteria for waiving jurisdiction over a juvenile. Spytma was fifteen years old in 1974 when he was charged with first-degree murder. In waiving jurisdiction over Spytma, the lower court made specific findings regarding some but not all of the applicable waiver criteria. The federal Court of Appeals stated:

“[O]ur concern today is whether petitioner received due process as required by *Kent v United States*, 383 US 541 (1966), not whether the state court meticulously complied with Juvenile Rule 11.1. We find that minimum due process requirements were met. Petitioner was represented by counsel and a hearing was held on the record. Whether the Michigan court’s waiver of jurisdiction and transfer to adult court contain sufficient indicia under state law is a question for the Michigan courts, which have held that it was valid. Accordingly, despite the lack of specific findings on the record concerning the listed criteria, we cannot say that the judge did not consider all the criteria before making his decision or that the hearing did not comport with minimum due process.” *Spytma, supra* at __.

The Court also indicated that despite the lack of a reviewable record, any error was harmless because any “reasonable” probate judge would have transferred the juvenile to adult court.

### 16.21 Court Procedures When Waiver Is Denied

If the court does not waive jurisdiction, the court must enter an appropriate order and make written findings of fact and conclusions of law or place them on the record. A transcript of the court’s findings or a copy of the written opinion shall be sent to the prosecuting attorney, the juvenile, or the juvenile’s attorney upon request. MCL 712A.4(8)–(9) and MCR 3.950(F).*


MCR 3.950(F) states that “[i]f the juvenile is detained and the trial of the matter in the family division has not started within 28 days after entry of the order denying the waiver motion, and the delay is not attributable to the
defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter.”

MCR 3.942(A) provides that all trials in juvenile court must be commenced within six months after the filing of the petition, unless adjourned for good cause.

16.22 Notice of Juvenile’s Right to Appeal

If the court waives jurisdiction over the juvenile, the court must advise the juvenile, orally or in writing, that:

“(i) the juvenile is entitled to appellate review of the decision to waive jurisdiction,

“(ii) the juvenile must seek review of the decision in the Court of Appeals within 21 days of the order to preserve the appeal of right, and

“(iii) if the juvenile is financially unable to retain an attorney, the court will appoint one to represent the juvenile on appeal.” MCR 3.950(E)(1)(c)(i)–(iii).

By pleading guilty to an offense in the trial court without seeking review of the decision to waive jurisdiction, a juvenile waives any infirmity in the waiver proceeding. People v Mahone, 75 Mich App 407, 410 (1977), and People v Jackson, 171 Mich App 191, 195 (1988). Where the juvenile does appeal the decision to waive jurisdiction immediately after waiver, a guilty plea by the juvenile in the trial court does not render a subsequent appeal of the decision to waive jurisdiction moot. People v Rader, 169 Mich App 293, 299–300 (1988).

16.23 Transfer to Adult Criminal Justice System

MCR 3.950(E)(2) states that “[u]pon the grant of a waiver motion, a juvenile must be transferred to the adult criminal justice system and is subject to the same procedures used for adult criminal defendants. Juveniles waived pursuant to this rule are not required to be kept separate and apart from adult prisoners.”
If the Family Division waives jurisdiction, the juvenile must be arraigned on an information filed by the prosecutor in the court of general criminal jurisdiction. The probable cause finding in the first-phase hearing satisfies the requirements of, and is the equivalent of, the preliminary examination required by the Code of Criminal Procedure. Thus, the juvenile is not entitled to a preliminary examination in district court following “traditional” waiver. MCL 712A.4(10).*

A juvenile defendant over whom jurisdiction was waived for an offense cannot be charged with a greater offense in the circuit court. People v Hoerle, 3 Mich App 693, 698 (1966). However, a guilty plea to an included felony (but not a misdemeanor) other than that with which the defendant was charged is not precluded. People v Smith, 35 Mich App 597, 598 (1971). See also People v Peters, 397 Mich 360 (1976) (plea to second-degree murder after waiver on charge of first-degree felony murder).

The Holmes Youthful Trainee Act, MCL 762.11 et seq., applies to juveniles over whom jurisdiction has been waived under MCL 764.27. MCL 762.15. MCL 764.27 provides for “traditional waiver” of a juvenile under MCL 712A.4. Application of the Holmes Youthful Trainee Act to “traditionally waived” juveniles is rare, and a discussion of that act is beyond the scope of this benchbook.

16.24 Use of Evidence and Testimony at Criminal Trials

A provision of the Juvenile Code restricts the use of evidence from juvenile delinquency cases in subsequent proceedings. MCL 712A.23 states as follows:

“Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code].”

In People v Hammond, 27 Mich App 490 (1970), the defendant argued on appeal that the trial court erred by considering physical evidence at trial that had been introduced during a “traditional waiver” proceeding. The Court of Appeals disagreed, holding that MCL 712A.23 did not affect the admissibility at trial of both physical evidence and testimony offered during a “traditional waiver” proceeding:

“It is our conclusion that the intent of the statute is to proscribe the actual testimony taken at the juvenile proceedings. It is not meant to preclude the physical
evidence, nor is it meant to exclude a witness who testified at the juvenile proceedings from testifying on the same subject matter at a subsequent trial for the same offense.” *Id.* at 494.

See also *People v Pennington*, 113 Mich App 688, 697–98 (1982) (the trial court did not err in allowing the waiver-hearing testimony of an accomplice to be read to the jury, where the accomplice asserted his Fifth Amendment privilege against self-incrimination at trial).

**Testimony derived from a court-ordered examination.** MCR 3.950(G) states as follows:

“(1) A psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for purposes of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile’s written consent.

“(2) The juvenile’s consent may only be given:

(a) in the presence of an attorney representing the juvenile or, if no attorney represents the juvenile, in the presence of a parent, guardian, or legal custodian;

(b) after the juvenile has had an opportunity to read the report of the psychiatrist, psychologist, or certified social worker; and

(c) after the waiver decision is rendered.

“(3) Consent to testimony by the psychiatrist, psychologist, or certified social worker does not waive the juvenile’s privilege against self-incrimination.” MCR 3.950(G)(1)–(3).
Chapter 17: Designated Case Proceedings—Arraignments, Designation Hearings, and Preliminary Examinations

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Appendix: Designation Process

In this chapter . . .

This chapter discusses the procedural requirements to initiate a designated case proceeding. It describes the procedural requirements for arraignments, designation hearings, and preliminary examinations. The rules governing preliminary examinations in adult criminal cases apply to designated case proceedings; however, a complete discussion of those rules is beyond the
The appendix contains a flowchart describing the procedural steps in designated case proceedings.*

Pretrial issues that may arise in designated case proceedings are discussed in other portions of this benchbook. See the following:

- Comparison of waiver and designated case proceedings, Section 1.6;
- Pretrial detention, Section 3.9;
- Amending a petition to designate a case, Section 5.5;
- Infancy defense, Section 9.1;
- Pretrial motions, including motions to suppress evidence, Chapter 7; and
- Prosecutorial charging discretion in “automatic waiver” proceedings, Section 20.3.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

17.1 Definition of Designated Case Proceeding

A designated case proceeding is a proceeding in which the prosecutor has designated, or has asked the Family Division to designate, the case for trial in the Family Division in the same manner as an adult. MCR 3.903(A)(6).

The proceedings in a designated case are criminal and must afford all of the procedural protections and guarantees to which the juvenile would be entitled if he or she were being tried for the offense in a court of general criminal jurisdiction. A plea of guilty or nolo contendere, or a verdict of guilty, results in the entry of a judgment of conviction. The conviction has the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction. MCL 712A.2d(7) and MCR 3.903(D)(9).
Only the prosecuting attorney may designate a case or request leave to amend a petition to designate a case in which the petition alleges a specified juvenile violation, and only the prosecuting attorney may request the court to designate a case in which the petition alleges an offense other than a specified juvenile violation. MCR 3.914(D)(1)–(2). Thus, although the prosecuting attorney initiates both types of designated cases, if a specified juvenile violation is not alleged, the court must hold a hearing to determine whether or not to designate the case. That hearing is described in Sections 17.10–17.12, below.

A. Prosecutor-Designated Cases

MCL 712A.2d(1) states as follows:

“(1) In a petition or amended petition alleging that a juvenile is within the court’s jurisdiction under [MCL 712A.2(a)(1)] for a specified juvenile violation, the prosecuting attorney may designate the case as a case in which the juvenile is to be tried in the same manner as an adult. An amended petition making a designation under this subsection shall be filed only by leave of the court.”*

MCR 3.903(D)(6) defines “prosecutor-designated case” as a case in which the prosecuting attorney has endorsed a petition charging a juvenile with a “specified juvenile violation” with the designation that the juvenile is to be tried in the Family Division in the same manner as an adult.

MCR 3.903(D)(8) provides that MCL 712A.2d contains the list of specified juvenile violations. MCL 712A.2d(9)(a)–(g), in turn, include the following offenses:

- burning a dwelling house, MCL 750.72;
- assault with intent to murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
• bank, safe, or vault robbery, MCL 750.531;

• assault with intent to do great bodily harm, MCL 750.84, if armed with a dangerous weapon;

• first-degree home invasion, MCL 750.110a(2);

• escape or attempted escape from a medium- or high-security juvenile facility operated by the Family Independence Agency or a county juvenile agency, or a high-security facility operated by a private agency under contract with the Family Independence Agency or a county juvenile agency, MCL 750.186a;

• manufacture, sale, or delivery, MCL 333.7401(2)(a)(i), or possession, MCL 333.7403(2)(a)(i), of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine;*

• any attempt, MCL 750.92, to commit any of the above crimes;

• any solicitation, MCL 750.157b, to commit any of the above crimes;

• any conspiracy, MCL 750.157a, to commit any of the above crimes.

MCL 712A.2d(9)(b)(i)–(iv) provide that “dangerous weapon,” as used in the context of a specified juvenile violation, means one of the following:

• a loaded or unloaded firearm, whether operable or inoperable;

• a knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon;

• an object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon, or carried or possessed for use as a weapon; or

• an object or device that is used or fashioned in a manner to lead a person to believe the object or device is a weapon.

MCL 712A.2d(9)(h) and (i) provide that the definition of specified juvenile violation includes:

• any lesser-included offense arising out of the same transaction as a specified juvenile violation if the juvenile is also charged with a specified juvenile violation, and

• any other offense arising out of the same transaction if the juvenile is also charged with a specified juvenile violation.
**Lesser-included offenses.** Two types of lesser-included offenses exist: (1 necessarily included offenses, and (2 cognate (or allied) lesser offenses. A necessarily included offense is one in which all the elements of the offense are contained within the greater offense, and it is impossible to commit the greater offense without also having committed the lesser. *People v Bearss*, 463 Mich 623, 627 (2001). See also *People v Veling*, 443 Mich 23, 36 (1993) (the evidence at trial will always support the lesser offense if it supported the greater). A cognate or allied lesser offense is one that “share[s] some common elements, and [is] of the same class or category as the greater offense, but ha[s] some additional elements not found in the greater offense.” *People v Perry*, 460 Mich 55, 61 (1999), quoting *People v Hendricks*, 446 Mich 435, 443 (1994).

In *People v Cornell*, 466 Mich 335, 353–54 (2002), the Michigan Supreme Court ruled that MCL 768.32(1), a seldom-used statute governing lesser-included offenses, must be applied to offenses that are expressly divided into degrees and to offenses in which different grades or offenses or degrees of enormity are recognized. The Court in *Cornell* also held that MCL 768.32(1) “does not permit cognate lesser offenses.” *Cornell, supra* at 354. See also *People v Pasha*, 466 Mich 378, 384 n 9 (2002) (“Following our decision in *Cornell*, the trier of fact may no longer convict a defendant of a cognate lesser offense.”).

**B. Court-Designated Cases**

MCL 712A.2d(2) states in part:

“In a petition alleging that a juvenile is within the court’s jurisdiction under [MCL 712A.2(a)(1)] for an offense other than a specified juvenile violation, the prosecuting attorney may request that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult. The court may designate the case following a hearing if it determines that the best interests of the juvenile and the public would be served by the juvenile being tried in the same manner as an adult.”

MCR 3.903(D)(2) defines “court-designated case” as a case in which the court, pursuant to a request by the prosecutor, has decided according to the factors set forth in MCR 3.952(C)(3) that the juvenile is to be tried in the Family Division in the same manner as an adult for an offense other than a specified juvenile violation. As required by MCL 712A.2d(2), the court must hold a hearing to determine whether to designate the case. MCR 3.903(D)(4) defines a “designation hearing” as a hearing on the prosecutor’s request that the court designate the case for trial in the Family Division in the same manner as an adult.*

*See Section 17.10, below, for rules governing designation hearings.*
17.2 **Venue in Designated Case Proceedings**

Designated cases are to be filed in the Family Division of the county in which the offense occurred. Other than a change of venue for purpose of trial, a designated case may not be transferred to any other county, except, after conviction, a designated case may be transferred to the juvenile’s county of residence for entry of a juvenile disposition only. Sentencing of a juvenile, including delayed imposition of sentence, must be done in the county in which the offense occurred. MCR 3.926(G). See also MCL 712A.2(d), which provides that a designated case “shall not be transferred on grounds of residency.”

17.3 **Right to Counsel**

At the arraignment in a designated case, the court must advise the juvenile of the right to an attorney pursuant to MCR 3.915(A)(1). MCR 3.951(A)(2)(b)(i) and 3.951(B)(2)(b)(i).*

17.4 **Arraignments**

An arraignment, in the context of a designated case, means the first hearing at which “the juvenile is informed of the allegations, the juvenile’s rights, and the potential consequences of the proceeding[,] the matter is set for a probable cause or designation hearing[,] and if the juvenile is in custody or custody is requested pending trial, a decision is made regarding custody pursuant to MCR 3.935(C).” MCR 3.903(D)(1)(a)–(c).

17.5 **Referees Who May Conduct Arraignments**

A referee may conduct a hearing other than a preliminary examination, trial, or sentencing in a designated case. MCR 3.913(A)(1). A referee who conducts an arraignment in a designated case need not be a licensed attorney. See MCR 3.913(A)(2)(c) (referees who conduct hearings to amend the petition to designate case and designation hearings must be licensed attorneys).

17.6 **Time Requirements for Arraignments**

When juvenile is in custody or custody is requested. MCR 3.951(A) (prosecutor-designated cases) and 3.951(B) (court-designated cases) outline the procedures for initiating designated cases. The procedures differ slightly depending upon whether the case is a prosecutor-designated case or a court-designated case, and whether the juvenile is in custody or custody is requested, or the juvenile is not in custody and custody is not requested.

*See Section 5.7 for discussion of a juvenile’s right to counsel.*
In both prosecutor-designated and court-designated cases, if the juvenile is in custody or custody is requested, the arraignment must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays as defined by MCR 8.110(D)(2), or the juvenile must be released. MCR 3.951(A)(1)(a) and 3.951(B)(1)(a).

**Note:** See also MCR 3.935(A)(1), which requires a preliminary hearing to commence within 24 hours after the juvenile is taken into custody. The prosecutor may amend the petition by right to designate the case or to ask the court to designate the case during the preliminary hearing. See Section 5.5.

**When juvenile is not in custody and custody is not requested.** Where the juvenile is not in custody and custody is not requested, the juvenile must be brought before the court for an arraignment as soon as the juvenile’s attendance can be secured. MCR 3.951(A)(1)(b) and 3.951(B)(1)(b).

**Adjournments.** MCR 3.951(A)(1)(a) and 3.951(B)(1)(a) state:

> “The court may adjourn the arraignment for up to 7 days to secure the attendance of the juvenile’s parent, guardian, or legal custodian or of a witness, or for other good cause shown.”

### 17.7 Required Procedures at Arraignments

MCR 3.951(A)(2) and 3.951(B)(2) provide that at the beginning of an arraignment, the court shall do the following:

“(a) The court shall determine whether the juvenile’s parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile.

“(b) The court shall read the allegations in the petition . . .”

### A. Advice of Rights in Prosecutor-Designated Cases

MCR 3.951(A)(2)(b) states that in a prosecutor-designated case, the court must advise the juvenile on the record in plain language:

“(i) of the right to an attorney pursuant to MCR 3.915(A)(1);*

“(ii) of the right to trial by judge or jury on the allegations in the petition;
“(iii) of the right to remain silent and that any statement made by the juvenile may be used against the juvenile;

“(iv) of the right to have a preliminary examination within 14 days;

“(v) that the case has been designated for trial in the same manner as an adult and, if the prosecuting attorney proves that there is probable cause to believe an offense was committed and there is probable cause to believe that the juvenile committed the offense, the juvenile will be afforded all the rights of an adult charged with the same crime and that upon conviction the juvenile may be sentenced as an adult;

“(vi) of the maximum possible prison sentence and any mandatory minimum sentence required by law.”

B. Advice of Rights in Court-Designated Cases

MCR 3.951(B)(2)(b) states that in a court-designated case, the court must advise the juvenile on the record in plain language:

“(i) of the right to an attorney pursuant to MCR 3.915(A)(1);*

“(ii) of the right to trial by judge or jury on the allegations in the petition;

“(iii) of the right to remain silent and that any statement made by the juvenile may be used against the juvenile;

“(iv) of the right to have a designation hearing within 14 days;

“(v) of the right to have a preliminary examination within 14 days after the case is designated if the juvenile is charged with a felony or offense for which an adult could be imprisoned for more than one year;

“(vi) that if the case is designated by the court for trial in the same manner as an adult and, if a preliminary examination is required by law, the prosecuting attorney proves that there is probable cause to believe that an offense was committed and there is probable cause to believe that the juvenile committed the offense, the juvenile will be afforded all the rights of an adult charged with the same crime and that upon conviction the juvenile may be sentenced as an adult;

*See Section 5.7.
“(vii) of the maximum possible prison sentence and any mandatory minimum sentence required by law.”

17.8 Authorization of Petition by Court at Arraignment

Unless the arraignment is adjourned, the court must decide whether to authorize the petition to be filed. MCR 3.951(A)(2)(c) and 3.951(B)(2)(c) provide that if it authorizes the filing of the petition, the court must:

- determine if fingerprints must be taken pursuant to MCR 3.936,*
- determine whether to detain or release the juvenile pursuant to MCR 3.935(C)–(E).*

If the arraignment is adjourned, the juvenile may be detained pending the completion of the arraignment if it appears to the court that one of the circumstances in MCR 3.935(D)(1) is present. MCR 3.951(A)(2)(d) and 3.951(B)(2)(d).

17.9 Scheduling of Preliminary Examination or Designation Hearing

In a prosecutor-designated case, if the petition is authorized for filing, the court must “schedule a preliminary examination within 14 days before a judge other than a judge who would conduct the trial.” MCR 3.951(A)(2)(c)(ii). If the petition alleges an offense other than a specified juvenile violation and is authorized for filing, the court must schedule a designation hearing within 14 days before a judge other than the judge who would conduct the trial. MCR 3.951(B)(2)(c)(ii).

17.10 Required Procedures at Designation Hearings

A. Referees Who May Preside at Designation Hearings

A referee licensed to practice law in Michigan may preside at a hearing to designate a case and to make recommended findings and conclusions. MCR 3.913(A)(2)(c).*

B. Time, Notice, and Service of Process Requirements for Designation Hearings

“The designation hearing shall be commenced within 14 days after the arraignment, unless adjourned for good cause.” MCR 3.952(A).
MCR 3.952(B)(1)–(2) state:

“(1) A copy of the petition or a copy of the petition and separate written request for court designation must be personally served on the juvenile and the juvenile’s parent, guardian, or legal custodian, if the address or whereabouts of the juvenile’s parent, guardian, or custodian is known or can be determined by the exercise of due diligence.

“(2) Notice of the date, time, and place of the designation hearing must be given to the juvenile, the juvenile’s parent, guardian, or legal custodian, and the attorney for the juvenile, if any, and the prosecuting attorney. The notice may be given either orally on the record or in writing, served on each individual by mail, or given in another manner reasonably calculated to provide notice.”

C. Rules of Evidence, Standard of Proof, and Burden of Proof at Designation Hearings

MCR 3.952(C)(1)–(2) state:

“(1) The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.

“(2) The prosecuting attorney has the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by designation.”

17.11 Criteria to Determine Whether to Designate the Case

MCL 712A.2d(2)(a)–(f) set forth the criteria to determine whether to designate a case for trial. Those provisions state in relevant part:

(2) . . . The court may designate the case following a hearing if it determines that the best interests of the juvenile and the public would be served by the juvenile being tried in the same manner as an adult. In determining whether the best interests of the juvenile and the public would be served, the court shall consider all of the following factors, giving greater weight to the seriousness of the alleged offense and the juvenile’s prior delinquency record than to the other factors:
(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

(b) The juvenile’s culpability in committing the alleged offense, including, but not limited to, the level of the juvenile’s participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

(c) The juvenile’s prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

(d) The juvenile’s programming history, including, but not limited to, the juvenile’s past willingness to participate meaningfully in available programming.

(e) The adequacy of the punishment or programming available in the juvenile justice system.

(f) The dispositional options available for the juvenile.”

MCR 3.952(C)(3)(a)–(f) contain substantially similar criteria.

17.12 Required Procedures Following Designation Hearings

MCR 3.952(D)(1)(a)–(b) state as follows:

“(1) If the court determines that it is in the best interests of the juvenile and the public that the juvenile be tried in the same manner as an adult in the family division of the circuit court, the court must:

(a) enter a written order granting the request for court designation and

(i) schedule a preliminary examination within 14 days if the juvenile is charged with a felony or an offense for which an adult could be imprisoned for more than one year, or
(ii) schedule the matter for trial or pretrial hearing if the juvenile is charged with a misdemeanor.

(b) make findings of fact and conclusions of law forming the basis for entry of the order designating the petition. The findings and conclusions may be incorporated in a written opinion or stated on the record.”

If the case is designated, the case shall be set for trial in the same manner as the trial of an adult in a court of general criminal jurisdiction unless a probable cause hearing is required under MCL 712A.2d(4). MCL 712A.2d(3).

MCR 3.952(E) states that “[i]f the request for court designation is denied, the court shall make written findings or place them on the record.* Further proceedings shall be conducted pursuant to MCR 3.941–3.944,” rules governing delinquency proceedings.

17.13 Combined Designation Hearings and Preliminary Examinations

MCR 3.953(C) provides that, in a court-designated case, the preliminary examination and the designation hearing may be combined, “provided that the Michigan Rules of Evidence, except as otherwise provided by law, apply only to the preliminary examination phase of the combined hearing.”

Although a referee may preside at a designation hearing, only a judge may preside at a preliminary examination. Thus, a judge must preside at a combined hearing.*

17.14 Preliminary Examinations in Designated Case Proceedings

MCL 712A.2d(4) sets forth the requirements for preliminary examinations in designated case proceedings:

“(4) If the petition in a case designated under this section alleges an offense that if committed by an adult would be a felony or punishable by imprisonment for more than 1 year, the court shall conduct a probable cause hearing not later than 14 days after the case is designated to determine whether there is probable cause to believe the offense was committed and whether there is probable cause to believe the juvenile committed the offense. This hearing may be combined with the designation hearing under subsection (2) for an offense other than a specified juvenile offense.* A probable cause hearing under this

*See Section 21.7 for case law requiring a court to make findings on all of the applicable factors when deciding whether to sentence a juvenile as an adult.

*See Sections 17.14–17.20 for the rules governing preliminary examinations.

*See Section 17.13, above.
section is the equivalent of the preliminary examination in a court of general criminal jurisdiction and satisfies the requirement for that hearing. A probable cause hearing shall be conducted by a judge other than the judge who will try the case if the juvenile is tried in the same manner as an adult.”

See also MCR 3.953(A). This probable cause hearing is defined in MCR 3.903(D)(5) as a preliminary examination and is referenced as such in MCR 3.953. The preliminary examination should be distinguished from the probable cause hearing required to support detention at the arraignment.

17.15 Judges Who May Preside at Preliminary Examinations

A judge must preside at a preliminary examination in a designated case. MCR 3.912(A)(3). The judge who presides at the preliminary examination may not preside at the trial of the same designated case unless a determination of probable cause is waived. MCL 712A.2d(4) and MCR 3.912(C)(1).*

However, the judge who presides at a preliminary examination may accept a plea in the designated case. MCR 3.912(C)(1).*

In adult criminal cases, the preliminary examination takes place in the district court, and the defendant may challenge that court’s bindover decision by moving to quash the information in circuit court, a “higher” court. In designated case proceedings, however, the preliminary examination occurs within the Family Division of the Circuit Court. Thus, in order for a judge of a “higher” court to review the probable cause determination, the juvenile would have to appeal to the Court of Appeals. In addition, if another judge of the Family Division were required to review the probable cause determination, a problem would arise in circuits with only one judge sitting in the Family Division.

In People v Cason, 387 Mich 586 (1972), the Michigan Supreme Court approved the practice of one Recorder’s Court judge reviewing the bindover decision of another Recorder’s Court judge. See also People v Doss, 78 Mich App 541, 545 (1977) (the practice in Recorder’s Court “does not come under the usual rule which precludes a judge of one jurisdiction from hearing an appeal from a decision of another judge enjoying coordinate jurisdiction . . . . The judges are occupying different roles; in one instance, acting as magistrates, and in the other, as felony trial judges”).

These cases suggest that judges of the Family Division may review one another’s probable cause determinations in designated cases. In addition,
MCR 3.912(A)(3) and 3.912(C) do not seem to require that the judge who conducts a preliminary examination be a Family Division judge. Thus, a district court judge or magistrate may conduct the preliminary examination, and, if a motion to quash is filed, it may be heard by the trial judge in the Family Division.

17.16 Required Procedures at Preliminary Examinations

“The preliminary examination must be conducted in accordance with MCR 6.110.” MCR 3.953(E). MCR 6.110 contains the procedural requirements for preliminary examinations in adult criminal cases. MCL 766.1 et seq. contain the statutory requirements for preliminary examinations in adult criminal cases.*

17.17 Requirements to Waive a Preliminary Examination

Under MCR 3.953(B), “[t]he juvenile may waive the preliminary examination if the juvenile is represented by an attorney and the waiver is made and signed by the juvenile in open court. The judge shall find and place on the record that the waiver was freely, understandingly, and voluntarily given.”

If the court permits the juvenile to waive the preliminary examination, it must schedule the matter for trial or pretrial hearing on the charge set forth in the petition. MCR 3.953(F)(1) and MCR 6.110(A).

The people and an adult criminal defendant are entitled to a prompt preliminary examination. MCR 6.110(A). The people may demand a preliminary examination even though the defendant has waived his or her right to an examination. *People v Wilcox*, 303 Mich 287, 295–96 (1942).

17.18 Time Requirements for Preliminary Examinations

MCR 3.953(D) provides that “[t]he preliminary examination must commence within 14 days of the arraignment in a prosecutor-designated case or within 14 days after court-ordered designation of a petition, unless the preliminary examination was combined with the designation hearing.”

17.19 Rules of Evidence at Preliminary Examinations

Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. Except as otherwise provided by law, the court must conduct the examination in accordance with

*See Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition) (MJI, 2003) for a full discussion of these requirements.
the rules of evidence. A verbatim record must be made of the preliminary examination. MCR 6.110(C).

The judge may inquire into any matter connected with the charged offense deemed pertinent. *People v Dochstader*, 274 Mich 238, 243 (1936), and *People ex rel Ingham Co Prosecutor v East Lansing District Judge*, 42 Mich App 32, 37–38 (1972) (judge has discretion to order in-court lineup to assure reliability of identification process). However, only legally admissible evidence may be considered in reaching a decision to bind the defendant over for trial. *People v Walker*, 385 Mich 565, 574–76 (1971), and *People v Kubasiak*, 98 Mich App 529, 536 (1980). See also *People v McMahan*, 451 Mich 543, 545–53 (1996) (corpus delicti rule applies to preliminary examinations).

### 17.20 Possible Findings and Conclusions Following Preliminary Examinations

MCL 712A.2d(5)–(6) set forth the possible findings and conclusions following a preliminary examination. Those provisions state as follows:

“(5) If the court determines there is probable cause to believe the offense alleged in the petition was committed and probable cause to believe the juvenile committed the offense, the case shall be set for trial in the same manner as the trial of an adult in a court of general criminal jurisdiction.

“(6) If the court determines that an offense did not occur or there is not probable cause to believe the juvenile committed the offense, the court shall dismiss the petition. If the court determines there is probable cause to believe another offense was committed and there is probable cause to believe the juvenile committed that offense, the court may further determine whether the case should be designated as a case in which the juvenile should be tried in the same manner as an adult as provided in subsection (2).* If the court designates the case, the case shall be set for trial in the same manner as the trial of an adult in a court of general criminal jurisdiction.”

Note that subsection (6) states that the court must conduct a designation hearing if it finds that there is probable cause to believe that the juvenile has committed “another offense.” Similarly, MCR 3.953(F)(3) provides that the court must conduct a designation hearing if the court finds there is probable cause to believe that the juvenile committed a lesser-included offense. MCR 3.953(F)(1)–(3) state:

*See Sections 17.11 (criteria to determine whether to designate case) and 17.13 (combined designation hearing and preliminary examination), above.*
“(1) If the court finds there is probable cause to believe that the alleged offense was committed and probable cause to believe the juvenile committed the offense, the court may schedule the matter for trial or a pretrial hearing.

“(2) If the court does not find there is probable cause to believe that the alleged offense was committed or does not find there is probable cause to believe the juvenile committed the offense, the court shall dismiss the petition, unless the court finds that probable cause exists to believe that a lesser-included offense was committed and probable cause to believe the juvenile committed it.

“(3) If the court finds there is probable cause to believe that a lesser-included offense was committed and probable cause to believe the juvenile committed that offense, the court may, as provided in MCR 3.952, further determine whether the case should be designated as a case in which the juvenile should be tried in the same manner as an adult. If the court designates the case following the determination of probable cause under this subrule, the court may schedule the matter for trial or a pretrial hearing.”

A criminal defendant may be bound over for trial for a different or greater offense than that charged if the prosecutor at the preliminary examination moves to amend the complaint and warrant, and if the amendment does not prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. People v Mathis (On Remand), 75 Mich App 320, 327–30 (1977), and People v Hunt, 442 Mich 359, 362–65 (1993). MCL 712A.11(6) provides that a petition may be amended at any stage of the proceedings, as the ends of justice require.

17.21 Motions to Dismiss or Remand Following Preliminary Examinations

MCR 3.953(E) provides that the preliminary examination in a designated case must be conducted in accordance with MCR 6.110, which deals with preliminary examinations in criminal cases. Once an examining magistrate has bound over an adult defendant for trial in a court of general criminal jurisdiction, the defense may challenge the bindover and move to quash the information or remand the case to the district court for further proceedings. MCR 6.110(H) provides that if, on proper motion, the trial court finds a violation of the following rules, it must either dismiss the information or remand the case to district court for further proceedings:
• MCR 6.110(C), which deals with the conduct of the examination;

• MCR 6.110(D), which deals with the exclusion or admission of evidence at the examination;

• MCR 6.110(E), which deals with the probable cause finding of the magistrate; and

• MCR 6.110(F), which deals with discharge of the defendant upon a finding of no probable cause.

In the context of designated case proceedings, where the authorized petition serves as the criminal information, and where a judge other than the trial judge must serve as the examining magistrate, MCR 6.110(H) must be construed to afford the juvenile the procedural protections and guarantees that would be available to an adult criminal defendant. See MCL 712A.2d(7). These protections and guarantees include:

• The right to a preliminary examination. If the accused waived the statutory right to a preliminary examination without having the benefit of counsel at the time of waiver, upon timely motion before trial or plea, the trial judge may remand the case to a magistrate for a preliminary examination. MCL 767.42(1).*

• A prompt examination. MCL 766.4 requires that the examination be held within 14 days of arraignment. MCR 3.953(D) mirrors this requirement. The examination may be adjourned, continued, or delayed for good cause shown. See MCR 6.110(B) and People v Crawford, 429 Mich 151, 156–57 (1987).*

• Questioning of the complainant and prosecution witnesses in the presence of the accused with regard to the offense charged and any other matters connected to the charged offense that the magistrate deems pertinent. MCL 766.4.*

• A showing that a crime has been committed and that the accused committed the alleged crime. People v Greenberg, 176 Mich App 296, 305–07 (1989), and People v Makela, 147 Mich App 674, 679–82 (1985). The prosecuting attorney must make a prima facie case for each element of the crime charged before the accused can be ordered to stand trial. People v Uhl, 169 Mich App 217, 220–21 (1988).*

• The calling and examination of defense witnesses, with the assistance of counsel. MCL 766.12.*

• “Good reason” for the magistrate to believe that the defendant is guilty of the crime charged. People v King, 412 Mich 145, 153 (1981).
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*See Section 17.15 for a discussion of which judges may review probable-cause findings in designated cases.

- Trial court review of the magistrate’s finding of probable cause. People v Stewart, 52 Mich App 477 (1974). When a magistrate has ordered an accused bound over for trial, a review of that order is limited to the contents of the preliminary examination transcript. People v Waters, 118 Mich App 176, 183 (1982).*


- Trial court determination of the admissibility of evidence allowed or excluded during the preliminary examination. MCR 6.110(D) provides that this may be based on any prior evidentiary record, a prior record supplemented with a hearing before the trial court, or a new evidentiary hearing if there was no prior evidentiary hearing.

The remedies that MCR 6.110(H) provides upon a violation of MCR 6.110(C)–(F) include quashing the information (which dismisses the prosecution) or, in the alternative, remanding the case for further proceedings before the magistrate. In the context of designated proceedings, this would mean either that the petition would be dismissed without prejudice, or that the matter would be remanded to the judge who conducted the preliminary examination for further proceedings.

In In re Abraham, 234 Mich App 640 (1999), the trial court denied defendant’s motion to quash the petition. Defendant, who was 11 years old at the time, allegedly fatally shot one person and attempted to shoot another person. The prosecuting attorney designated defendant’s case for criminal trial in the Family Division. At the “probable cause hearing,” friends of defendant testified that defendant broke into a house, stole a rifle, practiced shooting balloons and streetlights, threatened to shoot gang members, and then boasted about having shot someone. The Family Division bound defendant over for trial on one count of first-degree murder, one count of assault with intent to commit murder, and two counts of felony firearm.

The Court of Appeals affirmed the magistrate’s decision to bind over defendant on all charges. Although testimony showed that defendant shot at inanimate objects prior to his alleged shooting of the dead victim, other evidence sufficiently established his intent to kill to allow defendant to be bound over for trial on the first-degree murder charge. As to the charge of assault with intent to commit murder, the victim testified that he heard a bullet go past his head, and that he then saw defendant fleeing with what appeared to be a rifle in his hand. This testimony, coupled with defendant’s alleged statement that he planned on killing someone, were sufficient to establish defendant’s intent for purposes of bindover.
### 17.22 Table Summarizing Requirements to Initiate Designated Case Proceedings

The following table summarizes the different requirements for initiating the two types of designated case proceedings.

<table>
<thead>
<tr>
<th>What Types of Offenses May Be Alleged?</th>
<th>Prosecutor-Designated Cases</th>
<th>Court-Designated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>A specified juvenile violation must be alleged. MCR 3.903(D)(6).</td>
<td>Any offense, felony or misdemeanor, other than a specified juvenile violation may be alleged. MCR 3.903(D)(2).</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What Must Be Stated on the Petition?</th>
<th>Prosecutor-Designated Cases</th>
<th>Court-Designated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutor must endorse petition with designation of case for criminal trial in Family Division. MCR 3.903(D)(6) and 3.914(D)(1).</td>
<td>Prosecutor must submit petition requesting the court to designate case for criminal trial in Family Division. MCR 3.903(D)(2) and 3.914(D)(2).</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>How and When May a Petition Without a Designation Be Amended?</th>
<th>Prosecutor-Designated Cases</th>
<th>Court-Designated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutor may amend petition to designate the case by right during a preliminary hearing, or prosecutor may request leave of court to designate the case no later than a pretrial hearing or, if no pretrial hearing is held, no later than 21 days before trial, absent good cause for further delay. MCR 3.951(A)(3). Court may also permit prosecutor to amend the petition to designate the case as the interests of justice require. MCR 3.951(A)(3).</td>
<td>Prosecutor may amend petition to request the court to designate the case by right during a preliminary hearing, or prosecutor may request leave of court to amend the petition to request the court to designate the case no later than a pretrial hearing or, if no pretrial hearing is held, no later than 21 days before trial, absent good cause for further delay. MCR 3.951(B)(3). Court may also permit prosecutor to amend the petition to request the court to designate the case as the interests of justice require. MCR 3.951(B)(3).</td>
<td></td>
</tr>
</tbody>
</table>
### Section 17.22
#### What Are the Time Requirements for Arraignments in Family Division?

<table>
<thead>
<tr>
<th>Prosecutor-Designated Cases</th>
<th>Court-Designated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>If juvenile is in custody or custody is requested, arraignment must commence within 24 hours after taking custody of juvenile, excluding Sundays and holidays, or juvenile must be released. MCR 3.951(A)(1)(a).</td>
<td>If juvenile is in custody or custody is requested, arraignment must commence within 24 hours after taking custody of juvenile, excluding Sundays and holidays, or juvenile must be released. MCR 3.951(B)(1)(a).</td>
</tr>
<tr>
<td>Arraignment may be adjourned up to 7 days to secure attendance of juvenile’s parent, guardian, or legal custodian, or for other good cause shown. MCR 3.951(A)(1)(a).</td>
<td>Arraignment may be adjourned up to 7 days to secure attendance of juvenile’s parent, guardian, or legal custodian, or for other good cause shown. MCR 3.951(B)(1)(a).</td>
</tr>
<tr>
<td>If juvenile is not in custody and custody is not requested, arraignment must commence as soon as juvenile’s attendance can be secured. MCR 3.951(A)(1)(b).</td>
<td>If juvenile is not in custody and custody is not requested, arraignment must commence as soon as juvenile’s attendance can be secured. MCR 3.951(B)(1)(b).</td>
</tr>
</tbody>
</table>

**Prosecution-Designated Cases**

- Prosecutor discretion.

**Court-Designated Cases**

- Prosecutor requests that the court designate the case. If the court authorizes the petition, a designation hearing must commence within 14 days of arraignment unless adjourned for good cause. MCR 3.951(B)(2)(c)(ii) and 3.952(A).

At hearing, court decides whether to designate the case by using the factors in MCR 3.952(C)(3)(a)–(f).

The designation hearing may be combined with the preliminary examination. MCR 3.953(C).
**What are the Requirements for the Preliminary Examination?**

<table>
<thead>
<tr>
<th>Prosecutor-Designated Cases</th>
<th>Court-Designated Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exam is required unless waived by juvenile in a writing made and signed in open court, and juvenile is represented by an attorney; the judge must find and place on the record that the waiver was freely, understandingly, voluntarily given. MCR 3.953(B). Exam must commence within 14 days of arraignment unless adjourned for good cause shown, and must be conducted in accordance with MCR 6.110. MCR 3.953(D)–(E).</td>
<td>Exam is required for felonies and offenses punishable by imprisonment for more than 1 year unless waived by juvenile in a writing made and signed in open court, and juvenile is represented by an attorney; the judge must find and place on the record that the waiver was freely, understandingly, and voluntarily given. MCR 3.953(A)–(B). Exam must commence within 14 days of court-ordered designation, unless the exam was combined with the designation hearing; exam may be adjourned for good cause shown, and must be conducted in accordance with MCR 6.110. MCR 3.953(D)–(E).</td>
</tr>
</tbody>
</table>
### 17.23 Table of Time and Notice Requirements in Designated Case Proceedings

The following table contains time and notice requirements only; for contents of notices, see the appropriate sections. To compute time periods, see MCR 1.108. For court holidays, see MCR 8.110(D).

<table>
<thead>
<tr>
<th>Type of Proceeding</th>
<th>Time and Notice Requirements</th>
<th>Authorities and Cross-References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arraignment</td>
<td>If juvenile is in custody or custody is requested, arraignment must be held within 24 hours after juvenile has been taken into court custody, excluding Sundays and holidays. As soon as hearing is scheduled, notice must be given in person, on record, or by phone to juvenile and his or her parent. If juvenile is not in custody, arraignment must be held as soon as juvenile’s attendance can be secured. Court may adjourn arraignment for up to 7 days to secure attendance of juvenile’s parent, guardian, or legal custodian, or for other good cause shown.</td>
<td>MCR 3.951(A)(1)(a) and 3.951(B)(1)(a). See Section 17.6</td>
</tr>
</tbody>
</table>

|                  |                              | MCR 3.951(A)(1)(b) and 3.951(B)(1)(b). See Section 17.6 |
### Chapter 17

#### Motion to Amend

<table>
<thead>
<tr>
<th>Type of Proceeding</th>
<th>Time and Notice Requirements</th>
<th>Authorities and Cross-References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motion to Amend Petition to Designate Case for Criminal Trial in Family Division</td>
<td>If a specified juvenile violation is alleged but prosecutor did not initially designate the case, prosecutor may amend the petition by right during the preliminary hearing, or by leave of court no later than a pretrial hearing. If no pretrial hearing is held, prosecutor may request leave to amend no later than 21 days before trial, absent good cause for further delay. Court may allow amendment in interest of justice. If an offense other than a specified juvenile violation is alleged, prosecutor may amend the petition by right to request the court to designate case during the preliminary hearing, or by leave of court no later than a pretrial hearing. If no pretrial hearing is held, prosecutor may request leave to amend no later than 21 days before trial, absent good cause for further delay. Court may allow amendment in interest of justice. If a hearing is required, seven days’ notice in writing or on record must be given to juvenile, custodial parent or guardian, or legal custodian, noncustodial parent who has requested notice at a hearing or in writing, guardian ad litem, attorney for juvenile, prosecuting attorney, and petitioner.</td>
<td>MCR 3.951(A)(3). See Section 5.5 MCR 3.951(B)(3). See Section 5.5 MCR 3.920(C)(1) and 3.921(A)(1). See Sections 6.3 and 6.7</td>
</tr>
<tr>
<td>Type of Proceeding</td>
<td>Time and Notice Requirements</td>
<td>Authorities and Cross-References</td>
</tr>
<tr>
<td>-------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Designation Hearings</td>
<td>Hearing must be commenced within 14 days after arraignment, unless adjourned for good cause. Notice in writing, on the record, or in another manner reasonably calculated to provide notice must be given to juvenile, parent, guardian, or legal custodian, attorney for juvenile, and prosecuting attorney. The petition, or a copy of the petition, and a separate request for court designation must be personally served on juvenile, and if address or whereabouts known or discoverable by due diligence, parent, guardian, or custodian.</td>
<td>MCR 3.952(A). See Section 17.10(B) 3.952(B)(2). See Section 17.10(B) MCR 3.952(B)(1). See Section 17.10(B)</td>
</tr>
<tr>
<td>Preliminary Examinations</td>
<td>Examination must commence within 14 days of arraignment in a prosecutor-designated case, or within 14 days of court designation in a court-designated case unless the preliminary examination was combined with designation hearing. Examination may be adjourned for good cause. Finding must be made on the record.</td>
<td>MCR 3.953(D). See Section 17.18 MCR 6.110(B)(1). See Section 17.18</td>
</tr>
<tr>
<td>Trials in Designated Cases</td>
<td>In all cases, prejudice to the defendant is presumed where delay between arrest and trial exceeds 18 months.</td>
<td>MCL 768.1 and People v Grimmett, 388 Mich 590, 606 (1972). See Chapter 18</td>
</tr>
<tr>
<td>Adult Sentencing Hearings</td>
<td>Court must sentence defendant within a reasonably prompt time, unless court delays sentencing as provided by law. Presentence report must be disclosed to prosecutor, defendant, and defense counsel at a reasonable time before the day of sentencing.</td>
<td>MCR 3.955(C) and 6.425(D)(2). See Section 19.3 MCR 6.425(B). See Section 19.3</td>
</tr>
<tr>
<td>Type of Proceeding</td>
<td>Time and Notice Requirements</td>
<td>Authorities and Cross-References</td>
</tr>
<tr>
<td>--------------------</td>
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</tr>
<tr>
<td>Annual Review of Delayed Imposition of Adult Sentence</td>
<td>Court must conduct review annually. No notice or hearing is required.</td>
<td>MCR 3.956(A)(1)(a)(i). See Section 22.2</td>
</tr>
<tr>
<td>Periodic Review Hearing of Delayed Imposition of Adult Sentence</td>
<td>Court may conduct a hearing at any time upon petition of institution or agency to which juvenile has been committed. Not less than 14 days before hearing is to be conducted, court must notify the prosecutor, the agency or superintendent of the institution or facility to which the juvenile has been committed, the juvenile, and, if addresses are known, the juvenile’s parent, guardian, or legal custodian.</td>
<td>MCR 3.956(A)(1)(a)(ii). MCR 3.956(A)(1)(b). See Section 22.2</td>
</tr>
<tr>
<td>Mandatory Hearing to Review Delayed Imposition of Adult Sentence</td>
<td>Court must conduct hearing within 42 days of juvenile’s 19th birthday, unless adjourned for good cause. Not less than 14 days before hearing is to be conducted, court must notify the prosecutor, the agency or superintendent of the institution or facility to which the juvenile has been committed, the juvenile, and, if addresses are known, the juvenile’s parent, guardian, or legal custodian.</td>
<td>MCR 3.956(A)(1)(a)(iii). MCR 3.956(A)(1)(b). See Section 22.3(A), Section 22.3(B)</td>
</tr>
<tr>
<td>Final Review Hearing of Delayed Imposition of Adult Sentence</td>
<td>Court must conduct hearing not less than 91 days before the end of probation period. Not less than 14 days before hearing is to be conducted, court must notify the prosecutor, the agency or superintendent of the institution or facility to which the juvenile has been committed, the juvenile, and, if addresses are known, the juvenile’s parent, guardian, or legal custodian.</td>
<td>MCR 3.956(A)(1)(a)(iv). MCR 3.956(A)(1)(b). See Section 22.8, Section 22.8(A)</td>
</tr>
<tr>
<td>Type of Proceeding</td>
<td>Time and Notice Requirements</td>
<td>Authorities and Cross-References</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Probation Violation Hearing in Designated Case Involving Delayed Imposition of Adult Sentence</td>
<td>If a hearing is required, it must be conducted pursuant to MCR 3.944(C).</td>
<td>MCR 3.956(B)(3). See Sections 22.5–22.7</td>
</tr>
</tbody>
</table>
This chapter briefly discusses the procedural requirements for pleas and trials in designated case proceedings. With a few exceptions, which are noted in this chapter, the procedural requirements for pleas and trials in designated case proceedings are the same as those in adult criminal proceedings. However, a complete discussion of those requirements is beyond the scope of this benchbook.

For discussion of plea bargains, see Section 8.6. For discussion of plea withdrawal, see Section 21.8. For discussion of fingerprinting and recordkeeping requirements, see Chapter 25.

**Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).

### 18.1 Court Rules Governing Pleas and Trials in Designated Case Proceedings

MCL 712A.2d(7) states:

“If a case is designated under this section, the proceedings are criminal proceedings and shall afford all procedural protections and guarantees to which the
Section 18.2

juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction. A plea of guilty or nolo contendere or a verdict of guilty shall result in entry of a judgment of conviction. The conviction shall have the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction.”

**Pleas.** “Pleas in designated cases are governed by subchapter 6.300.” MCR 3.954. The court rules that govern guilty pleas and no contest pleas in designated cases are as follows:

- MCR 6.301–6.312—Pleas in Felony Cases
- MCR 6.610(E)—Pleas in Misdemeanor Cases. For a detailed discussion of misdemeanor pleas, see Criminal Procedure Monograph 3, Misdemeanor Arraignments and Pleas (MJi, 1992).

**Trials.** MCR 3.954 states that “[t]rials of designated cases are governed by Subchapter 6.400 of the Michigan Court Rules except for MCR 6.402(A). The court may not accept a waiver of trial by jury until after the juvenile has been offered an opportunity to consult with a lawyer.”* Subchapter 6.400 governs the procedures for trials in criminal cases.

Jury procedure is governed by MCR 6.401–6.420. MCR 3.911(C)(4). In addition, MCL 712A.17(2) provides that the summoning and impaneling of jurors shall be governed by Chapter VIII (Trials) of the Code of Criminal Procedure (MCL 768.1 et seq.).

**18.2 Judges Who May Accept Pleas or Conduct Trials**

The judge who presides at a preliminary examination may accept a plea in the designated case. MCR 3.912(C)(1). Moreover, the juvenile has the right to demand that the same judge who accepted the plea in a designated case preside at sentencing or delayed imposition of sentence, but not at a juvenile disposition of the designated case. MCR 3.912(C)(2).*

MCR 3.912(A)(3) requires a judge to preside at a jury or nonjury trial in a designated case proceeding. The judge who presides at the preliminary examination may not preside at the trial of the same designated case unless a determination of probable cause was waived. MCR 3.912(C)(1).

**18.3 Waiver of the Right to Jury Trial**

A criminal defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury. MCR 6.401 and MCL 763.3.
A defendant’s constitutional rights to trial by jury are contained in Const 1963, art 1, § 20, and US Const, Am VI. However, a criminal defendant has no constitutional or substantive right to insist upon a nonjury trial. *People v Kirby*, 440 Mich 485, 494 (1992) (requiring consent of prosecutor to waiver of jury trial does not violate due process).


In designated cases, the court may not accept a waiver of trial by jury until after the juvenile has been offered an opportunity to consult with a lawyer. MCR 3.954. In delinquency cases, a jury trial is automatically waived unless the juvenile makes a demand for a jury trial.

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. MCR 6.402(B).

The waiver procedure in MCR 6.402(B) differs from that contained in MCL 763.3(2), which requires a writing signed in open court by the defendant. The statute has been superseded by the court rule. *People v James*, 184 Mich App 457, 464 (1990).

### 18.4 Number of Jurors

MCR 6.410(A) states that, except as provided by this rule, a jury that decides a case must consist of 12 jurors.

### 18.5 Rules of Evidence and Standard of Proof


### 18.6 Verdicts in Designated Cases

**Not Guilty.** A verdict of “not guilty” shall serve as a finding that the defendant is not within the provisions of the Juvenile Code, MCL 712A.1 et seq., and the court shall enter an order dismissing the petition. MCL 712A.18(1).
**Guilty.** A jury verdict of “guilty” serves as a finding that the defendant is within the provisions of the Juvenile Code, MCL 712A.1 et seq., for the offense and is a conviction. The conviction has the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction. MCL 712A.2d(7).

### 18.7 Crime Victim Rights in Designated Case Proceedings

Article 2 of the Crime Victim’s Rights Act, MCL 780.751 et seq., applies to felonies and “serious misdemeanors” committed by juveniles. MCL 780.781(1)(f). For purposes of Article 2, “juveniles” are individuals less than 17 years old who are charged in delinquency or designated case proceedings. MCL 780.781(1)(d). However, for purposes of enforcing a restitution order against the parent of a juvenile who has been convicted in a designated case proceeding, Article 1 of the Crime Victim’s Rights Act applies. MCL 780.766(15)(a).
Chapter 19: Designated Case Proceedings—Sentencing & Dispositional Options

In this chapter. . .

This chapter discusses the court’s options following conviction in a designated case proceeding. Following conviction, a Family Division judge may order a juvenile disposition, impose a sentence in the same manner as an adult, or order an “adult sentence” but delay imposition of that sentence. Different procedural rules apply depending upon the court’s decision.

A comparison of waiver and designated case proceedings may be found in Section 1.6. Discussion of the rules governing juvenile dispositions is contained in Chapter 10. For case law on the decision to sentence a juvenile as an adult in “automatic waiver” proceedings, see Section 21.3.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).
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19.1 Court’s Options Following Convictions in Designated Case Proceedings

MCL 712A.2d(8) provides that following a judgment of conviction in a designated case, the court must enter a disposition or impose a sentence authorized under MCL 712A.18(1)(n). See also MCR 3.955(A), which states in part “[i]f a juvenile is convicted under MCL 712A.2d, sentencing or disposition shall be made as provided in MCL 712A.18(1)(n) and the Crime Victim’s Rights Act, MCL 780.751 et seq., if applicable.”*

MCL 712A.18(1)(n) states in relevant part:

“If the court entered a judgment of conviction under section 2d of this chapter, [the court may] enter any disposition under this section or, if the court determines that the best interests of the public would be served, impose any sentence upon the juvenile that could be imposed upon an adult convicted of the offense for which the juvenile was convicted. If the juvenile is convicted of a violation or conspiracy to commit a violation of [MCL 7403(2)(a)(i)], the court may impose the alternative sentence permitted under that section if the court determines that the best interests of the public would be served.* The court may delay imposing a sentence of imprisonment under this subdivision for a period not longer than the period during which the court has jurisdiction over the juvenile under this chapter by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate, including any disposition under this section. If the court delays imposing sentence under this section, section 18i of this chapter applies. If the court imposes sentence, it shall enter a judgment of sentence. If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing.

Thus, MCL 712A.18(1)(n) allows the court to:

• enter any disposition allowed under MCL 712A.18;* or

• if the court determines that the best interests of the public would be served, impose any sentence, including probation or an alternative sentence provided by statute, upon the juvenile that could be imposed upon an adult convicted of the same offense;* or

*See Section 4.3 for the applicability of the Crime Victim’s Rights Act.

*See Section 23.4 for a discussion of this alternative sentence.

*See Section 19.3, below, and Chapter 10.

*See Sections 19.3–19.6, below, and Chapter 23.
• delay imposing a sentence of imprisonment while the court has jurisdiction over the juvenile by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate, including any disposition allowed under MCL 712A.18.*

MCR 3.903(D)(7) defines sentencing, in the context of designated case proceedings, as the imposition of any sanction on a juvenile that could be imposed on an adult convicted of the same offense, or the decision to delay the imposition of such a sanction. Thus, the definition excludes juvenile dispositions.

19.2 Factors to Determine Whether to Impose a Juvenile Disposition or Adult Sentence

MCL 712A.18(1)(n) states in relevant part:

“In determining whether to enter an order of disposition or impose a sentence under this subdivision, the court shall consider all of the following factors, giving greater weight to the seriousness of the offense and the juvenile’s prior record:

(i) The seriousness of the offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

(ii) The juvenile’s culpability in committing the offense, including, but not limited to, the level of the juvenile’s participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

(iii) The juvenile’s prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

(iv) The juvenile’s programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
Section 19.3

(v) The adequacy of the punishment or programming available in the juvenile justice system.

(vi) The dispositional options available for the juvenile.”

MCR 3.955(A)(1)–(6) contain substantially similar criteria.

Although MCL 712A.18(1)(n) requires a court to consider the factors listed in that statute but does not require factual findings on each factor, the Court of Appeals has made such factual findings a requirement of meaningful review. See People v Passeno, 195 Mich App 91, 103 (1992), overruled on other grounds 229 Mich App 218 (1998), and People v Miller, 199 Mich App 609, 612 (1993). The court must “sort the logical, reasonable, and believable evidence on the record from the incredible or irrelevant,” and based on these findings, “consider and balance all the [statutory] factors to decide whether to sentence a defendant as a juvenile or adult.” People v Thenghkam, 240 Mich App 29, 67 (2000), citing People v Cheeks, 216 Mich App 470, 478–79 (1996).

19.3 Hearing Procedures

Time requirements. No time requirement is specified in the applicable statutes or court rules for the court’s decision on whether to sentence the juvenile as an adult or to order a juvenile disposition. However, a sentencing hearing must be held within a reasonably prompt time after the plea or verdict, MCR 6.425(D)(2), and a dispositional hearing must be held within 35 days of the plea or adjudication if the juvenile is detained or the juvenile must be released, MCR 3.943(B). Thus, the court should determine whether it will order a disposition or impose a sentence within a period that would permit the court to comply with these requirements.

Standard and burden of proof. MCR 3.955(B) states:

“The court shall enter an order of disposition unless the court determines that the best interests of the public would be served by sentencing the juvenile as an adult. The prosecuting attorney has the burden of proving by a preponderance of the evidence that, on the basis of the criteria listed [in Section 19.2, above] it would be in the best interests of the public to sentence the juvenile as an adult.”

Disposition or sentencing hearing. If the court does not determine that the juvenile should be sentenced as an adult, the court must hold a dispositional hearing and comply with the procedures in MCR 3.943. MCR 3.955(E). If the court determines that the juvenile should be sentenced as an adult, either
initially or following delayed imposition of sentence, the sentencing hearing must be held in accordance with MCR 6.425. MCR 3.955(C).

**Reports.** An FIA Juvenile Justice Specialist and Department of Corrections Probation Officer will typically prepare Presentence Information Reports. See MCL 771.14, MCL 771.14a, MCL 803.224, and FIA Services Manual, Item 812.1.

**Judges who may preside at a sentencing hearing.** A judge must preside at a sentencing in a designated case. MCR 3.912(A)(3). “The juvenile has the right to demand that the same judge who accepted the plea or presided at the trial of a designated case preside at sentencing or delayed imposition of sentence, but not at a juvenile disposition of the designated case.” MCR 3.912(C)(2).

**Entering a judgment of sentence and granting credit for time served before sentencing.** “If the court imposes sentence, it shall enter a judgment of sentence. If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing.” MCL 712A.18(1)(n).*

### 19.4 Offenses for Which Juveniles May Be Sentenced to Prison

Juveniles convicted of specified juvenile violations* and sentenced under MCL 712A.18(1)(n) may be committed to the Department of Corrections. MCL 712A.18h states:

“A juvenile sentenced to imprisonment under section 18(1)(n) of this chapter shall not be committed to the jurisdiction of the department of corrections. This section does not apply if the juvenile was convicted of a specified juvenile violation as defined in section 2d of this chapter.”

A juvenile may also be sentenced to prison for a lesser-included offense of a specified juvenile violation, or for any other offense arising out of the same transaction, if the juvenile was charged with a specified juvenile violation. Consequently, prison is an option for all prosecutor-designated cases, but is not initially an option in court-designated cases.

MCL 712A.18h states that juveniles “sentenced to imprisonment under section 18(1)(n) of this chapter shall not be committed to the jurisdiction of the department of corrections.” This limitation does not apply to juveniles convicted of specified juvenile violations. Id. Because MCL 712A.18(1)(n) deals with the initial decision to impose or delay imposition of sentence, it is unclear whether juveniles may be committed to the Department of Corrections during the delay in imposition of sentence.

*See SCAO Forms JC 71 and 72. See Section 23.2 for a discussion of credit for time served before sentencing.

*See Section 17.1(A) for the list of specified juvenile violations.
When imposition of an adult sentence has been delayed, the court may impose sentence at any time during the delay under MCL 712A.18i, and section (11) of that statute contemplates a sentence of imprisonment. Thus, it appears that commitment to the Department of Corrections is a sentencing option in court-designated cases during the period that the court has jurisdiction over the juvenile.

19.5 Offenses for Which Adult Probation May Be Ordered

The court may place the juvenile on adult probation when allowed by law. See, however, MCL 771.1 (adult probation precluded for murder, first- or third-degree criminal sexual conduct, armed robbery, and major controlled substance offenses other than MCL 333.7401(2)(a)(iv) or 333.7403(2)(a)(iv)), and People v Blyth, 417 Mich 430, 435–36 (1983) (Court’s interpretation of the phrase “life or any term of years” to require imprisonment may preclude probation for assault with intent to murder, assault with intent to commit armed robbery, attempted murder, kidnapping, carjacking, bank, safe, or vault robbery, or conspiracy to commit these offenses).

If the court, following conviction in a designated case, imposes a sentence of probation in the same manner as probation could be imposed upon an adult convicted of the same offense for which the juvenile was convicted, the probation supervision and related services shall not be performed by employees of the Department of Corrections. MCL 712A.9a. In such cases, probation supervision and related services will be performed by Family Division probation officers or by Family Independence Agency delinquency workers.

19.6 Requirements for Imposing Jail Sentences

MCL 769.28 requires a person sentenced to one year or less to serve that sentence in a county jail rather than a state institution. MCL 712A.18(16) states:

“The court shall not impose a sentence of imprisonment in the county jail under [MCL 712A.18(1)(n)] unless the present county jail facility for the juvenile’s imprisonment would meet all requirements under federal law and regulations for housing juveniles. The court shall not impose the sentence until it consults with the sheriff to determine when the sentence will begin to ensure that space will be available for the juvenile.”*
19.7 Required Procedures for Delayed Imposition of Adult Sentences

MCL 712A.18(1)(n) states in relevant part:

“The court may delay imposing a sentence of imprisonment under this subdivision for a period not longer than the period during which the court has jurisdiction over the juvenile under this chapter by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate, including any disposition under this section.* If the court delays imposing sentence under this section, section 18i of this chapter applies. If the court imposes sentence, it shall enter a judgment of sentence. If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing.”

See also MCR 3.955(D), which states:

“If the court determines that the juvenile should be sentenced as an adult, the court may, in its discretion, enter an order of disposition delaying imposition of sentence and placing the juvenile on probation on such terms and conditions as it considers appropriate, including ordering any disposition under MCL 712A.18. A delayed sentence may be imposed in accordance with MCR 3.956.”

According to MCL 712A.18i(1), a delay in sentencing does not deprive the court of jurisdiction to sentence the juvenile under MCL 712A.18(1)(n) at any time during the delay.*

If the court, following conviction in a designated case, enters an order of disposition delaying imposition of sentence and placing the juvenile on probation, the probation supervision and related services shall not be performed by employees of the Department of Corrections. MCL 712A.9a. In such cases, probation supervision and related services will be performed by Family Division probation officers or by Family Independence Agency delinquency workers.
Chapter 20: “Automatic Waiver” Proceedings—Arraignments & Preliminary Examinations

In this chapter . . .

“Automatic waiver” proceedings may be instituted when a prosecuting attorney decides to file a complaint in district court alleging a specified juvenile violation instead of filing a delinquency petition in the Family Division of Circuit Court. If the juvenile is bound over for trial following a preliminary examination, he or she faces criminal trial in the Circuit Court. This chapter discusses the procedural requirements for arraignments and preliminary examinations in “automatic waiver” proceedings. It does not contain discussion of trial or plea procedure.

Related issues are discussed in the following sections of this benchbook:

- comparison of waiver and designated case proceedings, Section 1.6;
- jurisdiction, Section 2.6;
- custody and detention, Section 3.10;
- “special adjournment” of preliminary hearings to allow the prosecuting attorney decide whether to proceed under the “automatic waiver” statutes, Section 3.6; and
- admissibility of confessions, Section 7.5.
Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).

20.1 Court Rules That Apply to “Automatic Waiver” Proceedings in District and Circuit Courts

MCR 6.901(B) provides that the rules in Subchapter 6.900 apply to criminal proceedings in the district court and circuit court concerning a juvenile against whom the prosecuting attorney has authorized the filing of a criminal complaint charging a “specified juvenile violation” instead of approving the filing of a petition in the Family Division of Circuit Court. Following the filing of a complaint and warrant in district court, the rules in Subchapter 6.900 take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders. MCR 6.901(A). A complete discussion of the rules of criminal procedure not contained in Subchapter 6.900 is beyond the scope of this benchbook.

The rules do not apply to cases where there has been a “traditional” waiver of jurisdiction over the juvenile pursuant to MCL 712A.4. MCR 6.901(B).*

20.2 “Automatic Waiver” of Family Division Jurisdiction

Under MCL 712A.2(a)(1), the Family Division has jurisdiction over a juvenile 14 years of age or older who is charged with a “specified juvenile violation” only if the prosecuting attorney files a petition in the Family Division instead of authorizing a complaint and warrant and proceeding in district court.* MCL 600.606(1) states that “[t]he circuit court has jurisdiction to hear and determine a specified juvenile violation if committed by a juvenile 14 years of age or older and less than 17 years of age.”

Note: Although MCL 600.606(1) assigns jurisdiction to “circuit court” and the Family Division is within the circuit court, “automatic waiver” cases are heard in the Criminal Division of Circuit Court. See MCL 600.601(3) and 600.1021(1)(e), limiting the Family Division’s jurisdiction to cases under the Juvenile Code, MCL 712A.1 et seq. MCR 6.903(C) defines “court” as the
circuit court as provided in MCL 600.606, but not including the
Family Division of Circuit Court.

MCL 712A.2(a)(1)(A)–(I), MCL 600.606(2)(a)–(i), and MCL 764.1f(2)(a)–
(i) list the specified juvenile violations. The “specified juvenile violations”
are as follows:

- burning a dwelling house, MCL 750.72;
- assault with intent to murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- bank, safe, or vault robbery, MCL 750.531;
- assault with intent to do great bodily harm, MCL 750.84, if
  armed with a dangerous weapon;
- first-degree home invasion, MCL 750.110a(2), if armed with a
dangerous weapon;
- escape or attempted escape from a medium- or high-security
  juvenile facility operated by the Family Independence Agency
  or a county juvenile agency, or a high-security facility operated
  by a private agency under contract with the Family
  Independence Agency or a county juvenile agency, MCL
  750.186a;
20.3 Prosecutorial Charging Discretion

MCL 764.1f(1) sets forth the required procedure for divesting the Family Division of jurisdiction and vesting jurisdiction in the Criminal Division when a “specified juvenile violation” is alleged. That provision states as follows:

“If the prosecuting attorney has reason to believe that a juvenile 14 years of age or older but less than 17 years of age has committed a specified juvenile violation, the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile.”

Whether to proceed in the Family Division or Criminal Division of Circuit Court on an enumerated offense is a matter of prosecutorial discretion. A prosecutorial policy to authorize complaints and warrants in all cases

The probate court (now the Family Division of the Circuit Court) did not abuse its discretion in dismissing a petition on the prosecutor’s motion, where the prosecutor immediately filed a complaint under the “automatic waiver” statutes. There was no denial of due process or bad faith on the part of the prosecutor, as the juvenile was neither detained nor prejudiced by any delay, and the prosecutor dismissed the petition based on the seriousness of the alleged offenses, newly discovered evidence, and a belief that the alleged offenses were part of a conspiracy. *People v Dilling*, 222 Mich App 44, 47–50 (1997).

20.4 Right to Counsel

The magistrate or court must advise a juvenile of his or her right to counsel at each stage of the proceedings. MCR 6.905(A) states as follows:

“If the juvenile is not represented by an attorney, the magistrate or court shall advise the juvenile at each stage of the criminal proceedings of the right to the assistance of an attorney. If the juvenile has waived the right to an attorney, the court at later proceedings must reaffirm that the juvenile continues to not want an attorney.”

**Appointment of counsel.** The court must appoint an attorney to represent the juvenile unless counsel has been retained or the juvenile has waived the right to an attorney. MCR 6.905(B).

**Waiver of right to counsel.** Under MCR 6.905(C)(1)–(5), the magistrate or court may permit waiver of the right to counsel if:

“(1) an attorney is appointed to give the juvenile advice on the question of waiver;

“(2) the magistrate or the court finds that the juvenile is literate and is competent to conduct a defense;

“(3) the magistrate or the court advises the juvenile of the dangers and of the disadvantages of self-representation;

“(4) the magistrate or the court finds on the record that the waiver is voluntarily and understandingly made; and

“(5) the court appoints standby counsel to assist the juvenile at trial and at the juvenile sentencing hearing.”
Costs. The court may assess costs of legal representation, in whole or in part, against the juvenile, a person responsible for the support of the juvenile, or both. An order assessing costs shall not be binding on a person responsible for the juvenile’s support unless an opportunity for a hearing has been given and until a copy of the order is served on the person, in person or by first-class mail, to the person’s last-known address. MCR 6.905(D).

20.5 Arraignments in District Court

“When the prosecuting attorney authorizes the filing of a complaint and warrant charging a juvenile with a specified juvenile violation instead of approving the filing of a petition in the family division of circuit court, the juvenile in custody must be taken to the magistrate for arraignment on the charge.* The prosecuting attorney must make a good-faith effort to notify the parent of the juvenile of the arraignment.” MCR 6.907(A).

A. Time Requirements

“The juvenile must be released if arraignment has not commenced:

(1) within 24 hours of the arrest of the juvenile; or

(2) within 24 hours after the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 3.935(A)(3), provided the juvenile is being detained in a juvenile facility.” MCR 6.907(A)(1)–(2).

B. Required Procedures

MCR 6.907(C)(1)–(2) set forth the required procedure for arraignments:

“At the arraignment on the complaint and warrant:

(1) The magistrate shall determine whether a parent, guardian, or an adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the magistrate appoints an attorney to appear at arraignment with the juvenile or provided an attorney has been retained and appears with the juvenile.

(2) The magistrate shall set a date for the juvenile’s preliminary examination within the next 14 days, less time given and used by the prosecuting attorney under special adjournment.
pursuant to MCR 3.935(A)(3), up to three days credit. The magistrate shall inform the juvenile and the parent, guardian, or adult relative, if present, of the preliminary examination date. If a parent, guardian, or adult relative is not present at the arraignment, the court shall direct the attorney of the juvenile to advise a parent or guardian of the juvenile of the scheduled preliminary examination.”

C. Setting Bail

Unless detention without bail is allowed, the magistrate or court must advise the juvenile of a right to bail as provided for an adult accused.* “The magistrate or the court may order a juvenile released to a parent or guardian on the basis of any lawful condition, including that bail be posted.” MCR 6.909(A)(1).

MCR 6.909(A)(2)(a)–(b) set forth the conditions for detaining a juvenile without bail. Those provisions state:

“(2) If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail:

(a) to a juvenile charged with first-degree murder, second-degree murder, or

(b) to a juvenile charged with first-degree criminal sexual conduct, or armed robbery,

(i) who is likely to flee, or

(ii) who clearly presents a danger to others.”

20.6 Required Procedures at Preliminary Examinations

Preliminary examinations for juveniles in “automatic waiver” cases must follow the same procedures as preliminary examinations for adult defendants charged with criminal offenses. See, generally, MCR 6.110 and MCR 6.901(A) (the rules in Subchapter 6.900 “take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders”).*

A. Time Requirements

Preliminary examinations must be held within 14 days after the juvenile’s arraignment, less any time used by the prosecuting attorney for a special
adjournment pursuant to MCR 3.935(A)(3), up to three days. Thus, the period consumed by the special adjournment, up to three days credit, must be deducted from the 14 days allowed for the conduct of the preliminary examination following district court arraignment. MCR 6.907(C)(2).

**B. Rules of Evidence**

Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. Except as otherwise provided by law, the court must conduct the examination in accordance with the rules of evidence. A verbatim record must be made of the preliminary examination. MCR 6.110(C).

**C. Bindover Decisions Following Preliminary Examinations**

If a district court judge determines that probable cause exists that a “specified juvenile violation” was committed and that the juvenile committed it, the juvenile must be bound over to the Circuit Court, which then has jurisdiction over the juvenile. MCL 766.13. Note that the definition of “specified juvenile violation” includes:

- any attempt, solicitation, or conspiracy to commit one of the “specified juvenile violations”;
- any lesser-included offense arising out of the same transaction as a “specified juvenile violation” if the juvenile is also charged with a “specified juvenile violation”; and
- any other offense arising out of the same transaction if the juvenile is also charged with a “specified juvenile violation.”

MCL 712A.2(a)(1)(E)–(I), MCL 600.606(2)(e)–(i), and MCL 764.1f(2)(e)–(i).

MCL 766.14(2) and MCR 6.911(B) require the magistrate to transfer the case “back” to the Family Division if, at the conclusion of the preliminary examination, the magistrate finds that a “specified juvenile violation” did not occur or that there is not probable cause to believe that the juvenile committed a “specified juvenile violation,” but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense.

As noted above, the definition of “specified juvenile violation” includes lesser-included offenses and other offenses arising out of the same transaction as a “specified juvenile violation” if the juvenile is charged with a “specified juvenile violation.” This suggests that the district court may bind the juvenile over for trial if it finds probable cause that the juvenile committed a lesser-included or other offense rather than the charged enumerated offense. However, the district court may not bind the juvenile
over for trial on these other offenses unless it also finds probable cause that
the juvenile committed an enumerated “specified juvenile violation.” See
Supreme Court held that the circuit court gains jurisdiction over non-
enumerated offenses only if the juvenile is also charged in circuit court
with an enumerated offense, and the circuit court does not lose jurisdiction to
sentence the juvenile if the juvenile is convicted of a lesser-included offense
or other offense that is not an enumerated offense.

On the other hand, the district court may bind the juvenile over to circuit
court if it finds probable cause that the juvenile committed a “specified juvenile violation” other than the offense charged in the district court
complaint. For example, if the juvenile is charged with first-degree murder,
and the district court finds probable cause that the juvenile committed
second-degree murder, the juvenile could be bound over for trial since
second-degree murder is also an enumerated “specified juvenile violation.”

MCR 3.939(A) states that the Family Division must hear and dispose of a
case transferred pursuant to MCL 766.14 in the same manner as if the case
had commenced in the Family Division. A petition that has been approved
by the prosecuting attorney must be submitted to the court. Pursuant to
MCR 3.939(B), the Family Division “may use the probable cause finding of
the magistrate made at the preliminary examination to satisfy the probable
cause requirement of MCR 3.935(D)(1).”

Transfer of the case to the Family Division does not prevent the Family
Division from waiving jurisdiction using the “traditional” waiver
procedures under MCL 712A.4. MCL 766.14(3).

20.7 Waiver of Preliminary Examination

“The juvenile may waive a preliminary examination if the juvenile is
represented by an attorney and the waiver is made and signed by the juvenile
in open court. The magistrate shall find and place on the record that the
waiver was freely, understandably, and voluntarily given.” MCR 6.911(A).

20.8 Juvenile’s Right to a Speedy Trial

Within seven days of the filing of a motion, the court must release a juvenile
who has remained in detention while awaiting trial for more than 91 days.
In computing the 91-day period, the court must exclude delays as provided
in MCR 6.004(C)(1)–(6) and the time required to conduct the hearing on the
motion. MCR 6.909(C).
20.9 Notice of Juvenile Sentencing Hearing

“If a juvenile sentencing hearing is required, the prosecuting attorney, the juvenile, and the attorney of the juvenile must be advised on the record immediately following conviction of the juvenile by a guilty plea or verdict of guilty that a hearing will be conducted at sentencing, unless waived, to determine whether to sentence the juvenile as an adult or to place the juvenile on juvenile probation and commit the juvenile to state wardship as though a delinquent. The court may announce the scheduled date of the hearing. On request, the court shall notify the victim of the juvenile sentencing hearing.” MCR 6.931(C).*

20.10 Table of Time and Notice Requirements in “Automatic Waiver” Proceedings

The following table contains time and notice requirements only; for contents of notices, see the appropriate section. Also, only provisions applicable to cases involving juveniles have been included; provisions governing general criminal procedure in the Circuit Court are excluded. To compute time periods, see MCR 1.108. For court holidays, see MCR 8.110(D).

<table>
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<tr>
<th>Event</th>
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| Arraignment in District Court  | The juvenile must be released if the arraignment has not commenced within 24 hours after arrest, or within 24 hours after the prosecutor authorized the complaint and warrant during special adjournment, if the juvenile is detained in a juvenile facility. | MCR 6.907(A).  
  See Section 20.5(A)          |
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<td>Preliminary Examination in District Court</td>
<td>Court must conduct exam within 14 days of arraignment, less time used during special adjournment, up to 3 days.</td>
<td>MCR 6.907(C). \n<strong>See Section 20.6(A)</strong></td>
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<td>During arraignment, the court must inform the juvenile and parent, guardian, or adult relative, if present, of the examination date. If the parent, guardian, or adult relative is not present, the juvenile’s attorney must advise them of the examination date.</td>
<td>MCR 6.907(C). \n<strong>See Section 20.5(B)</strong></td>
</tr>
<tr>
<td>Trial in “Automatic Waiver” Cases</td>
<td>Court must release a juvenile within 7 days of filing a speedy trial motion if the juvenile is detained awaiting trial for more than 91 days.</td>
<td>MCR 6.909(C). \n<strong>See Section 20.8</strong></td>
</tr>
<tr>
<td>Annual Reviews of Juveniles Placed on Probation and Committed to Public Wardship</td>
<td>Court must conduct an annual review. No hearing is required, but court may not order more restrictive placement or treatment without a hearing pursuant to MCR 6.937.</td>
<td>MCL 769.1(11) and MCR 6.935(B)(2). \n<strong>See Section 22.2</strong></td>
</tr>
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### Progress Reviews of Juveniles Placed on Probation and Committed to Public Wardship

- **Event:** Court must conduct a review 182 days after entry of the order of commitment and semi-annually thereafter.
- **Notice:** No hearing is required, but court may not order more restrictive placement or treatment without a hearing pursuant to MCR 6.937.

### Periodic Review Hearing for Juveniles Placed on Probation and Committed to Public Wardship

- **Event:** On petition of the institution or agency to which a juvenile was committed, court may conduct a hearing any time before the juvenile’s 19th birthday or, if jurisdiction was continued, juvenile’s 21st birthday.
- **Notice:** Not less than 14 days before the hearing, court must notify the prosecutor, juvenile, agency or superintendent of facility to which the juvenile has been committed, and (if addresses known) parent or guardian.

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<tr>
<td>Progress Reviews of Juveniles Placed on Probation and Committed to Public Wardship</td>
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<td>MCR 6.935(B)(1). See Section 22.2 MCR 6.935(D). See Section 22.2</td>
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<td>Periodic Review Hearing for Juveniles Placed on Probation and Committed to Public Wardship</td>
<td>On petition of the institution or agency to which a juvenile was committed, court may conduct a hearing any time before the juvenile’s 19th birthday or, if jurisdiction was continued, juvenile’s 21st birthday. Not less than 14 days before the hearing, court must notify the prosecutor, juvenile, agency or superintendent of facility to which the juvenile has been committed, and (if addresses known) parent or guardian.</td>
<td>MCR 6.937(B). See Section 22.2 MCR 6.937(A)(1). See Section 22.2</td>
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<tr>
<td>Commitment Review Hearings for Juveniles Placed on Probation and Committed to Public Wardship</td>
<td>Court must hold a hearing within 42 days before juvenile’s 19th birthday. FIA or agency, facility, or institution to which the juvenile was committed must advise the court at least 91 days before the juvenile’s 19th birthday of the need to schedule a hearing. Not less than 14 days before the hearing, court must notify the prosecutor, juvenile, agency or superintendent of facility to which juvenile has been committed, and (if addresses known) parent or guardian.</td>
<td>MCR 6.937(A). See Section 22.3(A) MCR 6.937(A)(1). See Section 22.3(B)</td>
</tr>
<tr>
<td>Final Review Hearing for Juveniles Placed on Probation and Committed to Public Wardship</td>
<td>Court must conduct a hearing not less than 3 months before the end of the probation and commitment period. Not less than 14 days before the hearing, court must notify the prosecutor, juvenile, parent or guardian (if addresses known).</td>
<td>MCL 769.1b(5) and MCR 6.938(A). See Section 22.8 MCL 769.1b(6) and MCR 6.938(B). See Section 22.8(A)</td>
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This chapter discusses the requirements for “juvenile sentencing hearings” in “automatic waiver” proceedings. If a juvenile is convicted of one of twelve enumerated “specified juvenile violations,” he or she is not entitled to a juvenile sentencing hearing, and the court must impose an adult sentence. The enumerated offenses requiring imposition of adult sentence are listed in Section 21.1. If a juvenile is convicted of a “specified juvenile violation” that does not require imposition of adult sentence, the court must hold a juvenile sentencing hearing to determine whether to impose sentence upon the juvenile or place the juvenile on probation and commit him or her to public wardship.

See Section 1.6 for a comparison of waiver and designated case proceedings.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).
Section 21.1

21.1 Offenses That Require Imposition of Adult Sentence

MCR 6.931(A) states that “[i]f the juvenile has been convicted of an offense listed in MCL 769.1(a)–(l), the court must sentence the juvenile in the same manner as an adult. MCL 769.1(1)(a)–(l), in turn, provides that if the juvenile is convicted of the following subset of specified juvenile violations, the juvenile must be sentenced as an adult:

- burning a dwelling house, MCL 750.72;
- assault with intent to murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- attempted murder, MCL 750.91;
- conspiracy, MCL 750.157a, to commit murder;
- solicitation, MCL 750.157b, to commit murder;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529; and
- carjacking, MCL 750.529a.

In People v Conat, 238 Mich App 134 (1999), the Court considered four consolidated cases. The prosecuting attorneys appealed circuit court orders finding MCL 769.1, as amended by 1996 PA 247, unconstitutional. The Court of Appeals reversed and remanded the cases for trial. The amendment in question requires the circuit court to sentence juveniles convicted of the 12 very serious “specified juvenile violations” listed above as adults upon conviction. The court retains no discretion to place the juvenile on probation and commit the juvenile to the public wardship. In the instant cases, the circuit courts found that this regime violated the separation of powers doctrine, the Equal Protection Clauses of the federal and Michigan constitutions, procedural due process requirements, and the Michigan Supreme Court’s authority to govern procedure in Michigan courts.

The Court of Appeals first held that the statutory amendment did not violate the separation of powers doctrine by assigning judicial sentencing discretion to the prosecuting attorney. Conat, supra at 146. The separation of powers doctrine is intended to prevent exercise by one branch of government of the whole power assigned to another branch of government. Under the amended statute in question, the prosecuting attorney does not impose sentence (a judicial function); rather, as in the adult criminal justice system, a
prosecuting attorney’s charging decision affects the sentence that may be imposed. MCL 769.1 is a permissible legislative limitation on judicial sentencing discretion, and the court still maintains discretion to fashion an individualized (adult) sentence.

Nor does MCL 769.1 violate Equal Protection. 

Conat, supra at 153. The defendants did not argue that the statutory classification—those eligible to be charged under the “automatic” or prosecutorial waiver regime and those not eligible to be so charged—itself violated the juveniles’ equal protection rights. Instead, the defendants argued that the prosecuting attorney’s charging discretion, when exercised, would result in an arbitrary classification of some juveniles who would be sentenced as adults upon conviction and some who would be treated “as juveniles.” However, the Court of Appeals found that the defendants had not shown intentional discrimination based on impermissible factors by prosecuting attorneys in the exercise of their charging discretion.

The Court of Appeals held that the statute did not violate state and federal procedural due process guarantees. Id. at 157. Although a “juvenile sentencing hearing” was required in all “automatic waiver” cases before the amendment, such a hearing was not constitutionally required. The Court of Appeals stated that there is no constitutional right to be treated as a juvenile. In addition, the Court found Kent v United States, 383 US 541 (1966), inapplicable. Kent does not apply to an “automatic” or prosecutorial waiver regime; rather, the “full investigation” and hearing required by Kent applies to a “traditional” or judicial waiver regime. See MCL 712A.4. Finally, the lack of standards to guide the prosecuting attorney’s charging discretion, by itself, does not violate procedural due process requirements.

Hoekstra, J, concurred but wrote separately to state that he viewed the issue as one of jurisdiction. Id. at 165. The statutory scheme within which amended MCL 769.1 is placed provides the prosecuting attorney with a choice of courts in which to file charges. This jurisdictional choice has sentencing consequences but does not violate the separation of powers doctrine.

In a case decided before the 1996 amendments to the “automatic waiver” statutes, the Court of Appeals held that the “automatic waiver” procedure did not violate the separation of powers doctrine of Const 1963, art 3, § 2.


21.2 Offenses That Do Not Require Imposition of Adult Sentence

MCL 769.1(3) states that “[u]nless a juvenile is required to be sentenced in the same manner as an adult under [MCL 769.1(1)], a judge of the court having jurisdiction over a juvenile shall conduct a hearing at the juvenile’s sentencing to determine if the best interests of the public would be served
by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, [MCL 803.301 et seq.], or by imposing any other sentence provided by law for an adult offender.” MCR 6.931(A) contains substantially similar language.

Thus, where the juvenile is convicted of any of the following “specified juvenile violations,” a hearing must be held to determine whether the juvenile will be sentenced as an adult:

- assault with intent to rob while armed, MCL 750.89;
- bank, safe, or vault robbery, MCL 750.531;
- first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;
- assault with intent to do great bodily harm, MCL 750.84, if armed with a dangerous weapon;
- escape or attempted escape from a medium- or high-security juvenile facility operated by the Family Independence Agency, or a high-security facility operated by a private agency under contract with the Family Independence Agency, MCL 750.186a;
- manufacture, sale, or delivery of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(i), or possession of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7403(2)(a)(i);*
- any attempt, MCL 750.92, solicitation, MCL 750.157b, or conspiracy, MCL 750.157a, to commit a specified juvenile violation other than murder;
- any lesser-included offense of the above offenses arising out of the same transaction; and
- any other violation arising out of the same transaction if the juvenile is charged with one of the above offenses.

21.3 Required Procedures at Juvenile Sentencing Hearings

A “juvenile sentencing hearing” is conducted by the circuit court following a criminal conviction of a juvenile to determine whether the best interests of the public would be served by:

- imposing any sentence provided by law for an adult offender, or
- placing the juvenile on probation and committing the juvenile to a state institution or agency as described in the Youth...
Rehabilitation Services Act, MCL 803.301 et seq. MCL 769.1(3).

“At the conclusion of the juvenile sentencing hearing, the court shall determine whether to impose a sentence against the juvenile as though an adult offender or whether to place the juvenile on juvenile probation and commit the juvenile to state wardship pursuant to MCL 769.1b.” MCR 6.931(A).

In *People v Veling*, 443 Mich 23, 42–43 (1993), the Michigan Supreme Court held that the circuit court does not lose jurisdiction to sentence an “automatically” waived juvenile if the juvenile is tried for an enumerated offense but convicted of a lesser-included offense or other offense that is not an enumerated offense. See also *People v Dean*, 198 Mich App 267, 269–70 (1993), where the Court of Appeals held that a plea to a lesser-included offense does not divest the court of jurisdiction under the “automatic waiver” statutes.

A juvenile sentencing hearing must not be held if the circuit court has obtained jurisdiction via “traditional waiver” proceedings in the Family Division. MCR 6.901(B) and *People v Cosby*, 189 Mich App 461, 464 (1991).*

**A. Reports**

An FIA Delinquency Services Worker and Department of Corrections Probation Officer will prepare Presentence Information Reports. See MCL 771.14, MCL 771.14a, MCL 803.224, and FIA Services Manual, Item 812.1.

The court must give the prosecuting attorney, the juvenile, and the juvenile’s attorney an opportunity to review the presentence report and the social report prior to the juvenile sentencing hearing. The court may exempt information from the reports as provided in MCL 771.14 and MCL 771.14a. MCR 6.931(D). The social report is the written report prepared by the Family Independence Agency or county juvenile agency under MCL 803.224 of the Juvenile Facilities Act. MCR 6.903(L).

**Contents of social reports.** Prior to a juvenile sentencing hearing, the Family Independence Agency or county juvenile agency must inquire into the antecedents, character, and circumstances of the juvenile, and must report in writing to the court as provided in the Juvenile Facilities Act. MCL 771.14a. The Juvenile Facilities Act, in turn, requires the following information be provided to the court:

“(a) An evaluation of and a prognosis for the juvenile’s adjustment in the community based on factual information contained in the report.
“(b) A recommendation as to whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

“(c) A recommendation as to what disposition is in the best interests of the public welfare and the protection of public security.” MCL 803.224(2)(a)–(c).

Note: A determination of the juvenile’s mental maturity, which is crucial to determining how well the juvenile will adapt to the different treatment modalities of the juvenile and adult systems, generally requires a battery of tests. Such tests may be administered by examiners at the juvenile court (now the Family Division). Note, however, that a juvenile’s mental maturity is not a criterion used to decide whether to sentence or place the juvenile on probation.

Information that may be exempted from disclosure. MCL 771.14a(2) states that “[t]he court may exempt from disclosure in a report under this section information or a diagnostic opinion which might seriously disrupt a program of rehabilitation or sources of information obtained on a promise of confidentiality. If a part of the report is not disclosed, the court shall state on the record the reasons for its action and inform the juvenile and his or her attorney that information has not been disclosed. The action of the court in exempting information is subject to appellate review. Information or a diagnostic opinion exempted from disclosure under this subsection shall be specifically noted in the report.”

Use of juvenile adjudications to determine whether to sentence a juvenile in the same manner as an adult.* MCL 712A.23 states as follows:

“Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code].”

MCL 712A.23 does not prevent a judge from considering an adult criminal defendant’s juvenile offense record when imposing sentence upon the adult defendant. People v McFarlin, 389 Mich 557, 561 (1973). In People v Coleman, 19 Mich App 250, 255–56 (1969), the Court of Appeals held that MCL 712A.23 did not prevent the use of a defendant’s juvenile offense record at sentencing following “traditional waiver” proceedings. The Court concluded that use of the term “evidence” in MCL 712A.23 limited its

*See Section 25.7 for a more complete discussion of the use of prior juvenile adjudications and conduct that did not result in an adjudication when determining whether to sentence a juvenile as an adult and when determining the length of a juvenile’s adult sentence.
prohibition to “testimony and matters actually presented at trial.” Id. at 256. Although Coleman involved imposition of an adult sentence upon a juvenile following “traditional waiver” proceedings, the court’s rationale supports use of juvenile records to determine whether to sentence a juvenile in the same manner as an adult or commit the juvenile in “automatic waiver” proceedings. MCL 769.1(3)(c) requires a court to consider a juvenile’s delinquency record when making that decision. See also People v Laughlin, unpublished opinion per curiam of the Court of Appeals, decided January 24, 1997 (Docket No. 189428), relying on People v Zinn, 217 Mich App 340, 342 (1996), and People v Carpentier, 446 Mich 19 (1994) (the trial court erred by relying on a prior uncounseled juvenile adjudication when deciding whether to sentence the juvenile in the same manner as an adult or to commit the juvenile as a state ward).

No right to independent psychiatrist or psychologist for juvenile sentencing hearing. A judge has discretion in all cases to obtain a psychiatric report prior to sentencing. People v Wright, 431 Mich 282, 287 (1988). A juvenile is not entitled to an independent psychiatrist or psychologist at public expense for purposes of a juvenile sentencing hearing. In People v Stone, 195 Mich App 600, 604–06 (1992), the Court held that it was not a violation of Equal Protection guarantees to deny a juvenile’s request for public funds to hire an independent psychologist of his own choosing. Although Ake v Oklahoma, 470 US 68 (1985) may require appointment of a psychiatrist or psychologist for an indigent defendant prior to trial, the court’s appointment of an expert employed by the state sufficiently protects a juvenile’s interests at a juvenile sentencing hearing, where guilt has already been determined. The expert’s determination that the juveniles in Stone should be sentenced as adults was irrelevant.

B. Rules of Evidence

The rules of evidence do not apply at a juvenile sentencing hearing. MCL 769.1(3) and MCR 6.931(E)(1). All relevant and material evidence may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial. The court must receive and consider the presentence report prepared by the probation officer and the social report prepared by the Family Independence Agency or county juvenile agency. MCR 6.931(E)(1).

C. Burden and Standard of Proof

Except for controlled substance offenses allowing for imposition of alternative sentences,* the court must sentence the juvenile in the same manner as an adult unless the court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to a state institution or agency described in the Youth Rehabilitation Services Act, MCL 803.301

*See Section 23.4.
et seq. MCL 769.1(3). MCR 6.931(E)(2) contains substantially similar language.

In 1996, the Legislature amended MCL 769.1(3) to eliminate the requirement that the court consider the best interests of the juvenile when deciding whether to sentence the juvenile as an adult. Thus, the court is no longer required to balance the competing interests of the juvenile in rehabilitation and the public in safety. See People v Cheeks, 216 Mich App 470, 478–79 (1996). Moreover, before 1996, a sentencing court was required to give the applicable statutory and court rule criteria “weight appropriate to the circumstances.” The court is now required to consider the best interests of the public alone, to consider all of the criteria listed in Section 21.4, below, but to give greater weight to the seriousness of the offense and the juvenile’s prior record. See People v Perry, 218 Mich App 520, 531–32 (1996), and cases cited therein.

21.4 Criteria to Determine Whether to Impose Adult Sentence at Juvenile Sentencing Hearings

MCL 769.1(3)(a)–(f) set forth the criteria a court must consider when deciding whether to impose an adult sentence or place the juvenile on probation and commit him or her to public wardship. Those provisions state:

“(3) Unless a juvenile is required to be sentenced in the same manner as an adult under subsection (1), a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile’s sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, or by imposing any other sentence provided by law for an adult offender. Except as provided in subsection (5), the court shall sentence the juvenile in the same manner as an adult unless the court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309. The rules of evidence do not apply to a hearing under this subsection. In making the determination required under this subsection, the judge shall consider all of the following, giving greater weight to the seriousness of the alleged offense and the juvenile’s prior record of delinquency:
(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

(b) The juvenile’s culpability in committing the alleged offense, including, but not limited to, the level of the juvenile’s participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

(c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

(d) The juvenile’s programming history, including, but not limited to, the juvenile’s past willingness to participate meaningfully in available programming.

(e) The adequacy of the punishment or programming available in the juvenile justice system.

(f) The dispositional options available for the juvenile.”

MCR 6.931(C)(4) contains substantially similar language.

21.5 Waiver of Juvenile Sentencing Hearing

MCL 769.1(4) provides that the court may waive the juvenile sentencing hearing under MCL 769.1(3) with the consent of the prosecutor and the defendant. If the court waives the sentencing hearing, the court may place the juvenile on probation and commit the juvenile to a state institution or agency but shall not impose any other sentence provided by law for an adult offender. MCL 769.1(4) states:

“(4) With the consent of the prosecutor and the defendant, the court may waive the hearing required under subsection (3). If the court waives the hearing required under subsection (3), the court may place the juvenile on probation and commit the juvenile to an institution or agency described in the youth rehabilitation services act, [MCL 803.301 et seq.], but shall not impose
any other sentence provided by law for an adult offender.”

See also MCR 6.931(B), which states:

“The court need not conduct a juvenile sentencing hearing if the prosecuting attorney, the juvenile, and the attorney of the juvenile, consent that it is not in the best interest of the public to sentence the juvenile as though an adult offender. If the juvenile sentencing hearing is waived, the court shall not impose a sentence as provided by law for an adult offender. The court must place the juvenile on juvenile probation and commit the juvenile to state wardship.”

21.6 Requirements for Committing a Juvenile to Public Wardship

The Michigan Supreme Court has described placing a juvenile on probation and committing him or her to public wardship as an alternative to the normal adult penalty for an offense rather than as a sentence within the “juvenile system”:

“We do not agree with the Court of Appeals that the statutory scheme involved in this case demonstrates a legislative intent to ‘treat juveniles who are sentenced within the juvenile offender system differently than other offenders, including juveniles sentenced as adults. 220 Mich App at 413. Juveniles who come within the jurisdiction of the adult system by automatic waiver are not ‘sentenced within the juvenile offender system’ when they are sentenced to probation under MCL 769.1(3) . . . . They are sentenced within the adult system with a sentence that is an alternative to the normal adult penalty. MCL 769.1(10), 769.1b, 771.7(1) . . . make clear that circuit court jurisdiction over juvenile defendants convicted as adults continues after imposition of a sentence under MCL 769.1(3).”* People v Valentin, 457 Mich 1, 11 (1998).

For purposes of “automatic waiver” proceedings, a public ward is a youth accepted for care by a youth agency who is at least 14 years of age when committed to the youth agency by a court of general criminal jurisdiction under MCL 769.1 if the act for which the youth is committed occurred before his or her 17th birthday. MCL 803.302(c)(i)–(ii). A youth agency is either the Family Independence Agency or a county juvenile agency, whichever has responsibility over a public ward. MCL 803.302(d).
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A “county juvenile agency” is an agency operated by a county that has assumed financial responsibility for all juveniles under court jurisdiction in the county. MCL 45.623. A “county juvenile agency” must be created pursuant to the “County Juvenile Agency Act,” MCL 45.621 et seq. The act and related amendments to other statutes allow a “county juvenile agency” to provide services to juveniles “within or likely to come within” the Family Division’s jurisdiction of criminal offenses by juveniles and the Criminal Division’s jurisdiction over “automatically waived” juveniles. Because the act applies only to a county that is eligible for transfer of federal “Title IV-E funds”** under a 1997 waiver, the act apparently only applies to Wayne County. MCL 45.626. The Youth Rehabilitation Services Act, MCL 803.302 et seq., was amended to provide that “Act 150” wards are “public wards” rather than “state wards,” because juveniles may be committed to a “county juvenile agency” if one has been created within the county.

If the court retains jurisdiction over the juvenile, places the juvenile on juvenile probation, and commits the juvenile to public wardship, the court must comply with Subrules (1) through (11) of MCR 6.931(F).

**Title IV-E funds** are federal funds used to partially reimburse states for costs associated with delinquent and dependent children in foster care. See Section 11.1 for further discussion.

Reimbursement for cost of care and services. The judgment entered by the court must contain a provision for reimbursement by the juvenile or those responsible for the juvenile’s support, or both, for the cost of care and services pursuant to MCL 769.1(7).* MCR 6.931(F)(1).

Advice concerning probation revocation. The court must advise the juvenile at sentencing that if the juvenile, while on probation, is convicted of a felony or a misdemeanor punishable by more than one year’s imprisonment, the court must revoke juvenile probation and sentence the juvenile to a term of years in prison not to exceed the penalty that might have been imposed for the offense for which the juvenile was originally convicted. MCR 6.931(F)(2).

A defendant who is not advised of the ramifications of a subsequent conviction is not afforded due process and cannot thereafter have his juvenile probation revoked for failure to comply with the condition of probation requiring mandatory revocation and resentencing upon conviction of a felony or misdemeanor punishable by more than one year in prison. People v Stanley, 207 Mich App 300, 307 (1994), and People v Valentin, 220 Mich App 401, 405–06 (1996).

Records and reports that must be sent to juvenile and Family Independence Agency. The court must assure that the juvenile receives a copy of the social report and must send a copy of the order and the written opinion or transcript of the findings and conclusions of law to the Family Independence Agency or a county juvenile agency. MCL 769.1(9) and MCR 6.931(F)(3)–(4).

Limitations on juvenile probation. The court shall not do any of the following:
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- place the juvenile on deferred sentencing as provided in MCL 771.1(2). MCR 6.931(F)(5) and MCL 771.1(5);
- place the juvenile on lifetime probation for a conviction of a controlled substance violation as provided in MCL 771.1(4). MCR 6.931(F)(6) and MCL 771.1(5);
- require as a condition of juvenile probation that the juvenile report to a Department of Corrections probation officer. MCR 6.931(F)(8);
- as a condition of juvenile probation, impose jail time against the juvenile except as provided in MCR 6.933(B)(2)(g). MCR 6.931(F)(9);*
- commit the juvenile to the Department of Corrections for failing to comply with a restitution order. MCR 6.931(F)(10); or
- place the juvenile in a Department of Corrections probation camp for one year as provided in MCL 771.3a(1). MCR 6.931(F)(11) and MCL 771.3a(2).

In addition, the five-year limit on the term of probation for an adult offender does not apply. MCR 6.931(F)(7).

21.7 Required Findings of Court at Juvenile Sentencing Hearings

MCL 769.1(6) and MCR 6.931(E)(5) require the court to state on the record its findings of fact and conclusions of law forming the basis for its decision under MCL 769.1(3) to place the juvenile on juvenile probation and commit the juvenile to a state agency, or to sentence the juvenile as an adult. MCR 6.931(E)(5) states:

“Findings. The court must make findings of fact and conclusions of law forming the basis for the juvenile probation and commitment decision or the decision to sentence the juvenile as though an adult offender. The findings and conclusions may be incorporated in a written opinion or stated on the record.”

Although MCL 769.1(6) and MCR 6.931(E)(5) do not require factual findings on each criterion the court must consider, the Court of Appeals has made such factual findings a requirement of meaningful review. See People v Passeno, 195 Mich App 91, 103 (1992), overruled on other grounds 229 Mich App 218 (1998), People v Miller, 199 Mich App 609, 612 (1993), and People v Hazzard, 206 Mich App 658, 660–61 (1994). The court must “sort the logical, reasonable, and believable evidence on the record from the incredible or irrelevant,” and based on these findings, “consider and balance

In *Thenghkam*, supra at 69–71, the Court of Appeals held that a sentencing court’s failure to make findings of fact and to exercise its discretion when deciding whether to sentence a juvenile as an adult invalidated the court’s sentence placing the juvenile on probation and committing him to state wardship. The Court in *Thenghkam* relied on *People v Wybrecht*, 222 Mich App 160, 167 (1997), and *People v Miles*, 454 Mich 90, 96 (1997), which held that a sentencing court has authority to correct only an invalid sentence. A sentence may be invalid if the court fails to exercise its discretion because it is acting under a misconception of the law. The Court of Appeals concluded that the juvenile’s commitment as a state ward could be traced solely to the sentencing court’s errors. Thus, resentencing the juvenile after he had completed probation did not violate the prohibition against double jeopardy. *Thenghkam*, supra at 71.

In *Thenghkam*, supra at 71–73, the Court also concluded that resentencing the juvenile after he had completed probation and been discharged from state wardship would not violate due process. The juvenile defendant relied on *People v Gregorczyk*, 178 Mich App 1 (1989), in which the defendant was resentenced after the Parole Board had discharged him. The Court distinguished the discharge in *Gregorczyk* from a discharge from state wardship “set in motion by the trial court’s erroneous decision to sentence him as a juvenile, not by the intervention of an executive authority.” *Thenghkam*, supra at 73. Moreover, the sentencing court “perpetuated its own error” in its original sentencing decision by again failing to make proper findings and conclusions following an earlier remand from the Court of Appeals. *Id.* The Court of Appeals remanded the case again for proper findings and conclusions by another judge, instructing the court to impose an adult sentence or dismiss the case if it again found commitment as a state ward appropriate. *Id.* at 74–75.

### 21.8 Withdrawal of Pleas

In *People v Haynes (After Remand)*, 221 Mich App 551, 557–63, 565–68, 571–75 (1997), three juveniles were charged with first-degree murder and other offenses in “automatic waiver” proceedings. All three juveniles pled guilty of first-degree murder, and the court placed them on probation and committed them to state wardship following juvenile sentencing hearings. On first appeal, the Court of Appeals reversed the commitment orders and ordered the juveniles to be sentenced as adults. The juveniles then moved to withdraw their pleas. The sentencing court applied MCR 6.310(B), which governs withdrawal of pleas before sentencing, and granted the juveniles’ motions. On appeal after remand, the Court of Appeals held that the sentencing court should have applied MCR 6.311, which governs challenges to pleas after sentencing, and that there were no grounds to
justify setting aside the pleas under MCR 6.311. The decision to grant a motion to set aside a plea after sentencing rests within the sentencing court’s discretion. Haynes, supra, at 558, citing People v Eloby (After Remand), 215 Mich App 472, 475 (1996). The juveniles’ pleas were knowing, intelligent, and voluntary. They were informed before tendering their guilty pleas to first-degree murder that they could be sentenced to mandatory life imprisonment if the court chose to sentence them as adults. Furthermore, the juveniles were not denied the effective assistance of counsel due to defense counsels’ failure to advise the juveniles that the prosecuting attorney had the right to appeal the court’s decision to commit them to state wardship. After noting that the Court of Appeals had held in People v Effinger, 212 Mich App 67, 71 (1995), that a guilty plea to first-degree murder was not per se proof that a defendant received ineffective assistance of counsel, the Court in Haynes concluded that the juveniles were aware before pleading guilty that they could be sentenced as adults to life imprisonment without parole, that the sentencing court did commit the juveniles to state wardship instead of imposing an adult sentence, and that there was no evidence of promises of leniency.

The United States Court of Appeals for the Sixth Circuit subsequently affirmed the federal district court’s grants of writs of habeas corpus to the three juvenile defendants in the Haynes case. Lyons v Jackson, ___ F3d ___ (CA 6, 2002) and Miller v Straub, ___ F3d ___ (2002). The federal courts held that defense counsels’ failure to advise their clients of the prosecutors’ right to appeal a commitment order, particularly in light of the juveniles’ youth, constituted ineffective assistance of counsel, and that the contrary determination by the Michigan Court of Appeals constituted an unreasonable application of clearly established federal law. Lyons, supra at __, and Miller, supra at __, citing Hill v Lockhart, 474 US 52 (1985) and Strickland v Washington, 466 US 668 (1984).
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In both “automatic waiver” and designated case proceedings, the court may impose an adult sentence upon a juvenile, or the court may delay imposition of an adult sentence and place the juvenile on probation. When a juvenile has not been committed to the Department of Corrections following conviction, probation and court review requirements are substantially similar in “automatic waiver” and designated case proceedings. This chapter describes the requirements for case reviews, required review hearings, probation revocation, and final review hearings in both types of proceedings.

See Section 1.6 for a comparison of waiver and designated case proceedings.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered...
Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).

### 22.1 Jurisdiction to Impose Adult Sentence

In both “automatic waiver” and designated case proceedings, a delay in sentencing does not deprive the court of jurisdiction to sentence the juvenile during the delay. MCL 712A.18i(1) and MCL 769.1(10).

### 22.2 Required Annual Reviews

In both “automatic waiver” and designated case proceedings, the court must conduct an annual review of a juvenile’s probation to determine whether the juvenile has been rehabilitated and whether the juvenile presents a serious risk to public safety. Such reviews include, but are not limited to, the services being provided to the juvenile, the juvenile’s placement, and the juvenile’s progress in that placement. In conducting an annual review, the court must examine any annual report prepared under MCL 803.223 of the Juvenile Facilities Act, and any report prepared upon the court’s order by the officer or agency supervising probation. The court may order changes in the juvenile’s probation based on the review including but not limited to imposition of sentence. MCL 712A.18i(2), and MCR 3.956(A)(1)(a)(i), and MCL 769.1(11), MCR 6.935(B)(2), and MCR 6.935(C).

**Semi-annual progress reviews in “automatic waiver” proceedings.** In “automatic waiver” proceedings, in addition to annual reviews, the court must conduct semi-annual progress reviews of all juveniles who have been placed on juvenile probation and committed to public wardship. These reviews must occur 182 days after entry of the initial order and semi-annually thereafter. MCR 6.935(B)(1).

**Hearing requirements.** Under MCR 6.935(D), which applies to “automatic waiver” proceedings, there is no requirement that the court hold a hearing when conducting an annual review or semi-annual progress review unless the court orders a more restrictive placement or treatment plan. The court rules governing designated case proceedings do not contain a similar provision. As noted above, the statutes and court rules governing annual reviews in both “automatic waiver” and designated case proceedings give a court authority to commit a juvenile to the Department of Corrections based on an annual review.
22.3 Required Review Hearings at Age 19

In both “automatic waiver” and designated case proceedings, the court must conduct a review hearing to determine whether the juvenile has been rehabilitated and whether the juvenile presents a serious risk to public safety. MCR 3.956(A)(1) and MCR 6.903(A). The juvenile may be committed to the Department of Corrections following this hearing. MCL 712A.18i(3) and MCL 769.1b(1).

A. Time Requirements

In both “automatic waiver” and designated case proceedings, a review hearing must be held within 42 days before the juvenile turns age 19 unless adjourned for good cause. MCR 6.937(A) and MCR 3.956(A)(1)(a)(iii).

Failure to hold the required review hearing within 42 days of the juvenile’s 19th birthday violated applicable statutes and court rules but did not deprive the court of jurisdiction to sentence the juvenile for a subsequent probation violation, where at the time of the probation violation jurisdiction had been continued until the juvenile reached age 21, and where revocation proceedings had begun before the period of probation expired. People v Valentin, 220 Mich App 401, 406–08 (1996).

In both “automatic waiver” and designated case proceedings, if an institution or agency to which the juvenile was committed believes that the juvenile has been rehabilitated and that the juvenile does not present a serious risk to public safety, the institution or agency may petition the court to conduct a review hearing any time before the juvenile becomes 19 years of age or, if the court has continued jurisdiction, any time before the juvenile becomes 21 years of age. MCL 712A.18i(4) and MCR 3.956(A)(1)(a)(ii), and MCL 769.1b(2) and MCR 6.937(B).

B. Notice Requirements

In “automatic waiver” proceedings,” the Family Independence Agency or the agency, facility, or institution to which the juvenile has been committed must advise the court at least 91 days before the juvenile’s 19th birthday of the need to schedule a commitment review hearing. MCR 6.937(A)(1).

Not less than 14 days before a review hearing is to be conducted, the prosecuting attorney, juvenile, the agency or superintendent of the facility to which the juvenile has been committed, and, if addresses are known, the juvenile’s parent or guardian shall be notified by the court. The notice must state that the court may extend jurisdiction over the juvenile and must advise the juvenile and the juvenile’s parent or guardian of the right to legal counsel. MCL 769.1b(3) and MCR 6.937(A)(1).
In designated case proceedings, not less than 14 days before a review hearing is to be conducted, the prosecutor, the agency or superintendent of the institution or facility to which the juvenile has been committed, the juvenile, and, if addresses are known, the juvenile’s parent, guardian, or legal custodian shall be notified. The notice shall state that the court may extend jurisdiction over the juvenile or impose sentence and shall advise the juvenile and the juvenile’s parent or guardian of the right to legal counsel. MCL 712A.18i(5), and MCR 3.956(A)(1)(b).

C. Appointment of Counsel

In “automatic waiver” proceedings, if legal counsel has not been waived by the juvenile pursuant to MCR 6.905(C),* or if counsel has not been retained or appointed to represent the juvenile, the court shall appoint legal counsel and may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile’s support, or both, if the persons to be assessed are financially able to comply. MCL 769.1b(3) and MCR 6.937(A)(2).

In designated case proceedings, if legal counsel has not been retained or appointed to represent the juvenile, the court shall appoint legal counsel and may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile’s support, or both, if the persons to be assessed are financially able to comply. MCL 712A.18i(5) and MCR 3.956(A)(2).

D. Reports

In “automatic waiver” proceedings, the state institution or agency charged with the care of the juvenile must prepare commitment reports as provided in MCL 803.225 of the Juvenile Facilities Act. MCL 769.1b(4) and MCR 6.937(A)(3).

In designated case proceedings, a commitment report prepared pursuant to MCL 803.225 of the Juvenile Facilities Act and any report prepared upon the court’s order by the officer or agency supervising probation may be considered by the court at a review hearing. MCL 712A.18i(6) and MCR 3.956(A)(3).

A commitment report must contain all of the following:

“(a) The services and programs currently being utilized by, or offered to, the juvenile and the juvenile’s participation in those services and programs.

“(b) Where the juvenile currently resides and the juvenile’s behavior in his or her current placement.
“(c) The juvenile’s efforts toward rehabilitation.

“(d) Recommendations for the juvenile’s release or continued custody.” MCL 803.225(1)(a)–(d).

MCL 803.225(3) allows the report created pursuant to MCL 803.223 for purposes of annual reviews to be combined with a commitment review report.

E. Burden and Standard of Proof

MCR 6.937(A)(4), which applies to “automatic waiver” proceedings, states “[b]efore the court continues the jurisdiction over the juvenile until age 21, the prosecutor must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. The rules of evidence do not apply.”

MCR 3.956(A)(4)(a), which applies to designated case proceedings, states that “[b]efore the court may continue jurisdiction over the juvenile or impose sentence, the prosecuting attorney shall demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.”

22.4 Criteria to Determine Whether to Continue Jurisdiction or Impose Sentence at Required Review Hearing

In both “automatic waiver” and designated case proceedings, the court must decide whether to continue jurisdiction over the juvenile or impose sentence. In making this determination, the court must consider the following:

- the extent and nature of the juvenile’s participation in education, counseling, or work programs;
- the juvenile’s willingness to accept responsibility for prior behavior;
- the juvenile’s behavior in his or her current placement;
- the prior record and character of the juvenile and his or her physical and mental maturity;
- the juvenile’s potential for violent conduct as demonstrated by prior behavior;
- the recommendations of any institution, facility, or agency charged with the juvenile’s care for the juvenile’s release or continued custody; and
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• any other information the prosecuting attorney or juvenile may submit.

MCR 3.956(A)(4)(a)–(vii) and MCL 712A.18i(3)(a)–(g), and MCL 769.1b(1)(a)–(g) and MCR 6.937(A)(4)(a)–(g).

22.5 Mandatory Probation Revocation for Commission of a Felony

If a juvenile is placed on probation in either “automatic waiver” or designated case proceedings, the court must revoke probation and impose sentence if the juvenile is:

• convicted of a felony or a misdemeanor punishable by imprisonment for more than one year, or

• adjudicated as responsible for an offense that if committed by an adult would be a felony or misdemeanor punishable by imprisonment for more than one year. MCL 712A.18i(9) and MCR 3.956(B)(1), and MCL 771.7(1) and MCR 6.933(B)(1)(a).

The provisions governing designated case proceedings provide that the length of the sentence imposed must not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation. MCL 712A.18i(9) and MCR 3.956(B)(1). However, the court rule governing “automatic waiver” proceedings allows the court only to order the juvenile committed to the Department of Corrections for a term of years not to exceed the penalty that could have been imposed for the offense that led to the probation. MCL 771.7(1) and MCR 6.933(B)(1).

In “automatic waiver” proceedings, a juvenile who is placed on probation and committed to public wardship for manufacture, delivery, or possession with intent to deliver 650 grams or more of a controlled substance, MCL 333.7401(2)(a)(i), may be resentenced only to a term of years, not to a non-parolable life sentence as previously mandated* for adults by the controlled substance statute, and not to a parolable life sentence, following mandatory revocation of probation for commission of a subsequent felony. People v Valentin, 457 Mich 1, 11, 14 (1998).

Similarly, the literal language of MCL 771.7(1), upon which MCR 6.933 is based, indicates that a juvenile convicted of first-degree murder who violates probation can only be sentenced to a term of years, thus prohibiting a sentence of nonparolable life. See MCR 6.933(B)(1)(a).

MCR 6.933(C)(1) and (2) state:

*See Section 23.4 for the current penalty.
“(C) Disposition Regarding Specific Underlying Offenses.

(1) Controlled Substance Violation Punishable by Mandatory Nonparolable Life Sentence For Adults. A juvenile who was placed on probation and committed to state wardship for manufacture, delivery, or possession with the intent to deliver 650 grams or more of a controlled substance, MCL 333.7401(2)(a)(i), may be resentenced only to a term of years or to a parolable life sentence, following mandatory revocation of probation for commission of a subsequent felony or a misdemeanor punishable by more than one year of imprisonment.

(2) First-Degree Murder. A juvenile convicted of first-degree murder who violates juvenile probation by being convicted of a felony or a misdemeanor punishable by more than one year’s imprisonment may only be sentenced to a term of years, not to nonparolable life.”

In designated case proceedings, commitment to the Department of Corrections is apparently an option following revocation of probation for the commission of a felony or high-court misdemeanor, where the juvenile was originally convicted of a non-“specified juvenile violation” (i.e., in a court-designated case). MCL 712A.18i(9) and MCR 3.956(B)(1), allow imposition of any penalty that could have been imposed for the original conviction, and juveniles can be committed to the Department of Corrections immediately following conviction in a designated case only for “specified juvenile violations.” MCL 712A.18h. When imposition of an adult sentence has been delayed, however, the court may impose sentence at any time during the delay under MCL 712A.18i, and section (11) of that statute contemplates a sentence of imprisonment.

**Escape from juvenile facilities and consecutive sentencing.** MCL 750.186a(1) makes it a felony for an individual who is placed in a juvenile facility to escape or attempt to escape from that juvenile facility or from the custody of an employee of that facility. Thus, in “automatic waiver” and designated case proceedings, a juvenile convicted under this statute would face a mandatory prison sentence. “Escape” means to leave without lawful authority or to fail to return to custody when required. MCL 750.186a(2)(a). A juvenile facility includes an institution operated as an agency of the county or court, and a state institution to which an offender has been committed for a misdemeanor or felony offense. MCL 750.186a(2)(b).

Consecutive sentencing is required where a person commits any offense while incarcerated in a penal or reformatory institution, or after escaping from such an institution. MCL 768.7a. Consecutive sentences must also be
imposed where a person commits a major controlled substance offense while another felony charge is pending, MCL 768.7b(2)(b), and consecutive sentences may be imposed where a person commits a felony while another felony charge is pending. MCL 768.7b(2)(a). It is unclear whether a charge is pending where the court has delayed imposition of sentence and placed the juvenile on probation in designated case proceedings or placed the juvenile on probation and committed him or her to public wardship in “automatic waiver” proceedings. See People v Leal, 71 Mich App 319, 321 (1976), and People v Malone, 177 Mich App 393, 401–02 (1989) (statute does not apply to an offense committed while the defendant is on probation, as the prior offense is no longer pending); People v Hacker, 127 Mich App 796 (1983) (case is still pending if defendant is on delayed-sentence status when the new offense is committed), and People v Dukes, 189 Mich App 262, 266–67 (1991) (case is pending until a defendant is sentenced).

22.6 Other Probation Violations

In designated case and “automatic waiver” proceedings, if the juvenile violates probation in some way other than committing a felony or “high-court misdemeanor,” the court may impose sentence or may order any of the following for the juvenile:

• a change of placement;
• restitution;
• community service
• substance abuse counseling;
• mental health counseling;
• participation in a vocational-technical education program;
• incarceration in a county jail for not more than 30 days if:
  — the present county jail facility would meet all requirements under federal law and regulations for housing juveniles, and
  — the court has consulted with the sheriff to determine when the sentence will begin to ensure that space will be available for the juvenile. If the juvenile is under 17 years of age, the juvenile shall be placed in a room or ward out of sight and sound from adult prisoners;
• other participation or performance as the court considers necessary.

MCL 712A.18i(10)(a)–(g) and MCR 3.956(B)(2)(a)–(g), and MCL 771.7(2) and MCR 6.933(B)(2).
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22.7 Probation Violation Hearing Procedures

In designated case proceedings, probation violation hearings must be conducted pursuant to MCR 3.944(C), which governs probation violations in juvenile delinquency proceedings. MCR 3.956(B)(3).*

In “automatic waiver” proceedings, the court must proceed as provided in MCR 6.445(A)–(F), which govern probation revocation in adult criminal proceedings. MCR 6.933(A). If the court revokes juvenile probation, the court must receive an updated presentence report and comply with MCR 6.445(G) before it imposes a prison sentence on the juvenile. MCL 771.7(1) and MCR 6.933(B)(3). MCR 6.445(G) requires the court to disclose the presentence report before sentencing pursuant to MCR 6.425(B), and to comply with the procedures for sentencing hearings in MCR 6.425(D)(2)–(3).*

22.8 Final Reviews at End of Probation Period

In both “automatic waiver” and designated case proceedings, the court must conduct a final review of the juvenile’s probation and/or commitment not less than 91 days before the end of the probation period. If the court determines at this review that the best interests of the public would be served by imposing any other sentence provided by law for an adult offender, the court may impose that sentence. MCL 712A.18i(7), MCR 3.956(A)(1)(a)(iv), and MCR 3.956(A)(4), and MCL 769.1b(5), and MCR 6.938(A).

Final review hearings were added to the “automatic waiver” statutes in 1996. Final review hearings were also a feature of designated case proceedings from their inception in 1996. Prior to these statutory amendments, a court was required to attempt to determine whether a juvenile’s probation period would be long enough to make the juvenile’s rehabilitation a possibility. The advent of the final review hearing ameliorates this problem, which was identified by the Court of Appeals in People v Black, 203 Mich App 428, 430–31 (1994):

“In this case and in many others like it, our statutes create a serious quandry for the trial court. For older juveniles guilty of crimes that carry mandatory life sentences without any possibility of parole, trial courts are caught between Scylla and Charybdis: between underpunishing the most serious juvenile crimes or sentencing teenagers to live out their lives in prison.”

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A. Notice Requirements

Not less than 14 days before a final review hearing is to be conducted, the prosecuting attorney, juvenile, and, if addresses are known, the juvenile’s parent, guardian, or legal custodian must be notified. The notice must state that the court may impose a sentence upon the juvenile and must advise the juvenile and the juvenile’s parent or guardian of the right to legal counsel. MCL 769.1b(6), MCR 6.938(B), and MCL 712A.18i(8) and MCR 3.956(A)(1)(b).

B. Appointment of Counsel

In “automatic waiver” and designated case proceedings, if legal counsel has not been retained or appointed to represent the juvenile, the court must appoint legal counsel and may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile’s support, or both, if the persons to be assessed are financially able to comply. MCL 769.1b(6) and MCR 6.938(C), and MCL 712A.18i(8) and MCR 3.956(A)(2).

C. Reports

The rules governing the use of reports at final review hearings are the same as those applicable to commitment review hearings. For discussion of those rules, see Section 22.3(D), above.

D. Burden and Standard of Proof

MCR 6.938, which applies to “automatic waiver” proceedings, does not assign the burden of proof to either party or state whether the rules of evidence apply at a final review hearing. MCR 6.938(A) states only that “[i]f the court determines at this review that the best interests of the public would be served by imposing any other sentence provided by law for an adult offender, the court may impose that sentence.

MCR 3.956(A)(4)(a), which applies to designated case proceedings, states that “[b]efore the court may . . . impose sentence, the prosecuting attorney must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.”

22.9 Criteria to Determine Whether to Impose Adult Sentence at Final Review Hearing

In both “automatic waiver” and designated case proceedings, the court must determine whether the best interests of the public would be served by
imposition of a sentence provided by law for an adult offender. In making this determination, the court must consider all of the following criteria:

- the extent and nature of the juvenile’s participation in education, counseling, or work programs;
- the juvenile’s willingness to accept responsibility for prior behavior;
- the juvenile’s behavior in his or her current placement;
- the prior record and character of the juvenile and his or her physical and mental maturity;
- the juvenile’s potential for violent conduct as demonstrated by prior behavior;
- the recommendations of any institution, facility, or agency charged with the juvenile’s care for the juvenile’s release or continued custody;
- other information the prosecuting attorney or juvenile may submit;
- the effect of treatment on the juvenile’s rehabilitation;
- whether the juvenile is likely to be dangerous to the public if released; and
- the best interests of the public welfare and the protection of public security.

MCR 3.956(A)(4)(b)(i)–(iii) and MCL 712A.18i(7)(a)–(c), and MCL 769.1b(5)(a)–(c) and MCR 6.938(D)(1)–(10).

22.10 Release from Custody and Discharge From Public Wardship

A provision of the Youth Rehabilitation Services Act, MCL 803.307, sets forth the requirements for releasing from custody a juvenile who is subject to court jurisdiction, and for discharging a juvenile from public wardship. That provision states, in relevant part:

“(1) A youth accepted by a youth agency remains a public ward until discharged from public wardship with the approval of any of the following and, if placed in an institution, shall remain until released with the approval of any of the following:
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. . . . (b) If the youth was committed to a youth agency under . . . MCL 769.1, with the approval of the court of general criminal jurisdiction under . . . MCL 769.1b.

“(2) Except as otherwise provided in this section, a youth accepted as a public ward shall be automatically discharged from public wardship upon reaching the age of 19. Except as provided in subsection (3), a youth committed to a youth agency under section 18(1)(e) of chapter XIIA of 1939 PA 288, MCL 712A.18, for an offense that, if committed by an adult, would be a violation or attempted violation of section 72, 83, 84, 86, 88, 89, 91, 110a(2), 186a, 316, 317, 349, 520b, 520c, 520d, 520g, 529, 529a, 530, or 531 of the Michigan penal code, 1931 PA 328, MCL 750.72, 750.83, 750.84, 750.86, 750.88, 750.89, 750.91, 750.110a, 750.186a, 750.316, 750.317, 750.349, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a, 750.530, and 750.531, or section 7401(2)(a)(i) or 7403(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, shall be automatically discharged from public wardship upon reaching the age of 21. Except as provided in subsection (4), a youth committed to a youth agency under . . . MCL 769.1, shall be automatically discharged from public wardship upon reaching the age of 21.

“(3) If the family division of circuit court imposes a delayed sentence on the youth under [MCL 712A.18(1)(n)], the youth shall be discharged from public wardship and committed under the court’s order.

“(4) If a court of general criminal jurisdiction sentences the youth to a sentence provided by law for an adult offender under . . . MCL 769.1b, the youth shall be discharged from public wardship and committed under the court’s order.”
Chapter 23: Selected Issues Regarding Imposition of Adult Sentence

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In this chapter...

This chapter discusses selected issues surrounding imposition of adult sentences upon juveniles. It does not contain discussion of the procedural or substantive requirements for criminal sentences.

For discussion of the requirements for challenging the use of a prior adjudication or conviction due to a juvenile’s lack of counsel, see Section 25.7.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (MJI, 1998).

23.1 Applicable Court Rule and Legislative Sentencing Guidelines

MCR 6.425 contains the applicable procedural rules for criminal sentencing hearings. MCR 6.425 governs sentencing hearings in “traditional waiver,” “automatic waiver,” and designated case proceedings. Discussion of this court rule is beyond the scope of this benchbook.

The statutory Sentencing Guidelines, mandated by 1998 PA 317, MCL 777.1 et seq., are applicable to felonies committed on or after January 1, 1999. A sentencing court must impose a minimum sentence within the appropriate sentence range, unless there is a “substantial and compelling reason” to depart from the Guidelines. MCL 769.34(3). “Substantial and
“compelling” reasons only exist in exceptional cases, and those reasons should irresistibly grab the court’s attention and have considerable worth in determining the length of sentence. *People v Babcock (Babcock I)*, 244 Mich App 64, 75 (2000). Only “objective and verifiable” factors may be used to assess whether there are “substantial and compelling” reasons to depart from the appropriate guideline range. *Id.* A sentencing court must articulate its reasons for departure on the record. *People v Bennett*, 241 Mich App 511 (2000), citing *People v Fleming*, 428 Mich 408, 428 (1987).

A sentencing court must also “specifically articulate the reasons why the factors it identifies and relies upon collectively provide ‘substantial and compelling’ reasons to except the case from the legislatively mandated regime.” *People v Johnson (On Remand)*, 223 Mich App 170, 173–74 (1997). Factors used in scoring the guidelines cannot be used as “objective or verifiable” factors unless the trial court finds “from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

The principle of proportionality applies when determining the extent of a departure from the recommended Guideline range. See *People v Hegwood*, 465 Mich 432, 437 n 10 (2001), which modified the holding in *Babcock I, supra*, as follows:

“The Court of Appeals indicated in *Babcock* that the principle of proportionality is not part of the legislative guidelines, and that there will be no appellate review of sentence length in cases in which there is a substantial and compelling reason to depart from the recommended minimum stated in the legislative guidelines. . . . In this regard, however, we observe that the statute provides, ‘A court may depart from the appropriate sentence range established under the [guidelines] if the court has a substantial and compelling reason for that departure . . . .’ (Emphasis supplied.) MCL 769.34(3). In light of such language, we do not believe that the Legislature intended, in every case in which a minimal upward or downward departure is justified by ‘substantial and compelling’ circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the ‘substantial and compelling’ circumstances articulated by the court must justify the particular departure in a case, i.e., ‘that departure.’” [Emphasis in original.]

See also *People v Babcock (Babcock II)*, 250 Mich App 463, 468-469 (2002) (“*Hegwood* indicates that the principle of proportionality can be considered concerning the extent of a departure.”)
For sentencing requirements involving “intermediate sanction” ranges under the Guidelines, see People v Stauffer, 465 Mich 633 (2002) (if the recommended minimum range under the “intermediate sanction” statute is 18 months or less, a trial court cannot sentence a defendant to prison, unless it gives “substantial and compelling” reasons).

23.2 Required Credit for Time Spent in Custody Prior to Sentencing

MCR 6.425(D)(2) and MCR 6.445(G) require that the sentencing court grant credit for time served to which a defendant is entitled. The following statutes and court rules mandate such credits in proceedings involving juveniles:

- If sentencing is not delayed in a designated case proceeding, the juvenile is entitled to credit for “time served” before sentencing. MCL 712A.18(1)(n).

- If sentencing is delayed in a designated case proceeding, the juvenile is entitled to credit “for the period of time served on probation” before sentencing. MCL 712A.18(11). See also MCR 3.956(A)(5) and 3.956(B)(4), both of which also mandate credit “for the time served on probation” when sentencing is delayed in a designated case proceeding.

- MCL 769.1b(7), dealing with “automatically” waived juveniles, provides that the juvenile must receive credit for the period of time served on probation and committed to a state agency or institution. Similarly, MCL 771.7(1) states that following revocation of probation for commission of a felony, “[t]he court shall grant credit against the sentence for the period of time the juvenile served on probation.” See People v Cokley, unpublished opinion per curiam of the Court of Appeals, decided January 9, 1995 (Docket No. 156947) (the plain language of MCL 771.7(1) required credit for the entire period that the juvenile was on probation, including the time he was living at home with his grandparents. MCR 6.938(E) contains language substantially similar to MCL 771.7(1).

In addition, there are several other statutory provisions that mandate credit for time served for all criminal defendants. A criminal defendant must be granted credit for:

- time spent in jail due to inability to post bond, MCL 769.11b;

- time spent in a juvenile facility prior to sentencing because of being denied or unable to furnish bond, MCL 764.27a(5); see also People v Thomas, 58 Mich App 9, 10–11 (1975);
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• time spent in custody during competency evaluations and treatment, MCL 330.2042; see also People v Gravlin, 52 Mich App 467, 469 (1974); and

• time spent in jail or prison on a void sentence that is set aside: time must be credited against a new sentence imposed for a conviction “based upon facts arising out of the earlier void conviction,” MCL 769.11a.*

Sentence credit under MCL 769.11b must be limited to jail time served for the offense of which the defendant is convicted. A defendant is not entitled to credit for time served on unrelated charges committed while out on bond. People v Prieskorn, 424 Mich 327, 340 (1985).

23.3 Cruel or Unusual Punishment

In People v Launsburry, 217 Mich App 358, 363–65 (1996), the Court of Appeals held that imposing a mandatory life sentence without parole on a juvenile convicted of first-degree felony murder does not constitute cruel or unusual punishment under the Michigan Constitution. In Launsburry, the Court noted that to determine whether a punishment is “cruel or unusual,” several factors must be analyzed, including the goal of rehabilitation. Id. at 363, citing People v Bullock, 440 Mich 15 (1992). The Court in Launsburry noted that MCL 769.1(3) required a sentencing court to consider a juvenile’s prospects for rehabilitation at a juvenile sentencing hearing. Id. at 364. Launsburry was decided prior to the effective date of statutory amendments that require adult sentencing for juveniles convicted of first-degree murder following “automatic waiver” proceedings. See 1996 PA 247–248. No published case has addressed a “cruel or unusual punishment” challenge under the amended statute. See, however, People v Fernandez, 427 Mich 321, 339 (1986) (the goal of rehabilitation is not a consideration where the sentence is mandatory, non-parolable life imprisonment). See also Foster v Withrow, 159 F Supp 2d 629, 643–46 (ED Mich, 2001) (a sentence of non-parolable life imprisonment for first-degree murder imposed upon a juvenile does not violate the United States Constitution’s prohibition of “cruel and unusual punishment”).

23.4 Alternative Sentences for Major Controlled Substance Offenses

Possession of 650 grams or more. MCL 769.1(5) and MCL 769.1(12) provide that if an individual under the circuit court’s jurisdiction in an “automatic waiver” or “traditional waiver” proceeding is convicted of a violation or conspiracy to commit a violation of MCL 333.7403(2)(a)(i) (possession of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine), the court must determine whether the best interests of the public would be served by:
• imposing the sentence provided by law for an adult offender (mandatory life imprisonment*), or

• imposing a sentence of imprisonment for any term of years but not less than 25 years if the court determines by clear and convincing evidence that such a sentence would serve the best interests of the public.

In making this determination, the court shall use the same criteria as listed in MCL 769.1(3). MCL 769.1(5).*

In designated case proceedings, if the juvenile is convicted of a violation or a conspiracy to commit a violation of MCL 333.7403(2)(a)(i), the court may impose the alternative sentence permitted under that section if the court determines that the best interests of the public would be served. MCL 712A.18(1)(n). The alternative sentence permitted under MCL 333.7403(2)(a)(i) is a term of years not less than 25 years rather than mandatory life in prison. MCL 333.7403(2)(a)(i)(B). Unlike MCL 769.1(5), however, MCL 712A.18(1)(n) and MCL 333.7403(2)(a)(i)(B) do not specify the criteria to apply or require the “clear and convincing evidence” standard when deciding whether to impose the alternative sentence.

**Legislation effective March 1, 2003.** 2002 PA 665, effective March 1, 2003, eliminated the mandatory penalty under MCL 333.7403(2)(a)(i). That statute now provides that a person convicted of possession of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine may be sentenced to prison for life or any term of years, a fine of not more than $1,000,000.00, or both. 2002 PA 665 also deleted the alternative sentence of any term of years but not less than 25 years for juveniles convicted in “automatic waiver,” “traditional waiver,” or designated case proceedings. See 2002 PA 665, eliminating MCL 333.7403(2)(a)(i)(A)–(B).

**Possession or delivery of less than 650 grams.** If a juvenile is convicted of a violation of MCL 333.7401(2)(a)(ii)–(iv) or MCL 333.7403(2)(a)(ii)–(iv), the court may depart from the mandatory minimum terms listed below if the juvenile has not previously been convicted* of a felony or an assaultive crime, and has not been convicted of another felony or assaultive crime arising from the same transaction as the controlled substance violation. MCL 333.7401(4) and MCL 333.7403(3).

The controlled substance offenses covered by this alternative sentencing provision and their mandatory minimum terms are as follows:
• Manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:
  — 225 grams or more, but less than 650 grams. Not less than 20 years nor more than 30 years. MCL 333.7401(2)(a)(ii).
  — 50 grams or more, but less than 225 grams. Not less than 10 years nor more than 20 years. MCL 333.7401(2)(a)(iii).
  — Less than 50 grams. Not less than 1 year nor more than 20 years, and may be fined not more than $25,000.00, or placed on probation for life. MCL 333.7401(2)(a)(iv).

• Possession of the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:
  — 225 grams or more, but less than 650 grams. Not less than 20 years nor more than 30 years. MCL 333.7403(2)(a)(ii).
  — 50 grams or more, but less than 225 grams. Not less than 10 years nor more than 20 years. MCL 333.7403(2)(a)(iii).
  — 25 grams or more, but less than 50 grams. Not less than 1 year nor more than 4 years, and may be fined not more than $25,000.00, or placed on probation for life. MCL 333.7403(2)(a)(iv).

It does not appear that the court also needs “substantial and compelling reasons” to depart from the mandatory minimum sentences listed above. See MCL 333.7401(4) and MCL 333.7403(3). See also Managing a Trial Under the Controlled Substances Act (MJI, 1995), Section 15.6, for a discussion of what constitutes “substantial and compelling reasons” under these statutes.

“Assaultive crime” means any of the following offenses:

• assault and battery, MCL 750.81;
• assault, infliction of serious injury, MCL 750.81a;
• felonious assault, MCL 750.82;
• assault with intent to murder, MCL 750.83;
• assault with intent to do great bodily harm less than murder, MCL 750.84;
• assault with intent to maim, MCL 750.86;
• assault with intent to commit a felony, MCL 750.87;
• assault with intent to rob while unarmed, MCL 750.88;
• assault with intent to rob while armed, MCL 750.89; or

• sexual intercourse under pretext of medical treatment, MCL 750.90.

MCL 333.7401(5)(a) and MCL 333.7403(4).

**Legislation effective March 1, 2003.** 2002 PA 665, 666, and 670, effective March 1, 2003, deleted MCL 333.7401(4) and MCL 333.7403(3), eliminated mandatory minimum sentences under prior law, changed the amounts and penalties applicable to controlled substance offenses, and made persons convicted under prior law eligible for parole under certain circumstances. Thus, after March 1, 2003, a sentencing court need not depart from a mandatory minimum sentence as under prior law. Persons convicted on or after March 1, 2003, are subject to the following penalties:

• Manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:

  — 450 grams or more, but less than 1000 grams. Punishable by imprisonment for not more than 30 years, a fine of not more than $500,000.00, or both. MCL 333.7401(2)(a)(ii).

  — 50 grams or more, but less than 450 grams. Punishable by imprisonment for not more than 20 years, a fine of not more than $250,000.00, or both. MCL 333.7401(2)(a)(iii).

  — Less than 50 grams. Punishable by imprisonment for not more than 20 years, a fine of not more than $25,000.00, or both. MCL 333.7401(2)(a)(iv).

• Possession of the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:

  — 450 grams or more, but less than 1000 grams. Punishable by imprisonment for not more than 30 years, a fine of not more than $500,000.00, or both. MCL 333.7403(2)(a)(ii).

  — 50 grams or more, but less than 450 grams. Punishable by imprisonment for not more than 20 years, a fine of not more than $250,000.00, or both. MCL 333.7403(2)(a)(iii).

  — 25 grams or more, but less than 50 grams. Punishable by imprisonment for not more than 4 years, a fine of not more than $25,000.00, or both. MCL 333.7403(2)(a)(iv).*

As noted above, under MCL 333.7401(2)(a)(iv) and MCL 333.7403(2)(a)(iv) prior to March 1, 2003, the court had authority to place a defendant on probation for life. MCL 333.7401(4) now states as follows:
“(4) If an individual was sentenced to lifetime probation under subsection (2)(a)(iv) before the effective date of the amendatory act that added this subsection and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual’s probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection.”

MCL 333.7403(3) contains substantially similar language applicable to persons sentenced under MCL 333.7403(2)(a)(iv) prior to March 1, 2003.

**Conditional sentencing under MCL 333.7411.** For a limited number of controlled substances offenses, a provision of the Controlled Substances Act, MCL 333.7411, authorizes a judge to place a defendant on probation then dismiss the case if the defendant fulfills the probation conditions. The defendant must consent to use of §7411, but prosecuting attorney consent is not required. Under MCL 333.7411(1), a defendant may be sentenced to probation under §7411 if he or she:

- has no prior controlled substances convictions and is charged with possession of a controlled substance pursuant to MCL 333.7403(2)(a)(v) or (2)(b)–(d);
- has no prior controlled substances convictions and is charged with use of a controlled substance pursuant to MCL 333.7404; or
- has been convicted of either a first or second violation of possession of an imitation controlled substance pursuant to MCL 333.7341.

Probation conditions may include conditions stated in MCL 771.3, jail time, and residential or non-residential treatment programs.*
In this chapter... 

This chapter contains a brief discussion of the appeal of orders entered in all of the types of proceedings discussed in this benchbook. It also includes a discussion of applicable standards of review. This chapter does not contain discussion of appellate procedure.

For discussion of review of a referee’s recommended findings and conclusions, see Chapter 12. Rehearings are discussed in Section 9.15.

**Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 1998).
24.1 Court Rules Governing Appeals From Family Division

Except as modified by MCR 3.993, Chapter 7 of the Michigan Court Rules governs appeals from the Family Division. MCR 3.993(C)(1). Subchapter 7.200 governs appeals to the Court of Appeals, and Subchapter 7.300 governs appeals to the Supreme Court. Discussion of these rules is beyond the scope of this benchbook.*

24.2 Appeals by Right From Family Division Orders

MCR 3.993(A) lists the Family Division orders that may be appealed by right. That rule states as follows:

“(A) The following orders are appealable to the Court of Appeals by right:

(1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,

(2) an order terminating parental rights,

(3) any order required by law to be appealed to the Court of Appeals, and

(4) any final order.”

For orders entered prior to January 1, 1998, see MCL 600.861(c). See MCR 7.202(7)(a)–(b) for a definition of “final judgment” or “final order” in civil and criminal cases.

In In re EP, 234 Mich App 582 (1999), overruled on other grounds 462 Mich 341, 353 (2000), the trial court entered a disposition order in a child protective proceeding removing the child from his home. The child subsequently returned home for an “extended visit.” After the child was returned to foster care following an accelerated dispositional review hearing, the respondent parent appealed. The Court of Appeals held that respondent had an appeal by right under MCR 3.993(A)(1) because “the child was physically residing in respondent’s home at the time the juvenile court entered the supplemental dispositional order removing the child from the extended home visit.” EP, supra at 591.

There is no requirement in the court rules governing delinquency and minor PPO proceedings that the court advise the juvenile of the right to appeal following an order of disposition placing a minor under the supervision of the court or removing the juvenile from the home. Compare MCR 3.950(E)(1)(c)(i)–(iii), which requires the court following a “traditional waiver” proceeding to advise the juvenile of the rights to appeal a decision to waive jurisdiction and to appointed appellate counsel.
Orders revoking juvenile probation. Because it is an order removing the juvenile from his or her home, a juvenile may appeal as of right to the Court of Appeals an order by the Family Division revoking juvenile probation and committing the juvenile to an institution or agency. See MCR 3.993(A)(1). However, if the juvenile did not appeal the initial disposition, errors in the initial proceeding may not be raised on appeal of the probation revocation. In re Madison, 142 Mich App 216, 219–20 (1985), citing People v Pickett, 391 Mich 305, 316 (1974).*

MCL 600.1041 deals with suspension of a Family Division order pending appeal and sets forth a time for delayed appeals:

“The pendency of an appeal from the family division of circuit court in a matter involving the disposition of a juvenile or, in a case where the family division has ancillary jurisdiction, from an order entered pursuant to the mental health code . . . shall not suspend the order unless the court to which the appeal is taken specifically orders the suspension. An application for a delayed appeal from an order of the family division of circuit court in a matter involving the disposition of a juvenile shall be filed within 6 months after entry of the order.”

24.3 Appeals by Leave From Family Division Orders

All orders not listed in MCR 3.993(A) are appealable to the Court of Appeals by leave, including interlocutory appeals. MCR 3.993(B).

24.4 Appeals in Minor Personal Protection Order (PPO) Proceedings

MCR 3.709 provides:

“(A) Rules Applicable. Except as provided by this rule, appeals must comply with subchapter 7.200. Appeals involving minor personal protection actions under the Juvenile Code must additionally comply with MCR 3.993.

“(B) From Entry of Personal Protection Order.

“(1) Either party has an appeal of right from

(a) an order granting or denying a personal protection order after a hearing under subrule 3.705(B)(6), or
Section 24.5

(b) the ruling on respondent’s first motion to rescind or modify the order if an ex parte order was entered.

“(2) Appeals of all other orders are by leave to appeal.*

“(C) From Finding After Violation Hearing.

“(1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.

“(2) All other appeals concerning violation proceedings are by application for leave.”

24.5 Appeals in Designated Case Proceedings

Designated case proceedings are criminal proceedings that occur within the Family Division of the Circuit Court. Conviction has the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction. MCL 712A.2d(7). Criminal defendants have an appeal by right to the Court of Appeals following conviction, except that an appeal by a defendant who pleads guilty or nolo contendere shall be by application for leave to appeal. Const 1963, art 1, § 20 and MCL 770.3(1).

Following conviction, if the court enters an order of disposition instead of imposing sentence or delaying imposition of sentence, the juvenile may appeal by right under MCR 3.993(A)(1).

24.6 Appeals in “Traditional Waiver” Proceedings

Juveniles subject to “traditional waiver” proceedings have an appeal by right to the Court of Appeals following conviction, except that an appeal by a defendant who pleads guilty or nolo contendere shall be by application for leave to appeal. Const 1963, art 1, § 20 and MCL 770.3(1).

A juvenile may appeal by right to the Court of Appeals an order granting the prosecutor’s motion to waive jurisdiction following “traditional waiver” proceedings. See MCR 3.950(E)(1)(c)(ii).

24.7 Appeals in “Automatic Waiver” Proceedings

Juveniles subject to “automatic waiver” proceedings have an appeal as of right to the Court of Appeals following conviction, except that an appeal by a defendant who pleads guilty or nolo contendere shall be by application for leave to appeal. Const 1963, art 1, § 20 and MCL 770.3(1). A juvenile may
also appeal by right to the Court of Appeals from the imposition of a sentence of incarceration after a finding that the juvenile violated probation. MCR 6.933(D).

24.8 Standards of Review

A. Delinquency Proceedings


B. Designated Case Proceedings

There have been no published appellate decisions establishing standards of review for the decision to designate the case for criminal trial in the Family Division, or the decision to impose a juvenile disposition or adult sentence under MCL 712A.18(1)(n) following conviction in designated cases. See, however, In re Petty, unpublished opinion per curiam of the Court of Appeals, decided April 26, 2002 (Docket No. 219348), lv gtd ___ Mich ___ (2002), which applies the standards set forth in People v Thengkham, 240 Mich App 29 (2000). Those standards are set forth below in Section 24.8(D).

C. “Traditional Waiver” Proceedings

Where the prosecuting attorney appeals, denial of a motion to waive jurisdiction is reviewed under a bifurcated standard. Factual findings are reviewed for clear error, while the decision to waive or retain jurisdiction is subject to an abuse of discretion standard. In re Fultz, 211 Mich App 299, 305–06 (1995), rev’d on other grounds 453 Mich 937 (1996).

Where the juvenile appeals, an order granting a motion to waive jurisdiction will be affirmed where the court’s findings, based on substantial evidence and thorough investigation, show either that the juvenile is not amenable to treatment or that, despite his potential for treatment, the nature of the juvenile’s difficulty is likely to render the juvenile dangerous to the public if released at age 19 or 21, or to disrupt the rehabilitation of other children in the program. People v Dunbar, 423 Mich 380, 387 (1985).
**Note:** The standards of review established in *Dunbar* are based upon the criteria for second-phase hearings that were in place prior to the 1996 amendment of MCL 712A.4. See 1996 PA 262 and *People v Whitfield (After Remand)*, 228 Mich App 659 (1998). Because the criteria in the amended statute place emphasis on the seriousness of the offense rather than the juvenile’s amenability to treatment, it is likely that the *Dunbar* standards of review will be changed by the Court of Appeals to conform to the new statutory requirements.* The Court of Appeals may choose to use the more general standard established in *Fultz* for appeals by both prosecutors and juveniles.

### D. “Automatic Waiver” Proceedings

The standard for appellate review of a circuit court’s decision to sentence a juvenile as an adult or to place the juvenile on probation and commit the juvenile to the Family Independence Agency is set forth in *People v Thenghkam*, 240 Mich App 29, 41–42 (2000):

“This court employs a bifurcated procedure to review a trial court’s decision to sentence a minor as a juvenile or as an adult. First, we review the trial court’s factual findings supporting its determination regarding each statutory factor for clear error. *People v Launsburry*, 217 Mich. App. 358, 362 . . . (1996). This first part of the inquiry focuses on whether the court made a required finding of fact and whether the record supports that relevant finding; the absence of a required finding of fact or a factual finding without support in the record constitutes clear error. See generally *People v Faucett*, 442 Mich. 153, 170 . . . (1993); *Bivins v Bivins*, 146 Mich. App. 223, 234 . . . (1985). Second, we review the ultimate decision whether to sentence the minor as a juvenile or as an adult for an abuse of discretion. *Launsburry*, supra at 362. This second part of the analysis scrutinizes how the court weighed its factual findings to come to the ultimate sentencing decision. See *People v Perry*, 218 Mich. App. 520, 542 . . . (1996), aff’d on other grounds 460 Mich 55 . . . (1999).

In *Thenghkam*, supra at 43–50, the Court of Appeals explored in detail these two standards before applying them to the sentencing court’s decision to commit the juvenile as a public ward rather than impose sentence. The Court of Appeals relied on *United States v United States Gypsum Co*, 333 US 364, 395 (1948), as the source of the “clearly erroneous” standard of review:

“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire
Moreover, a trial court’s findings of fact may be “clearly erroneous” where those findings “do not accurately portray the factual background of the case.” *Id.* at 46. See also *People v Lyons (On Remand)*, 203 Mich App 465, 470–74 (1994). With regard to the “abuse of discretion” standard of review, the *Thenghkam* Court emphasized that the court must weigh its factual findings on all of the statutory factors in a meaningful way when making the ultimate decision to commit the juvenile to public wardship or impose sentence. *Thenghkam, supra* at 47–48. The court must “point to the requisite facts to justify its decision.” *Id.* at 48.

The “proportionality standard” established in *People v Milbourn*, 435 Mich 630 (1990) for reviewing sentence length must not be considered when deciding whether to commit a juvenile to public wardship or impose sentence. See *Thenghkam, supra* at 49, n 21.

The Court of Appeals may not consider post-juvenile sentencing hearing reports (updated service plans and psychiatric reports) when reviewing the sentencing court’s decision to commit a juvenile to public wardship or impose sentence. *People v Lyons (On Remand)*, 203 Mich App 465, 469–70 (1994).

**E. Applicability of the “Harmless Error Test”**

The “harmless error” test applies to corrections of error in both juvenile delinquency and criminal proceedings. MCR 3.902(A), MCR 2.613(A), and MCL 769.26.

**24.9 Prosecuting Attorney’s Right to Appeal**

**In criminal cases.** The scope of the prosecuting attorney’s right of appeal in criminal cases is explained in MCL 770.12. A prosecutor has no right to appeal outside the express provisions of that statute. *People v Cooke*, 419 Mich 420, 426 (1984). MCL 770.12 authorizes prosecutorial appeal from orders as long as the prohibition against double jeopardy is not violated.

The prosecuting attorney may appeal by right a decision to place a juvenile on probation and commit him or her to public wardship in “automatic waiver” proceedings. *People v Brown*, 205 Mich App 503, 504 (1994).

It does not appear that the prosecuting attorney has an appeal *by right* when the court denies the motion to waive jurisdiction. Because there is no statute or court rule providing an appeal by right, the order denying the prosecutor’s motion is not required by law to be appealed to the Court of Appeals pursuant to MCR 3.993(A)(3). In addition, the order is not a final order of
the Family Division appealable by right pursuant to MCR 3.993(A)(4). See also In re Fultz, 211 Mich App 299, 301 (1995), rev’d on other grounds 453 Mich 937 (1996) (following affirmance by the circuit court, the prosecutor appealed to the Court of Appeals by leave granted the probate court’s dismissal of the charges against defendant).

**In delinquency cases.** As petitioner in a delinquency case, the prosecuting attorney is a party to the proceeding. MCR 3.903(A)(18)(a). As a party, the prosecuting attorney may appeal to the Court of Appeals by right from the Family Division any of the following orders:

“(1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,

“(2) an order terminating parental rights,

“(3) any order required by law to be appealed to the Court of Appeals, and

“(4) any final order.” MCR 3.993(A)(1)–(4).

However, as in criminal cases, the prosecuting attorney may not appeal a “not guilty” verdict in a delinquency case. See 1988 Staff Comment following MCR 3.993, which states that the petitioner does not have the right to request a review of findings and orders issued after jeopardy has attached in a delinquency proceeding. Jeopardy attaches when a juvenile court assumes jurisdiction over a juvenile as a delinquent. Breed v Jones, 421 US 519, 531 (1975).

### 24.10 Appointment of Appellate Counsel

**Delinquency cases.** MCL 712A.17c(2) gives the court broad authority to appoint counsel for a juvenile in delinquency proceedings. That provision requires the court to appoint counsel for a juvenile when any of the following circumstances are present:

“(a) The child’s parent refuses or fails to appear and participate in the proceedings.

“(b) The child’s parent is the complainant or victim.

“(c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.
“(d) Those responsible for the child’s support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.

“(e) The court determines that the best interests of the child or the public require appointment.”

MCR 3.915(A)(2)(a)–(e) contain substantially similar criteria for the appointment of counsel.

See also MCR 3.950(E)(1)(c)(iii), which requires the court in “traditional waiver” proceedings to notify a juvenile of the right to appointed counsel to appeal a decision to waive jurisdiction over the juvenile.

**Criminal cases.** Indigent criminal defendants are entitled to appointed counsel in their first appeal as of right. *Douglas v California*, 372 US 353, 355, 357 (1963). However, the right to appointed counsel does not extend to subsequent discretionary appeals in state or federal courts. *Ross v Moffitt*, 417 US 600, 610–12 (1974).

Except in limited circumstances, criminal defendants who plead guilty or nolo contendere are not entitled to appointed appellate counsel. MCL 770.3a states as follows:

“(1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant’s conviction or sentence.

“(2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:

(a) The prosecuting attorney seeks leave to appeal.

(b) The defendant’s sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.

(c) The court of appeals or the supreme court grants the defendant’s application for leave to appeal.

(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
“(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

“(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.”

Indigent criminal defendants do not have a federal or state constitutional right to appointed appellate counsel to assist them in filing an application for leave to appeal. *People v Bulger*, 462 Mich 495 (2000).
## Chapter 25: Recordkeeping & Reporting Requirements

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In this chapter . . .

This chapter discusses recordkeeping and reporting requirements regarding juveniles subject to delinquency and criminal proceedings. The following subjects are discussed in this chapter:

- What records must the Family Division of Circuit Court keep regarding juveniles within its jurisdiction?
- Who has access to those records and for what purposes?
- When may such records be destroyed?
- What records must the Department of State Police and Secretary of State keep regarding juveniles?
- What is the effect of “setting aside” an adjudication or conviction?
- When must a juvenile register as a sex offender?
- When must a juvenile provide a DNA sample?
- When must a juvenile be tested for venereal disease or AIDS, and who has access to the test results?

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of
25.1 Family Division Records

MCR 3.903(A)(24) defines “records” as pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders. These items are contained in the so-called “legal file.” Confidential information is contained in the so-called “social file.”* For a general description of the purposes and contents of “juvenile court” records, see AO 1985-5, as amended by 1988-3, Part II, 430 Mich xcix (1988). A “file” is “a repository for collection of the pleadings and other documents and materials related to a case. MCR 3.903(A)(8).

A “register of actions” is “the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards.” MCR 3.903(A)(25). The clerk of the court must permanently maintain a register of actions for each case except a civil infraction case. MCR 8.119(A) and (D)(1).* The Michigan Supreme Court Case File Management Standards and MCR 8.119(D)(1)(c) require a register of actions to contain at least the following:

- case number;
- case type (code);
- case name;
- attorneys;
- date filed;
- fees paid (when applicable);
- offense;
- judge assigned (code);
- process issued and returned and date of service;
- date and title of each “filed” document;
- date of each event, type of action, and result;
- date of scheduled trials, hearings, and all other appearances or reviews;
- judge at adjudication (code);
- date adjudicated;
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- how adjudicated (code);
- location of papers filed apart from the case folder (e.g. exhibits, video tapes, audio tapes, or court reporter log); and
- fees for officers, transportation, and jurors (if not maintained in the accounting system).

The county clerk is the clerk of the court for the Family Division and keeps the records and indexes of actions. MCL 600.1007.

25.2 Access to Family Division Records and Confidential Files

Access to court records. The general rule is that “[r]ecords of the juvenile cases, other than confidential files, must be open to the general public.” MCR 3.925(D)(1). Records created before June 1, 1988, are open only by court order to persons with a legitimate interest. MCL 712A.28(1).

Confidential files. Confidential files are defined in MCR 3.903(A)(3)–(4). Those rules state as follows:

“(3) Confidential file means

(a) that part of a file made confidential by statute or court rule, including, but not limited to,

(i) the diversion record of a minor pursuant to the Juvenile Diversion Act, MCL 722.821 et seq.;*

(ii) the separate statement about known victims of juvenile offenses, as required by the Crime Victim’s Rights Act, MCL 780.751 et seq.;*

(iii) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);*

(iv) the dispositional reports pursuant to MCR 3.943(C)(3)* and MCR 3.973(A)(4)(c);

(v) fingerprinting material required to be maintained pursuant to MCL 28.243;*

(vi) reports of sexually motivated crimes, MCL 28.247;

(vii) test results of those charged with certain sexual offenses or substance abuse offenses, MCL 333.5129;*
“(b) the contents of a social file maintained by the court, including materials such as

(i) youth and family record sheet;

(ii) social study;

(iii) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);

(iv) Family Independence Agency records;

(v) correspondence;

(vi) victim statements.”

Petitions that the court has not authorized for filing do not fall within the definition of “records” in MCR 3.903(A)(24)* and are therefore “confidential files.”

If a document from a juvenile’s confidential or “social” file is admitted into evidence, that document becomes a “record,” as the definition of “record” includes “exhibits.” MCR 3.903(A)(24).

Access to confidential files. MCR 3.925(D)(2) provides that confidential files shall only be made accessible to persons found by the court to have a legitimate interest. In determining whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;
- the welfare and safety of the public;
- the interests of the juvenile; and
- any restriction imposed by state or federal law.
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*Discussion of these confidentiality provisions is beyond the scope of this benchbook. See, however, Section 9.11 (admissibility of attendance reports in truancy cases) and Section 10.6 (abrogation of privileges in disposition hearings).

Restrictions imposed by state and federal law include 20 USC 1232g(b)(1) and MCL 600.2165, educational records; MCL 330.1748, records of mental health services; 42 USC 290dd—2(a) and MCL 333.6111, records of federal or state drug or alcohol abuse prevention programs; and MCL 333.17752, records of prescriptions.*

Court records and confidential files are not subject to requests under the Freedom of Information Act, as the judicial branch of government is specifically exempted from that act. MCL 15.232(d)(v).

**Note:** No provision of the Juvenile Code makes confidential a juvenile probation or court officer’s file. A juvenile probation or court officer’s file may contain case notes and copies of records whose confidentiality is protected by other law. See MCL 791.229, which contains a “probation officer’s privilege,” but which is only applicable to Department of Corrections probation officers.

### 25.3 Recording Proceedings in the Family Division

MCR 3.925(B) states that “[a] record of all hearings must be made.” That subrule also requires that a record of all proceedings on the formal calendar be made and preserved by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded. “Formal calendar” means judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing. MCR 3.903(A)(10). However, in cases involving offenses falling under MCL 780.786b(1) of the Crime Victim’s Rights Act, the court must conduct a preliminary inquiry on the record. MCR 3.932(A). *

If a record of a hearing is made by a recording device, transcription of the hearing is unnecessary unless there is a request by an “interested party.” MCL 712A.17a states that such a recording remains a permanent record of the court. However, MCL 600.2137(3) requires courts to maintain untranscribed recordings for 15 years in a felony case and 10 years in other cases; if a record has been transcribed, the court need maintain a recording for only one year.
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25.4 Access to Records of Closed Proceedings

**Delinquency cases.** If a hearing in a delinquency case is closed to the general public under MCL 712A.17, the records of that hearing shall only be open by order of the court to persons having a legitimate interest. MCL 712A.28(2).*

MCL 712A.28(2) excepts MCL 780.799 of the Crime Victim’s Rights Act from its scope. MCL 780.799 provides that, upon request, a victim shall be given a certified copy of the order of an adjudicative hearing for purposes of obtaining relief under the “parental liability statute,” MCL 600.2913. This statute provides for vicarious and strict liability of the parents of an unemancipated minor who has willfully or maliciously destroyed real or personal property or caused bodily harm or injury to another. The statute limits recovery to $2,500.00. MCL 600.2913 states:

“A municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or an incorporated or unincorporated religious organization may recover damages in an amount not to exceed $2,500.00 in a civil action in a court of competent jurisdiction against the parents or parent of an unemancipated minor, living with his or her parents or parent, who has maliciously or willfully destroyed real, personal, or mixed property which belongs to the municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or religious organization incorporated or unincorporated or who has maliciously or willfully caused bodily harm or injury to a person.”

In *McKinney v Caball*, 40 Mich App 389, 390–91 (1972), the Court of Appeals noted that the “parental liability statute” was enacted in derogation of the common law, which did not provide for parents’ liability for the conduct of their children. Thus, the statute must be strictly construed to require plaintiffs to show the juvenile’s malicious or willful destruction of property or bodily harm before they may recover any damages from the parents.

A plaintiff may choose to sue a juvenile’s parent for negligent supervision rather than proceeding under MCL 600.2913. “Parents may be held liable for failing to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to know of the necessity and opportunity for doing so.” *Zapalski v Benton*, 178 Mich App 398, 403 (1989), citing *Dortman v Lester*, 380 Mich 80, 84 (1968).

In *Zapalski, supra*, the parents of a 14-year-old boy who allegedly sexually assaulted a 14-year-old girl were found not liable for negligently failing to
supervise their son. Although their son had a history of delinquent behavior, nothing in their son’s background would have enabled his parents to foresee his sexually assaultive behavior.

**Criminal cases.** Unless made confidential by statute, court rule, or court order, court records in criminal cases are open to the public. MCR 8.119(E)(1). A court may seal its records in a case upon motion of any person if the court finds good cause to seal its records, and if there is no less restrictive means to adequately and effectively protect the specific interest asserted.” MCR 8.119(F)(1).

MCR 8.116(D) provides a procedure through which any person may challenge a court-ordered limitation on access to records of closed court proceedings. That rule states:

“**Access to Court Proceedings.** When a court has ordered, or has pending before it a request to order, a limitation on the access of the public to court proceedings or records of those proceedings that are otherwise public, any person may file a motion to set aside the order or an objection to entry of the proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. . . .”

### 25.5 Access to Juvenile Diversion Records

The Family Division must keep diversion* information in a separate record. MCL 722.827. MCR 3.903(A)(3)(a)(i) provides that a juvenile’s diversion record is a “confidential file,” open only to persons with a legitimate interest. MCL 722.828(1)–(2) and 722.829(1) add that this record is open to law enforcement agencies and court intake workers and, by order of the court, to persons having a legitimate interest, but only for the purpose of deciding whether to divert a minor. These records must be destroyed within 28 days after the minor becomes 17 years of age. MCL 722.828(3).

### 25.6 Destruction of Family Division Files and Records

MCR 3.925(E) governs the destruction of Family Division files and records. MCR 3.925(E)(1), which sets forth a general rule regarding destruction of files and records, states as follows:
“The court may at any time for good cause destroy its own files and records pertaining to an offense by or against a minor, other than an adjudicated offense described in MCL 712A.18e(2), except that the register of actions must not be destroyed. Destruction of a file does not negate, rescind, or set aside an adjudication.”

A “register of actions” is “the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards.” MCR 3.903(A)(25). See Section 25.1, above, for a description of the contents of the register of actions.

MCR 3.925(E)(2)(c) states that, except for diversion and consent calendar cases, “the court must destroy the files and records pertaining to a person’s juvenile offenses, other than any adjudicated offense described in MCL 712A.18e(2), when the person becomes 30 years of age. MCL 712A.18e(2) lists offenses that if committed by an adult would be felonies punishable by life imprisonment and criminal violations of the Michigan Vehicle Code.”

**Note:** Former MCR 3.913 provided:

“The court may retain a child’s juvenile court delinquency records other than those involving motor vehicle violations until the child is 27, when they must be expunged. The court may retain a child’s motor vehicle violation citations and summonses until the child is 19, when they must be expunged.”

Effective January 1, 1988, former rule MCR 3.913 was superseded by MCR 3.925(E), and delinquency records may now be retained until age 30, with certain exceptions for life offenses. Motor vehicle violation citations are never expunged.

Offenders who had pre-1988 juvenile records and who believe that their offenses were or will be expunged at age 27 are chagrined to learn that MCR 3.925 now controls record expungement, and that the restrictions of MCR 3.925(E) now make life offenses and criminal traffic violations permanent records of the court.

**Criminal traffic violations.** MCR 3.925(E)(2)(c) requires that the court permanently maintain a record of “adjudicated” criminal traffic violations committed by a juvenile. A subsection of the Michigan Vehicle Code, MCL 257.732(20), adds that “notwithstanding any other provision of law, a court shall not order expunction of any violation reportable to the secretary of state under [MCL 257.732]” (emphasis added). MCL 257.732 requires the court to send an abstract of the court record to the Secretary of State following an adjudication or disposition of a criminal violation of the Michigan Vehicle Code.
MCL 712A.2b allows a court to enter an order of disposition if it finds the accusation to be true. It is unclear whether cases are “adjudicated” when the court is proceeding informally under MCL 712A.2b. The term “adjudication,” in the context of a case handled under §2b, is ambiguous. If the court does not adjudicate the offense or enter a dispositional order under §18 of the Juvenile Code, it is not required to maintain a permanent record of a criminal traffic violation committed by the juvenile.

**Diversion records.** MCR 3.925(E)(2)(a) deals with diversion records. Under this rule, the court is required to destroy a juvenile’s diversion record within 28 days after the juvenile’s 17th birthday.

**Consent calendar records.** MCR 3.932(C)(7) and MCR 3.925(E)(2)(b) deal with the files and records of cases placed on the consent calendar. MCR 3.932(C)(7) covers cases in which the juvenile successfully completes a consent calendar case plan. That rule states as follows:

> “Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar.”

MCR 3.925(E)(2)(b) states that “[t]he court must destroy all files of matters heard on the consent calendar within 28 days after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If a case is transferred to the consent calendar and a register of actions exists, the register of actions must be maintained as a nonpublic record.”

**Permanent records of cases heard on the formal calendar.** MCR 3.925(E)(2)(d) requires the court to preserve several records of cases heard on the formal calendar. That rule states as follows:

> “If the court destroys its files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation.”

### 25.7 Use of Evidence and Records in Subsequent Delinquency or Criminal Proceedings

A provision of the Juvenile Code restricts the use of evidence from juvenile delinquency cases in subsequent proceedings. MCL 712A.23 states as follows:
“Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code].”

Use of evidence and testimony at trial following “traditional waiver” proceedings. In People v Hammond, 27 Mich App 490 (1970), the defendant argued on appeal that the trial court erred by considering physical evidence at trial that had been introduced during a “traditional waiver” proceeding. The Court of Appeals disagreed, holding that MCL 712A.23 did not affect the admissibility at trial of both physical evidence and testimony offered during a “traditional waiver” proceeding:

“It is our conclusion that the intent of the statute is to proscribe the actual testimony taken at the juvenile proceedings. It is not meant to preclude the physical evidence, nor is it meant to exclude a witness who testified at the juvenile proceedings from testifying on the same subject matter at a subsequent trial for the same offense.” Id. at 494.

See also People v Pennington, 113 Mich App 688, 697–98 (1982) (the trial court did not err in allowing the waiver-hearing testimony of an accomplice to be read to the jury, where the accomplice asserted his Fifth Amendment privilege against self-incrimination at trial).

Designated case proceedings. The prohibition contained in MCL 712A.23 does not apply to evidence derived from a criminal conviction following designated proceedings in the Family Division. The conviction of a juvenile following designated proceedings has “the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction.” MCL 712A.2d(7).

Use of juvenile adjudications to determine whether to sentence a juvenile in the same manner as an adult and to determine the length of sentence. MCL 712A.23 does not prevent a judge from considering an adult criminal defendant’s juvenile offense record when imposing sentence upon the adult defendant. People v McFarlin, 389 Mich 557, 561 (1973). In People v Coleman, 19 Mich App 250, 255–56 (1969), the Court of Appeals held that MCL 712A.23 did not prevent the use of a defendant’s juvenile offense record at sentencing following “traditional waiver” proceedings. The Court concluded that use of the term “evidence” in MCL 712A.23 limited its prohibition to “testimony and matters actually presented at trial.” Id. at 256. Although Coleman involved imposition of an adult sentence upon a juvenile following “traditional waiver” proceedings, the court’s rationale
supports use of juvenile records to determine whether to sentence a juvenile in the same manner as an adult or commit the juvenile in “automatic waiver” or designated case proceedings. MCL 769.1(3)(c) requires a court to consider a juvenile’s delinquency record when making that decision. See also People v Laughlin, unpublished opinion per curiam of the Court of Appeals, decided January 24, 1997 (Docket No. 189428), relying on People v Zinn, 217 Mich App 340, 342 (1996), and Carpentier, infra (the trial court erred by relying on a prior uncounseled juvenile adjudication when deciding whether to sentence the juvenile in the same manner as an adult or to commit the juvenile as a state ward).

**Required procedures to challenge a prior adjudication.** MCR 3.925(G) requires the Family Division to maintain a record of whether a juvenile was represented by an attorney or waived such representation. That rule states:

> “When the juvenile offense record of an adult convicted of a crime is made available to the appropriate agency, as provided in MCL 791.228(1), the record must state whether, with regard to each adjudication, the juvenile had an attorney or voluntarily waived an attorney.”

MCL 791.228(1) requires the Family Independence Agency or court to supply the Department of Corrections with information concerning juveniles who have subsequently come within the DOC’s jurisdiction. That statute states:

> “(1) The [Family Independence Agency] and the probate court of this state shall furnish to the department information, on request, concerning any individual having a previous record as a juvenile probationer who comes within the jurisdiction of the department.”

A sentencing court must not consider prior convictions or juvenile adjudications if the convictions or adjudications were obtained in violation of the constitutional right to counsel. United States v Tucker, 404 US 443, 445–46 (1972), People v Moore, 391 Mich 426, 436–38 (1974), and People v Hannan (After Remand), 200 Mich App 123, 128–30 (1993) (court may not use counselless convictions to score sentencing guidelines). However, in People v Daoust, 228 Mich App 1, 17–20 (1998), the Court of Appeals held that a sentencing court may consider an uncounseled prior juvenile adjudication if no actual “incarceration” resulted from the adjudication. A sentencing court may also consider a defendant’s juvenile record that has been set aside. People v Smith, 437 Mich 293, 302–04 (1991).*

To challenge the validity of prior convictions or adjudications, the defendant must:

- present *prima facie* proof that a previous conviction or adjudication was violative of his or her constitutional right to

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*See Sections 25.16 and 25.17, below, for the requirements to set aside an adjudication or conviction.
counsel, such as a docket entry showing the absence of counsel or a transcript evidencing the same, or

- present evidence that he or she has requested these records from the sentencing court and it has failed to reply or refused to furnish copies of the records within a reasonable time (four weeks).

Upon such a showing, a hearing must be held where the burden shifts to the prosecutor to establish the constitutional validity of the prior conviction or to show affirmative record evidence of waiver. Unless the prosecutor shows such evidence within one month of the defendant’s motion, the matter must be set for a hearing. Moore, supra at 440–41, and People v Carpentier, 446 Mich 19, 35 (1994) (where a “juvenile court” record has been expunged, a criminal defendant must present proof that his or her previous adjudication was obtained in violation of the right to counsel).

**Use of evidence of juvenile’s conduct that did not result in adjudication.**
A sentencing judge may consider criminal conduct of which a defendant has been acquitted, as long as the defendant has an opportunity to challenge the accuracy of the allegations and the judge finds their accuracy supported by a preponderance of the evidence. People v Ewing (After Remand), 435 Mich 443, 451–53, 462–63 (1990). Incidents that occurred while the defendant was a juvenile but that did not result in adjudication may also be considered. People v Cross, 186 Mich App 216, 217–18 (1990).

### 25.8 Confidentiality of Public Wards’ Records

MCL 803.308 states as follows:

“All records of a youth agency pertaining to a public ward are confidential and shall not be made public except as follows:

(a) If the person is less than 18 years of age, by the agency’s authorization when necessary for the person’s best interests.

(b) If the person is 18 years of age or older, by his or her consent.”

A public ward is either:

- a youth accepted for care by a youth agency who is at least 12 years of age when committed to the youth agency by the family division of circuit court under MCL 712A.18(1)(e) and the act for which the youth is committed occurred before his or her 17th birthday, or
• a youth accepted for care by a youth agency who is at least 14 years of age when committed to the youth agency by a court of general criminal jurisdiction under MCL 769.1 if the act for which the youth is committed occurred before his or her 17th birthday. MCL 803.302(c)(i)–(ii).

A youth agency is either the Family Independence Agency or a county juvenile agency, whichever has responsibility over a public ward. MCL 803.302(d).

A “county juvenile agency” is an agency operated by a county that has assumed financial responsibility for all juveniles under court jurisdiction in the county. MCL 45.623. A “county juvenile agency” must be created pursuant to the “County Juvenile Agency Act,” MCL 45.621 et seq. The act and related amendments to other statutes allow a “county juvenile agency” to provide services to juveniles “within or likely to come within” the Family Division’s jurisdiction of criminal offenses by juveniles and the Criminal Division’s jurisdiction over “automatically waived” juveniles. Because the act applies only to a county that is eligible for transfer of federal “Title IV-E funds”* under a 1997 waiver, the act apparently only applies to Wayne County. MCL 45.626. The Youth Rehabilitation Services Act, MCL 803.302 et seq., was amended to provide that “Act 150” wards are “public wards” rather than “state wards,” because juveniles may be committed to a “county juvenile agency” if one has been created within the county.

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25.9 Confidentiality Provisions Under the Crime Victim’s Rights Act

For any offense falling under the juvenile article of the CVRA, the law enforcement agency must file with the charging document a separate list of the names, addresses, and telephone numbers of each victim. This separate list is not a matter of public record. MCL 780.784.

MCL 780.758(2) limits access to the victim’s home and work addresses and telephone numbers in felony cases:

“The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial.”

Under MCL 780.769(1) of the felony article, a victim may request notification from a sheriff or the Department of Corrections of certain post-conviction events, such as escape or parole. The victim’s address and telephone number maintained by the sheriff or Department of Corrections
for notification purposes are exempt from disclosure under Michigan’s Freedom of Information Act. MCL 780.769(2).

Similarly, in cases under the juvenile article of the CVRA, a victim may request notification from a sheriff or the Department of Corrections of certain post-conviction events regarding a juvenile who was sentenced as an adult following “designated proceedings.” Pursuant to MCL 780.798(5), the victim’s address and telephone number maintained by the sheriff or Department of Corrections for notification purposes are exempt from disclosure under Michigan’s Freedom of Information Act.

Victims of crime have a state constitutional right to be treated with respect for their dignity and privacy. Const 1963, art 1, § 24. To protect this right, all articles of the CVRA exempt from disclosure under Michigan’s Freedom of Information Act the following information and visual representations of a crime victim:

“(a) The home address, home telephone number, work address, and work telephone number of the victim unless the address is used to identify the place of the crime.

“(b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.” MCL 780.758(3)(a)–(b) and MCL 780.788(2)(a)–(b).

However, these provisions “shall not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services.” MCL 780.758(4) and MCL 780.788(3).

25.10 Immunity for Persons or Agencies Furnishing Information to the Court

MCR 3.924 provides immunity to persons or agencies who provide information to the court in response to a request from the court. That rule states as follows:

“Persons or agencies providing testimony, reports, or other information at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court.”
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*A more complete discussion of immunity from liability is beyond the scope of this benchbook.

Interpreting the predecessor to MCR 3.924, which was substantially similar to the current rule, the Court of Appeals held that the rule provided absolute immunity only for defamatory statements. *Bolton v Jones*, 156 Mich App 642, 652–53 (1987), rev’d on other grounds 433 Mich 861 (1989).*

25.11 Fingerprinting of Juveniles “Arrested” for “Juvenile Offenses”

The Department of State Police maintains criminal identification and criminal history information on juveniles adjudicated or convicted of certain offenses in Michigan. MCL 28.241a(g) (“juvenile history record information” includes name, date of birth, fingerprints, photographs (if available), personal description, and arrests and convictions) and MCL 28.242(1).

When a juvenile is arrested for a “juvenile offense,” other than a misdemeanor punishable by 92 days’ imprisonment or less, a fine of $1,000.00, or both, the arresting law enforcement agency must take the juvenile’s fingerprints and send them to the Department of State Police within 72 hours. MCL 28.243(1). “Juvenile offense” means an offense committed by a juvenile that, if committed by an adult, would be a felony, a criminal contempt conviction under [MCL 600.2950 or 600.2950a], a criminal contempt conviction for violation of a foreign protection order that satisfies the conditions for validity provided in [MCL 600.2950i], or a misdemeanor. MCL 28.241(h). Misdemeanors include violations of local ordinances that substantially correspond to a state law. MCL 28.241(j)(ii). However, a juvenile’s fingerprints need not be taken and forwarded to the department solely for a violation of MCL 257.904(3)(a) (first offense of driving with a suspended or revoked license). MCL 28.243(3).

The Family Division must permit fingerprinting of a juvenile as required by MCL 712A.11(5) and MCL 712A.18(10). MCR 3.936(A). MCL 712A.11(5) states as follows:

> “When a petition is authorized, the court shall examine the court file* to determine if a juvenile has had fingerprints taken as required under [MCL 28.243]. If a juvenile has not had his or her fingerprints taken, the court shall do either of the following:

(a) Order the juvenile to submit himself or herself to the police agency that arrested or obtained the warrant for the arrest of the juvenile so the juvenile’s fingerprints can be taken.

(b) Order the juvenile committed to the custody of the sheriff for the taking of the juvenile’s fingerprints.”
Similarly, MCL 712A.18(10) requires the court to examine the court file before the court enters an order of disposition or judgment of sentence to verify that the juvenile has been fingerprinted. That statutory provision states as follows:

“The court shall not enter an order of disposition for a juvenile offense as defined in [MCL 28.241a], or a judgment of sentence for a conviction until the court has examined the court file and has determined that the juvenile’s fingerprints have been taken and forwarded as required by [MCL 28.243], and as required by the sex offenders registration act . . . .”*

MCR 3.936(B) and MCR 3.943(E)(4) contain substantially similar requirements. MCR 3.936(B)(1)–(2) state that if the juvenile has not been fingerprinted when a petition was authorized or before disposition, the judge or referee must:

“(1) direct the juvenile to go to the law enforcement agency involved in the apprehension of the juvenile, or to the sheriff’s department, so fingerprints may be taken; or

“(2) issue an order to the sheriff’s department to apprehend the juvenile and to take the fingerprints of the juvenile.”

MCR 3.936 applies to designated proceedings. See MCR 3.951 and 3.955.

In “automatic waiver” cases, the district court must examine the court file at the time of arraignment to determine whether the juvenile has been fingerprinted as required by MCL 28.243. MCL 764.29(1). If the juvenile has not had his or her fingerprints taken prior to arraignment, the magistrate must order the juvenile to submit himself or herself to the arresting agency or order the juvenile committed to the custody of the sheriff so that fingerprints may be taken. MCL 764.29(2)(a)–(b). At sentencing, the court must examine the court file to determine whether the juvenile’s fingerprints have been taken. MCL 769.1(2). See also MCL 769.16a(5) and (6), which require a court at sentencing to order fingerprinting for felonies and certain misdemeanors, and to comply with the fingerprinting requirements of the Sex Offenders Registration Act.

If a court orders fingerprints to be taken pursuant to MCL 712A.11, MCL 712A.18, MCL 764.29, or MCL 769.1(2), the law enforcement agency that took the fingerprints must forward the fingerprints and arrest card to the Department of State Police. MCL 28.243(6).
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25.12 Destruction of Fingerprints and Arrest Card

If a petition is not authorized, or if a juvenile is released without being charged, the official taking or holding the juvenile’s fingerprints and arrest card must immediately destroy the fingerprints and arrest card. MCL 28.243(7). If the juvenile’s fingerprints were forwarded to the Department of State Police, the law enforcement agency must notify the department in writing that a petition was not authorized or that a charge was not made against the juvenile. Id.

MCL 28.243(8) provides that if a juvenile is adjudicated and found not to be within the Family Division’s jurisdiction over criminal offenses, or if following trial the juvenile is found not guilty, the fingerprints and arrest card must be destroyed by the person holding the information. MCR 3.936(D)(2) requires the court to “direct that fingerprint information in the court file pertaining to the offense be destroyed” in such cases.

However, the provisions of MCL 28.243(8) that require the destruction of fingerprints and arrest cards do not apply if the juvenile “was arraigned in circuit court or the family division of circuit court for any of the following:

“(a) The commission or attempted commission of a crime with or against a child under 16 years of age.

“(b) Rape.

“(c) Criminal sexual conduct in any degree.

“(d) Sodomy.

“(e) Gross indecency.

“(f) Indecent liberties.

“(g) Child abusive commercial activities.

“(h) A person who has a prior conviction, other than a misdemeanor traffic offense, unless a judge of a court of record, except the probate court, by express order on the record, orders the destruction or return of the fingerprints and arrest card.

“(i) A person arrested who is a juvenile charged with an offense that would constitute the commission or attempted commission of any of the crimes in this subsection if committed by an adult.” MCL 28.243(12)(a)–(i).*
Former MCL 28.243(9)(a), which precluded persons who were acquitted of criminal sexual conduct from obtaining the return of their fingerprint cards, arrest cards, and descriptions from the state police and the arresting police agency did not violate the Equal Protection Clauses of the United States and Michigan Constitutions because denying that return while permitting the return of these documents to persons acquitted of other serious crimes has a rational basis; namely, the particular difficulty in detecting, investigating, and prosecuting criminal sexual conduct offenses. People v Cooper (After Remand), 220 Mich App 368, 374 (1996). See also People v Pigula, 202 Mich App 87, 89–91 (1993) (statute does not violate defendant’s right of privacy).

25.13 Fingerprinting and Photographing of Minors in Family Division Custody

A request to fingerprint or photograph a juvenile may be made when police are conducting investigations of other matters and are seeking to link the juvenile to or exclude the juvenile from commission of other offenses. MCR 3.923(C) states that the court may permit fingerprinting or photographing or both* of a juvenile when a petition has been filed. The fingerprints and photographs must be placed in the confidential file, capable of being located and destroyed on court order.

MCR 3.923(C) applies to all delinquency cases and is discretionary with the court. It should not be confused with the fingerprinting requirements contained in MCL 28.243(1) and MCR 3.936(B) which make it mandatory for the police to take fingerprints of all juveniles who are arrested for “juvenile offenses.”*

The court may not require a juvenile to be fingerprinted following completion and closure of a consent calendar case. MCR 3.932(C)(7).

25.14 Required Reporting to the Department of State Police

MCL 712A.18(11) states as follows:

“Upon final disposition, conviction, acquittal, or dismissal of an offense within the court’s jurisdiction under [MCL 712A.2(a)(1)], the clerk of the court entering the final disposition, conviction, acquittal, or dismissal shall immediately advise the department of state police of that final disposition, conviction, acquittal, or dismissal on forms approved by the state court administrator, as required by [MCL 28.243]. The report to the department of state police shall include information as to the finding of the judge or the jury and a summary of the disposition or sentence imposed.”
MCL 28.243 applies to “juvenile offenses.” “‘Juvenile offense’ means an offense committed by a juvenile that, if committed by an adult, would be a felony, a criminal contempt conviction under [MCL 600.2950 or 600.2950a], a criminal contempt conviction for violation of a foreign protection order that satisfies the conditions for validity provided in [MCL 600.2950i], or a misdemeanor. MCL 28.241(h). Misdemeanors include violations of local ordinances that substantially correspond to a state law. MCL 28.241(j)(ii).

MCL 28.243(8) requires the clerk of the court that enters a final disposition to notify the Department of State Police of a finding of not guilty or not guilty by reason of insanity, a dismissal, a nolle prosequi, or a finding that a juvenile is not under the Family Division’s jurisdiction of criminal offenses. If the juvenile was found within the Family Division’s jurisdiction of criminal offenses, or if the juvenile was convicted of a criminal offense, the clerk of the court that enters the final disposition must transmit a summary of the conviction and disposition or sentence to the Department of State Police. MCL 28.243(9).

MCR 3.936(C)(1)–(2) summarizes the requirements applicable to delinquency and designated cases. These rules state that the Family Division must notify the Central Records Division of the Department of State Police in writing:

“(1) of any juvenile who had been fingerprinted for a juvenile offense and who was found not to be within the jurisdiction of the juvenile court under MCL 712A.2(a)(1); or

“(2) that the court took jurisdiction of a juvenile under 712A.2(a)(1), who was fingerprinted for a juvenile offense, specifying the offense, the method of adjudication, and the disposition ordered.”

For a consent calendar case that has been completed and closed, the court may not report any information to the Department of State Police. MCR 3.932(C)(7). In cases on the formal calendar, if the court finds that a juvenile has violated probation by committing a criminal offense, such a finding must be recorded only as a probation violation, not as a finding of guilt or responsibility for the criminal offense. MCR 3.944(E)(2). In addition, the finding must not be reported to the Department of State Police as an adjudication or disposition. Id.

In criminal cases, MCL 769.16a requires the clerk of the court entering a disposition of the following offenses to send a summary of the disposition to the Department of State Police:

- a felony;
• a misdemeanor for which the maximum penalty exceeds 92 days’ imprisonment;

• a local ordinance for which the maximum possible penalty is 93 days’ imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum possible penalty is 93 days’ imprisonment;

• a misdemeanor in a case in which the appropriate court was notified that fingerprints were forwarded to the Department of State Police;

• criminal contempt of court for a violation of MCL 600.2950 or 600.2950a; or

• criminal contempt for a violation of a foreign protection order that satisfies the conditions for validity in MCL 600.2950i.

25.15 Required Reporting to the Secretary of State

“The court shall prepare and forward to the Secretary of State an abstract of its findings at such times and for such offenses as are required by law.” MCR 3.943(E)(6). The clerk of the Family Division is required to keep a full record of every case in which a person is charged with violating the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code. MCL 257.732(1). The county clerk is the clerk of the court for the Family Division and keeps the records and indexes of actions. MCL 600.1007.

The clerk of the court must send an abstract of the court record to the Secretary of State following a finding that a juvenile has committed certain traffic-related offenses.* The abstract must be certified by signature, stamp, or facsimile signature to be true and correct, and it must contain the following information:

“(a) The name, address, and date of birth of the person charged or cited.

“(b) The number of the person’s operator’s or chauffeur’s license, if any.

“(c) The date and nature of the violation.

“(d) The type of vehicle driven at the time of the violation . . . .

“(e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.

*MCL 257.732(15) excludes non-moving violations from the abstracting requirements.
“(f) Whether bail was forfeited;

“(g) Any license restriction, suspension, or denial ordered by the court as provided by law.

“(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.

“(i) Other information considered necessary to the Secretary of State.” MCL 257.732(3)(a)–(i).

See also MCL 324.80131 (similar requirements for violations of the provisions governing off-road vehicles).

The time requirements for sending the required abstract vary according to the type of offense committed by the juvenile.

**“Drunk driving” offenses that must be abstracted when a charge is dismissed or a juvenile is acquitted.** The clerk must immediately forward an abstract of the record for each case charging a violation of MCL 257.625(1) (driving under the influence of liquor and/or controlled substance), MCL 257.625(3) (driving while visibly impaired), MCL 257.625(6) (person under 21 driving with any bodily alcohol content), or MCL 257.625(7) (“drunk driving” offense committed while person less than 16 years old was occupant or passenger), where the charge is dismissed or the juvenile is “acquitted.” MCL 257.732(1)(b).

**Offenses that must be abstracted upon conviction.** MCL 257.732(4) requires the clerk to forward an abstract of the court record upon a person’s conviction of any of the following offenses or attempt to commit any of the following offenses:

- unlawful driving away of a motor vehicle, MCL 750.413;
- unlawful use of an automobile, without intent to steal, MCL 750.414;
- failure to obey a police or conservation officer’s direction to stop, MCL 750.479a;
- felonious driving, MCL 752.191;
- negligent homicide with a motor vehicle, MCL 750.324;
- manslaughter with a motor vehicle, MCL 750.321;
- murder with a motor vehicle, MCL 750.316 (first-degree murder), and MCL 750.317 (second-degree murder);
• minor purchasing or attempting to purchase, consuming or attempting to consume, or possessing or attempting to possess alcoholic liquor, MCL 436.1703, or a local ordinance substantially corresponding to this section; or

• a controlled substance offense listed in MCL 333.7401–333.7461, or MCL 333.17766a.

A “conviction” includes a juvenile court adjudication. See MCL 257.8a.

Offenses that must be abstracted upon entry of a juvenile disposition. MCL 712A.2b(d) and MCL 257.732(1)(a) require the court, within 14 days after entry of an order of disposition, to forward an abstract of the court record to the Secretary of State if a juvenile is found within the jurisdiction of the Family Division for violating the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code.

For a case consent calendar case that has been completed and closed, the court may not send an abstract to the Secretary of State. MCR 3.932(C)(7). In cases on the formal calendar, if the court finds that a juvenile has violated probation by committing a criminal offense, such a finding must be recorded only as a probation violation, not as a finding of guilt or responsibility for the criminal offense. MCR 3.944(E)(2). In addition, the finding must not be reported to the Secretary of State as an adjudication or disposition. *Id.*

Felonies in which a motor vehicle was used. MCL 257.732(8) requires the clerk of the Family Division to forward an abstract of the court record to the Secretary of State where the offense for which the disposition is ordered is a “felony in which a motor vehicle was used.”*

### 25.16 Setting Aside a Juvenile Adjudication

MCR 3.925(F)(1) states that “[t]he setting aside of juvenile adjudications is governed by MCL 712A.18e.” Except as stated below, a person adjudicated of not more than one juvenile offense and who has no felony convictions may file an application with the adjudicating court for entry of an order setting aside the adjudication. A person may have only one adjudication set aside under this section. MCL 712A.18e(1). In criminal proceedings, a person convicted of more than one misdemeanor may not have any offense set aside. People v Grier, 239 Mich App 521, 522 (2000). See also People v McCullough, 221 Mich App 253 (1997) (the trial court erred by setting aside the defendant’s misdemeanor convictions for two offenses arising from the same incident).
A. Offenses That May Not Be Set Aside

MCL 712A.18e(2)(a)–(c) provides that a person shall not apply to have set aside, and the court shall not set aside, any of the following:

- an adjudication of an offense which if committed by an adult would be a felony for which the maximum punishment is life imprisonment;
- an adjudication for an offense which if committed by an adult would be a criminal violation of the Michigan Vehicle Code; or
- a conviction following designated proceedings in the Family Division, but a person may have a conviction following designated proceedings set aside as otherwise provided by law.*

B. Procedure for Application

An application to set aside a juvenile adjudication may not be filed until five years following imposition of the disposition for the adjudication, or five years following completion of any term of detention for the adjudication, or when the person becomes 24 years of age, whichever occurs later. MCL 712A.18e(3).

MCL 712A.18e(4)(a)–(g) provide that the application must be signed under oath and contain:

- the applicant’s full name and current address;
- a certified record of the adjudication that is to be set aside;
- a statement that the applicant has not been adjudicated of any other juvenile offense;
- a statement that the applicant has not been convicted of any felony offense;
- a statement as to whether the applicant has previously filed an application to set aside this or any other adjudication, and, if so, the disposition of the prior application;
- a statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country;
- a consent to the use of the nonpublic record to be held by the state police.*
C. Submission of Application to State Police

Although the original application is to be filed with the Family Division, MCL 712A.18e(5)–(6) state that the applicant must submit a copy of the application and two sets of fingerprints to the Department of State Police. The Department of State Police then compares the fingerprints to the records of the department, including the nonpublic record, and forwards a set of the fingerprints to the Federal Bureau of Investigation for a comparison to the records of that agency. The Department of State Police then reports its findings, if any, to the court, and the court may not act upon the application until the department reports to the court.

The copy of the application submitted to the Department of State Police must be accompanied by a fee of $25.00 payable to the State of Michigan. MCL 712A.18e(6).

D. Submission of Application to Attorney General and Prosecuting Attorney

A copy of the application must be served upon the attorney general and, if applicable, upon the office of the prosecuting attorney who prosecuted the offense. MCL 712A.18e(7). The attorney general and the prosecuting attorney must have the opportunity to contest the application. *Id.*

If the adjudication was for an offense that if committed by an adult would be an assaultive crime or “serious misdemeanor,” and if the name of a victim* is known to the prosecuting attorney, the prosecuting attorney must give the victim of that offense written notice of the application and forward a copy of the application to the victim pursuant to MCL 780.796a of the Crime Victim’s Rights Act. Notice must be sent by first-class mail to the victim’s last-known address. The victim has a right to appear at any proceeding concerning the adjudication and to make a written or oral statement. MCL 712A.18e(7).

“Assaultive crimes.” “Assaultive crime” is defined in MCL 770.9a. MCL 780.796a(2)(a). However, because “life offenses” may not be set aside, only certain “assaultive crimes” are eligible to be set aside.* The following list contains all of the “assaultive crimes” contained in MCL 770.9a(3), with those “life offenses” that may not be set aside in *italics*:

- felonious assault, MCL 750.82;
- *assault with intent to commit murder, MCL 750.83*;
- assault with intent to do great bodily harm less than murder, MCL 750.84;
- assault with intent to maim, MCL 750.86;
- assault with intent to commit a felony, MCL 750.87;
- *Juveniles accused of or charged with “assaultive offenses” must not be diverted from formal court procedures. MCL 722.823(3) and MCL 722.822(a).*
• assault with intent to commit unarmed robbery, MCL 750.88;
• assault with intent to commit armed robbery, MCL 750.89;
• first-degree murder, MCL 750.316;
• second-degree murder, MCL 750.317;
• manslaughter, MCL 750.321;
• kidnapping, MCL 750.349;
• prisoner taking another as hostage, MCL 750.349a;
• kidnapping a child under age 14, MCL 750.350;
• mayhem, MCL 750.397;
• first-degree criminal sexual conduct, MCL 750.520b;
• second-degree criminal sexual conduct, MCL 750.520c;
• third-degree criminal sexual conduct, MCL 750.520d;
• fourth-degree criminal sexual conduct, MCL 750.520e;
• assault with intent to commit criminal sexual conduct, MCL 750.520g;
• armed robbery, MCL 750.529;
• carjacking, MCL 750.529a; and
• unarmed robbery, MCL 750.530.

Effective October 1, 2002, 2002 PA 483 expanded the list of “assaultive crimes” in MCL 770.9a. The added offenses are:

• Assault against Family Independence Agency employee causing serious bodily impairment, MCL 750.81c(3).

• Intentional assaultive conduct against pregnant individual with intent to cause miscarriage or death to embryo or fetus, MCL 750.90a.

• Intentional assaultive conduct against pregnant individual causing great bodily harm, serious or aggravated injury, or miscarriage or death to embryo or fetus, MCL 750.90b.

• Attempted murder, MCL 750.91.

• A violation of MCL 750.200 to 750.212a [governing explosives, bombs, and harmful devices].

• Stalking, MCL 750.411h.
• Aggravated stalking, MCL 750.411i.

• A violation of MCL 750.543a to 750.543z [governing terrorist crimes].

“Serious misdemeanors.” “Serious misdemeanors” are listed in MCL 780.811. However, because criminal traffic offenses may not be set aside, the two criminal traffic offenses included in this list may not be set aside. The following list contains all of the “serious misdemeanors,” with those criminal traffic offenses that may not be set aside in italics:

• assault and battery, MCL 750.81;

• aggravated assault, MCL 750.81a;

• illegal entry, MCL 750.115;

• fourth-degree child abuse, MCL 750.136b;

• enticing a child for an immoral purpose, MCL 750.145a;

• discharge of a firearm intentionally aimed at a person, MCL 750.234;

• discharge of a firearm intentionally aimed at a person resulting in injury, MCL 750.235;

• indecent exposure, MCL 750.335a;

• stalking, MCL 750.411h;

• leaving the scene of a personal-injury accident, MCL 257.617a, resulting in damage to another individual’s property or physical injury or death to another individual;

• operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual’s property or physical injury or death to another individual;

• selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;

• operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or (3), if the violation involves an accident resulting in damage to another individual’s property or physical injury or death to any individual;

• a violation of a local ordinance substantially corresponding to a violation listed above; and
• a charged felony or serious misdemeanor that is subsequently reduced or pled to a misdemeanor. MCL 780.811(1)(a).

E. Court Action on the Application

MCL 712A.18e(8) provides that, after the state police report is received by the court, the court may require the filing of affidavits and the taking of such proofs as it considers proper before ruling on the application.

For the offense of unlawfully driving away an automobile or attempted UDAA only, an adjudication must be set aside if the applicant follows all of the requirements of this section. For any other offense, the setting aside of an adjudication is conditional and a privilege, not a right. The court may set aside the adjudication if it determines that the circumstances and behavior of the applicant from the date of the applicant’s adjudication to the filing of the application warrant setting aside the adjudication and that setting aside the adjudication is consistent with the public welfare. MCL 712A.18e(9)–(10). See People v Rosen, 201 Mich App 621, 622–24 (1993) (to determine whether to set aside a criminal conviction, a court should balance the circumstances and behavior of the offender and the public welfare; the nature of offense alone does not preclude setting aside the conviction).

F. Effect of Order

If the court grants the application and sets aside the sole juvenile adjudication of the applicant, the applicant, for purposes of the law, shall be considered never to have been adjudicated for the offense, except:

“(a) The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of an adjudication that is set aside.

“(b) This section does not affect the right of the applicant to rely upon the adjudication to bar subsequent proceedings for the same offense.

“(c) This section does not affect the right of a victim of an offense to prosecute or defend a civil action for damages.

“(d) This section does not create a right to commence an action for damages for detention under the disposition that the applicant served before the adjudication is set aside pursuant to this section.” MCL 712A.18e(11)(a)–(d).
G. Access to Records of Adjudications That Have Been Set Aside

MCL 712A.18e(12)–(15) deal with the maintenance of and access to the nonpublic records of the state police. If the court grants the application and sets aside the adjudication, the court must expunge its own files and send a copy of the order to the arresting agency and the state police. MCL 712A.18e(12).

The state police must maintain a nonpublic record of any order setting aside an adjudication and the record of the arrest, fingerprints, adjudication, and disposition of the applicant in the case to which the order applies. This nonpublic record is available only to:

- a court of competent jurisdiction;
- an agency of the judicial branch of state government;
- a law enforcement agency;
- a prosecuting attorney;
- the Attorney General; or
- the Governor. MCL 712A.18e(13).

The nonpublic record may be made available to these persons and entities upon request but only for the following reasons:

“(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.

“(b) Consideration by a law enforcement agency if a person whose adjudication has been set aside applies for employment with the law enforcement agency.

“(c) To show that a person who has filed an application to set aside an adjudication has previously had an adjudication set aside under this section.

“(d) The court’s consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.*

“(e) Consideration by the governor, if a person whose adjudication has been set aside applies for a pardon for another offense.” MCL 712A.18e(13)(a)–(e).

The applicant has the right to secure a copy of the nonpublic record upon payment of a fee to the state police in the same manner as the fee prescribed

*See People v Smith, 437 Mich 293 (1991), discussed in Section 25.7, above.
in MCL 15.234 of the Freedom of Information Act. However, the nonpublic record maintained by the state police is exempt from disclosure under the Freedom of Information Act. MCL 712A.18e(14)–(15).

25.17 Setting Aside a Criminal Conviction

MCL 712A.18e(2)(c) states that a conviction following designated proceedings in the Family Division shall not be set aside. However, this does not prevent a person convicted after designated proceedings from seeking to have the conviction set aside as otherwise provided by law. MCR 3.925(F)(2) states that the court may only set aside a conviction pursuant to MCL 780.621, et seq. In addition, a conviction following an “automatic” or “traditional waiver” proceeding may be set aside as provided in MCL 780.621.

Subject to the exceptions listed below, MCL 780.621(1) allows a person who is convicted of not more than one offense to file an application with the convicting court for entry of an order setting aside that conviction. A person may have only one conviction set aside. MCL 780.624. The term “offense” includes both misdemeanors and felonies. Thus, a person convicted of more than one misdemeanor may not have any offense set aside. People v Grier, 239 Mich App 521, 522 (2000). See also People v McCullough, 221 Mich App 253 (1997) (the trial court erred by setting aside the defendant’s misdemeanor convictions for two offenses arising from the same incident).

A person shall not apply to have set aside, and a judge shall not set aside, any of the following:

- a conviction of a felony for which the maximum punishment is life imprisonment, or an attempt to commit such a felony;

- a conviction for a violation or attempted violation of any of the following offenses:
  - second-degree criminal sexual conduct, MCL 750.520c;
  - third-degree criminal sexual conduct, MCL 750.520d;
  - assault with intent to commit criminal sexual conduct, MCL 750.520g;

- a conviction for a traffic offense. MCL 780.621(2).

MCL 780.621 was amended, effective April 1, 1997, to preclude setting aside convictions of an attempt to commit a life offense, second-, and third-degree criminal sexual conduct, and assault with intent to commit criminal sexual conduct. See 1996 PA 573. The Michigan Court of Appeals has held that the amendment must be given retroactive effect. People v Link, 225 Mich App 211, 214–18 (1997).
A. Procedure for Application

An application must not be filed until the expiration of five years following imposition of the sentence for the conviction the applicant seeks to set aside, or five years following completion of any term of imprisonment for that conviction, whichever occurs later. MCL 780.621(3).

The application is invalid unless it contains the following information and is signed under oath by the person whose conviction is to be set aside:

“(a) The full name and current address of the applicant.

“(b) A certified record of the conviction that is to be set aside.

“(c) A statement that the applicant has not been convicted of an offense other than the one sought to be set aside as a result of this application.

“(d) A statement as to whether the applicant has previously filed an application to set aside this or any other conviction and, if so, the disposition of the application.

“(e) A statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country.

“(f) A consent to the use of the nonpublic record created under [MCL 780.623] to the extent authorized by [MCL 780.623].”* MCL 780.621(4)(a)–(f).

B. Submission of Application to State Police

The applicant must submit a copy of the application and two complete sets of fingerprints to the Department of State Police. The Department of State Police then compares the fingerprints to the records of the department, including the nonpublic record, and forwards a set of the fingerprints to the Federal Bureau of Investigation for a comparison to the records of that agency. The Department of State Police then reports its findings, if any, to the court, and the court may not act upon the application until the department reports to the court. MCL 780.621(5).

The copy of the application submitted to the Department of State Police must be accompanied by a fee of $50.00 payable to the State of Michigan. MCL 780.621(6).
C. Submission of Application to the Attorney General and Prosecuting Attorney

A copy of the application must be served upon the attorney general and upon the office of the prosecuting attorney who prosecuted the crime. The attorney general and the prosecuting attorney must have the opportunity to contest the application. If the conviction was for an “assaultive crime” or “serious misdemeanor,” and if the name of the victim* is known to the prosecuting attorney, the prosecuting attorney must give the victim of that offense written notice of the application and forward a copy of the application to the victim pursuant to MCL 780.772a and MCL 780.827a of the Crime Victim’s Rights Act. Notice must be by first-class mail to the victim’s last known address. The victim has a right to appear at any proceeding concerning the conviction and to make a written or oral statement. MCL 780.621(7).

D. Court Action on the Application

MCL 780.621(8) provides that upon the hearing of the application the court may require the filing of affidavits and the taking of proofs as it considers proper. If the court determines that the circumstances and behavior of the applicant from the date of the applicant’s conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. The setting aside of a conviction under this act is a privilege and conditional and is not a right. MCL 780.621(9). See People v Rosen, 201 Mich App 621, 622–24 (1993) (to determine whether to set aside a conviction, a court should balance the circumstances and behavior of the offender and the public welfare; the nature of offense alone does not preclude setting aside the conviction).

E. Effect of Order

MCL 780.622(1) states that, after entry of an order setting aside a conviction, the applicant shall be considered not to have been previously convicted. However:

“(2) The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside.

“(3) If the conviction set aside pursuant to this act is for a listed offense [under] the sex offenders registration act,* the applicant is considered to have been convicted of that offense for purposes of the sex offenders registration act.
“(4) This act does not affect the right of the applicant to rely upon the conviction to bar subsequent proceedings for the same offense.

“(5) This act does not affect the right of a victim of a crime to prosecute or defend a civil action for damages.

“(6) This act does not create a right to commence an action for damages for incarceration under the sentence that the applicant served before the conviction is set aside pursuant to this act.” MCL 780.622(2)–(6).

F. Access to Records of Convictions That Have Been Set Aside

MCL 780.623 allows the state police to retain a nonpublic record of the order setting aside the conviction and a record of the arrest, fingerprints, conviction, and sentence of the applicant in the case to which the order applies. This nonpublic record shall be made available upon request but only to:

• a court of competent jurisdiction;

• an agency of the judicial branch of state government;

• a law enforcement agency;

• a prosecuting attorney;

• the Attorney General; or

• the Governor.

The nonpublic record may be made available to these persons and entities only for the following reasons:

“(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.

“(b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside pursuant to this act.

“(c) The court’s consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.*

“(d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.

*See People v Smith, 437 Mich 293 (1991), discussed in Section 25.7, above.
“(e) Consideration by a law enforcement agency if a person whose conviction has been set aside applies for employment with the law enforcement agency.

“(f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act has violated that act, or for use in a prosecution for violating that act.” MCL 780.623(2)(a)–(f).

A copy of the nonpublic record must also be provided to the person whose conviction is set aside upon payment of a fee to the state police in the same manner as the fee prescribed in MCL 15.234 of the Freedom of Information Act. MCL 780.623(3). However, the nonpublic record is exempt from disclosure under the Freedom of Information Act. MCL 780.623(4).

### 25.18 Recordkeeping Requirements of the Sex Offenders Registration Act

MCL 712A.18(13) states that if the Family Division has entered an order of disposition for a “listed offense,” as defined in MCL 28.722, or an attempt or conspiracy to commit any “listed offense,” the court or the Family Independence Agency must register the juvenile or accept the juvenile’s registration as provided in the Sex Offenders Registration Act (SORA or “the act”), MCL 28.721 et seq. Juveniles whose cases have been designated for criminal trial in the Family Division and juveniles waived to the Criminal Division must also comply with the act.

#### A. Who Must Register?

An individual who is domiciled, residing, working, or attending school for 14 or more consecutive days (or 30 or more total days in a calendar year) in Michigan is required to register under Michigan’s Act if any of the following apply:*

1. The individual is convicted of a “listed offense” after October 1, 1995. MCL 28.723(1)(a).

2. The individual is convicted on or after September 1, 1999 of an offense added on September 1, 1999 to the definition of “listed offense.” MCL 28.723(2)(a).

3. The individual is required to be registered as a sex offender in another state or country regardless of when the conviction was entered. MCL 28.724(6)(c).
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(4) The individual is required to register or otherwise be identified as a sex or child offender or predator under a comparable statute of that state. MCL 28.723(1)(d).

Note: For convictions on or before October 1, 1995, see MCL 28.723(1)(b)–(c). For convictions before September 1, 1999, of offenses added on September 1, 1999, to the definition of “listed offense,” see MCL 28.723(2)(b)–(d).

“Convicted.” Being “convicted” means any of the following under MCL 28.722(a)(i)–(iv):

- Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses, including but not limited to, a tribal or military court, and including a conviction subsequently set aside pursuant to MCL 780.621–780.624. See also MCL 780.622(3) (inability to set aside convictions for listed offenses for purposes of SORA).

- Being assigned to youthful trainee status pursuant to MCL 762.12–762.15. See People v Rahilly, 247 Mich App 108 (2001) (HYTA defendants must register in accordance with Sex Offenders Registration Act, even following discharge from youthful trainee status).

- Having an order of disposition entered pursuant to MCL 712A.18 that is open to the general public under MCL 712A.28 (records of cases).

- Having an order of disposition or other adjudication in a juvenile matter in another state or country.

Note: Whether juvenile delinquents are required to comply with the Act’s registration requirements after an order of disposition has been successfully set aside is unclear. The foregoing definition of “convicted” does not contain language requiring compliance with the Act in such circumstances, nor does the Juvenile Code’s set-aside provisions under MCL 712A.18e. However, the Code of Criminal Procedure’s set-aside provisions do contain such a provision: “If the conviction set aside . . . is for a listed offense . . . the applicant is considered to have been convicted of that offense for purposes of [the Act].” MCL 780.622(3). For information on the applicability of the Code of Criminal Procedure to juvenile offenders and proceedings, see Section 1.3(B).

“Listed Offense.” A “listed offense” means any of the following under MCL 28.722(e):
• accosting, enticing or soliciting a child for immoral purposes, MCL 750.145a;
• accosting, enticing or soliciting a child for immoral purposes, second offense, MCL 750.145b;
• child sexually abusive activity, MCL 750.145c;
• crimes against nature or sodomy, MCL 750.158, if a victim is less than 18 years of age;*
• a third or subsequent violation of any combination of the following:
  — disorderly person (indecent or obscene conduct), MCL 750.167(1)(f);
  — indecent exposure, MCL 750.335a;
  — local ordinances substantially corresponding to MCL 750.167(1)(f) (disorderly persons), or MCL 750.335a (indecent exposure);
• gross indecency between males, MCL 750.338, if a victim is less than 18 years of age (not applicable to juvenile dispositions or adjudications);*
• gross indecency between females, MCL 750.338a, if a victim is less than 18 years of age (not applicable to juvenile dispositions or adjudications);*
• gross indecency between males and females, MCL 750.338b, if a victim is less than 18 years of age (not applicable to juvenile dispositions or adjudications);*
• kidnapping, MCL 750.349, if a victim is less than 18 years of age;*
• kidnapping child under 14, MCL 750.350;*
• soliciting and accosting, MCL 750.448, if a victim is less than 18 years of age;*
• pandering, MCL 750.455;
• first-degree criminal sexual conduct, MCL 750.520b;
• second-degree criminal sexual conduct, MCL 750.520c;
• third-degree criminal sexual conduct, MCL 750.520d;
• fourth-degree criminal sexual conduct, MCL 750.520e;
assault with intent to commit criminal sexual conduct, MCL 750.520g;

a violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against a person less than 18 years of age;*

an offense committed by a person who was, at the time of the offense, a sexually delinquent person, as defined in MCL 750.10a;*

an attempt or conspiracy to commit any of the foregoing offenses; and

an offense substantially similar to any of the foregoing offenses under a law of the United States, any state, any country, or under tribal or military law.*

The foregoing asterisked (*) offenses were added to the definition of “listed offense” by the Legislature by 1999 PA 85, effective September 1, 1999. Under MCL 28.723(2)(a)–(d), an individual convicted of a 1999 “listed offense” must register for that offense if one of the following applies:

(a) The individual is convicted of that offense on or after September 1, 1999.

(b) On or after September 1, 1999, the individual is on (or placed on) probation or parole, committed to jail, committed to the jurisdiction of the Department of Corrections, under the jurisdiction of Family Division of Circuit Court, or committed to the Family Independence Agency for that offense.

(c) On September 1, 1999, the individual is on probation or parole for that offense which has been transferred to Michigan, or the individual’s probation or parole for that offense is transferred to Michigan after September 1, 1999.

(d) On September 1, 1999, in another state or country, the individual is on probation or parole, committed to jail, committed to the jurisdiction of the Department of Corrections or a similar type of state agency, under the jurisdiction of a court that handles matters similar to those handled by Michigan’s Family Division of Circuit Court, or committed to an agency with the same authority as Michigan’s Family Independence Agency for that offense.

In People v Meyers, 2002 WL 563359 (Mich App, April 16, 2002), the defendant pleaded guilty of violating MCL 750.145d(1)(b), which proscribes using the internet to communicate with a person for the purpose of attempting to commit conduct proscribed under MCL 750.145a. The defendant argued that he was not required to register under SORA because
MCL 750.145d is not a “listed offense.” The Court of Appeals held that the defendant was required to register under SORA. The Court first concluded that although MCL 750.145d prohibits persons from attempting to commit a violation of MCL 750.145a, a “listed offense,” the defendant in this case did not violate MCL 750.145a, which does not itself prohibit attempts to accost a child. Nonetheless, MCL 28.722(e)(xii) includes as a “listed offense” an attempt or conspiracy to commit a “listed offense.” The Court concluded that this provision, in conjunction with MCL 28.722(e)(i), MCL 750.145d, and MCL 750.145a, required the defendant to register under SORA. The Court also concluded that whether a case falls under SORA’s catch-all provision, MCL 28.722(e)(x), is to be determined on a case-by-case basis. To determine whether the catch-all provision applies, a court should analyze the underlying facts of the case, rather than the statute violated, to determine whether the violation was, “by its nature, a sexual offense.”

“Residence.” “Residence” means “that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act. This section shall not be construed to affect existing judicial interpretation of the term residence.” MCL 28.722(g).

“Student.” “Student” means “an individual enrolled on a full- or part-time basis in a public or private educational institution, including but not limited to a secondary school, trade school, professional institution, or institution of higher education.” MCL 28.722(h).

B. Initial Registration and Duties

**Individuals convicted in Michigan.** Under MCL 28.724(5), an individual convicted of a “listed offense” in Michigan after October 1, 1995, who is domiciled, residing, working, or attending school for 14 or more consecutive days (or 30 or more total days in a calendar year) in Michigan must register before any of the following occurs:

- sentencing;
- entry of an order of disposition; or
- assignment to youthful trainee status.

**Note:** For registration procedures regarding an individual convicted of a listed offense on or before October 1, 1995, see MCL 28.724(2)(1)–(3). For registration procedures regarding an individual convicted on or before September 1, 1999, of offenses that were added on September 1, 1999, to the definition of listed offense, see MCL 28.724(4).
The probation officer or the court must provide the registration form, explain the duty to register, verify the individual’s address, provide notice of address changes, and accept the completed form for processing under MCL 28.726. MCL 28.724(5). Furthermore, the court shall not impose sentence, enter an order of disposition, or assign an individual to youthful trainee status until it determines that the individual’s registration was forwarded to the state police. Id. The officer, court, or agency registering an individual must forward the registration or notification to the state police by the law enforcement information network (LEIN) within three business days after registration or notification. MCL 28.726(2).

Note: If an individual is required to be registered under the Act and is placed on probation, the probation order must include a condition that the individual comply with the Act. MCL 771.3(1)(g).

Individuals convicted (or registered) out of state. MCL 28.724(6)(a)–(c) require the following individuals to register with the local law enforcement agency, sheriff’s department, or state police within 14 days after becoming domiciled, temporarily residing, working, or being a student in Michigan for 14 or more consecutive days (or 30 or more total days in a calendar year):

(a) an individual convicted in another state or country after October 1, 1995, of a listed offense as defined before September 1, 1999;

(b) an individual convicted in another state or country of an offense added on September 1, 1999, to the definition of listed offenses; or

(c) an individual required to be registered as a sex offender in another state or country regardless of when the conviction was entered.

C. Post-Registration Change of Status

In-state changes. MCL 28.725(1) requires an individual who is required to be registered under the Act to notify local law enforcement, the sheriff’s department having jurisdiction where the individual’s new residence or domicile is located, or the state police within 10 days after any of the following occur:

- The individual changes his or her residence, domicile, or place of work or education.
- The individual is paroled.
- Final release of the individual from Department of Corrections jurisdiction.
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MCL 28.725(2) requires the Department of Corrections to notify local law enforcement, the sheriff’s department having jurisdiction over the area to which the individual is transferred, or the state police within 10 days after either of the following occur:

- The individual is transferred to a community residential program.
- The individual is transferred into a minimum custody correctional facility of any kind, including a correctional camp or work camp.

For registration duties and procedures for an individual convicted of a listed offense on or before October 1, 1995, see MCL 28.724(2)–(3).

For registration duties and procedures for an individual convicted on or before September 1, 1999, of an offense that was added on September 1, 1999, see MCL 28.724(4)(a)–(g).

Out-of-state changes. An individual required to be registered under the Act who changes domicile or residence to another state must notify the department of state police by form prescribed by the state police not later than 10 days before changing domicile or residence to that other state. The individual must indicate the new state and, if known, the new address. The state police must update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. MCL 28.725(3).

If an individual required to be registered under the Act is transferred from a state correctional facility to any correctional facility or probation or parole in another state, or if the individual’s probation or parole in transferred to another state, the department of corrections must promptly notify the department and the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. MCL 28.725(4). The state police must update the registration and compilation databases. Id.

“Campus reporting.” Effective October 1, 2002, 2002 PA 542 amended various provisions of the Sex Offenders Registration Act (SORA) to require individuals who are “required to be registered” and who also become a student, full- or part-time employee, contract provider, or volunteer with an institution of higher education to report their status in person to an applicable law enforcement agency having jurisdiction over that particular campus. These “campus reporting” amendments are reflected below.

Effective October 1, 2002, 2002 PA 542 amended MCL 28.725(1)(a) to include the requirement that an individual must notify law enforcement within 10 days of “any change required to be reported under section 4a [MCL 28.724a, governing campus reporting].”
Under MCL 28.724a(1)(a)-(f), an individual required to be registered under the SORA who is not a resident of this state must report his or her status in person to the local law enforcement agency or sheriff’s department having jurisdiction over a campus of an institution of higher education, or to a State Police post nearest to that campus, if any of the following occur:

“(a) Regardless of whether he or she is financially compensated or receives any governmental or educational benefit, the individual is or becomes a full- or part-time employee, contractual provider, or volunteer with that institution of higher education and his or her position will require that he or she be present on that campus for 14 or more consecutive days or 30 or more total days in a calendar year,

“(b) The individual is or becomes an employee of a contractual provider described in subsection (a) and his or her position will require that he or she be present on that campus for 14 or more consecutive days or 30 or more total days in a calendar year.

“(c) The status described in subdivision (a) or (b) is discontinued.

“(d) The individual changes the campus on which he or she is an employee, a contractual provider, an employee or a contractual provider, or a volunteer as described in subdivision (a) or (b).

“(e) The individual is or enrolls as a student with that institution of higher education or the individual discontinues that enrollment.

“(f) As part of his or her course of studies at an institution of higher education in this state, the individual is present at any other location in this state, another state, a territory or possession of the United States, or another country for 14 or more consecutive days or 30 or more total days in a calendar year, or the individual discontinues his or her studies at that location.”

Under MCL 28.724a(2), an individual required to be registered under the SORA who is a resident of this state must report his or her status in person to the local law enforcement agency or sheriff’s department having jurisdiction where his or her new residence or domicile is located, or the State Police post nearest to the individual’s new residence or domicile, if any of the events described in MCL 28.724a(1) occur.
Under MCL 28.724a(3)(a)-(c), an individual required to report under MCL 28.724a(1)-(2) must make his or her report within the following timeframes:

- Not later than January 15, 2003, if the individual is registered under SORA before October 1, 2002.
- On the date he or she is required to register under SORA, if the individual is an employee, a contractual provider, an employee of a contractual provider, a volunteer on that campus, or a student on that campus on October 1, 2002.
- Except as provided in the two preceding subparagraphs, within ten days after the individual becomes an employee, a contractual provider, an employee of a contractual provider, or a volunteer on the campus, or discontinues that status, or changes location, or if he or she enrolls or discontinues his or her enrollment as a student on that campus including study in this state or another state, a territory or possession of the United States or another country.

Under MCL 28.724a(5), the applicable law enforcement agency must require the individual who reports to present written documentation substantiating all of the following:

- Employment status.
- Contractual relationship.
- Volunteer status.
- Student status.

Under MCL 28.724a(5), such “written documentation” may include, but need not be limited to, any of the following:

- A W-2 form, pay stub, or written statement by employer.
- A contract.
- A student identification card or student transcript.

An individual required to report under MCL 28.724a must also verify his or her registration quarterly or yearly, as required under MCL 28.725a(4)-(b). MCL 28.724a(4).

Under MCL 28.722(c)(i)-(ii), an “institution of higher education” means one or more of the following:

- A public or private community college, college, or university.
• A public or private trade, vocational, or occupational school.

D. The “Registration”

**Form and contents.** A “registration” under the Act must be made on a form provided by the state police. MCL 28.727(1). The registration must contain the following information under MCL 28.727(1)(a)–(e):

- name;
- social security number;
- date of birth;
- address;
- a brief summary of the individual’s convictions for listed offenses, regardless of the date of conviction, including where the offense occurred and the original charge;
- a complete physical description;
- a photograph; and
- fingerprints, if not already on file with the Department of State Police. MCL 28.727(1).

Effective October 1, 2002, 2002 PA 542 added the following item to be contained on a SORA registration:

> “Information that is required to be reported under section 4a [MCL 28.724a, governing campus reporting requirements].” MCL 28.727(1)(f).

The form used for registration or verification must contain a written statement explaining the individual’s duty to provide notice of a change of address, as required under MCL 28.725 and MCL 28.725a.* MCL 28.727(3).

The registration may contain the following additional information: (1) blood type, and (2) whether a DNA identification profile* is available for the individual. MCL 28.727(2).

An individual’s duties. An individual must sign the registration, notice, and verification.* MCL 28.727(4). Additionally, the individual must not knowingly provide false or misleading information concerning a registration, notice, or verification. MCL 28.727(6). The registration, notice, and verification must be forwarded to the state police, regardless of whether the individual signs the registration, notice, or verification. MCL 28.727(4).

*See Section 25.18(F) for more information on an individual’s duty to notify.

*See Section 25.19, below.

*See Section 25.18(F) for more information regarding the verification process.
Agency duties. The officer, court, or an employee of the agency registering the individual or receiving or accepting a registration must sign the registration form. MCL 28.727(5).

E. Length of Registration Period

The Act delineates three time periods during which an individual must comply with the Act’s registration requirements:

- lifetime.
- 25 years.
- 10 years.

Lifetime registration. Under MCL 28.725(7), individuals must comply with the Act’s registration requirements for life if convicted of any of the following offenses, or a substantially similar offense under a law of the United States, any state or country or a tribal or military court:

- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520c(1)(a);
- kidnapping, if the victim is less than 18 years of age, MCL 750.349;
- kidnapping child under 14 years of age, MCL 750.350;
- child sexually abusive activity, MCL 750.145c(2)–(3);
- attempt or conspiracy to commit any of the immediately foregoing offenses; or
- a second or subsequent “listed offense”* after October 1, 1995, regardless of when any earlier listed offense was committed.

Note: Under this subparagraph, a sex offender does not have to register for life if the first or second listed offense is for a conviction on or before September 1, 1999, for an offense that was added on September 1, 1999, to the definition of listed offense, unless convicted of a subsequent listed offense after September 1, 1999. MCL 28.725(7)(g).

10- or 25-year registration. Under MCL 28.725(6), individuals must comply with the Act’s registration requirements for 25 years after the date of the initial registration if convicted of any listed offense other than an offense detailed in the foregoing subsection. However, if incarcerated in a state correctional facility, the individual must comply with the Act’s
registration requirements for 10 years after the release from the facility, or 25 years from the date of initial registration, whichever is longer.

F. Yearly or Quarterly Verification of Domicile or Residence

Under MCL 28.725a(4), individuals must, after initial registration,* verify their domicile or residence either yearly or quarterly by reporting in person to any of the following law enforcement agencies:

- a local law enforcement agency;
- the sheriff’s department having jurisdiction where the individual resides or is domiciled; or
- The Department of State Police post in or nearest to the individual’s county of residence or domicile.

An officer or authorized employee of the law enforcement agency, sheriff’s department, or state police post must verify the individual’s residence or domicile, sign and date the verification form, give a copy of the signed form to the individual (showing the date of verification), forward verification information to the department by the law enforcement information network (LEIN), and revise the data bases to indicate verification in the compilation. MCL 28.725a(5).

An individual required to be registered under the Act must maintain a valid operator’s or chauffeur’s license issued under the Michigan Vehicle Code, MCL 257.1 to 257.923, or an official state personal identification card issued under MCL 28.291 to 28.300, with the individual’s current address. MCL 28.725a(6). The license or card may be used as proof of domicile or residence under MCL 28.725a. MCL 28.725a(6). An individual may also be required to produce another document bearing the individual’s name and address, including but not limited to voter registration or a utility or other bill, or other satisfactory proof of domicile or residence. Id.

Effective October 1, 2002, 2002 PA 542 amended MCL 28.725a(5) to require law enforcement officers to verify not only the registered individual’s residence and domicile but also “any information required to be reported under section 4a [MCL 28.724a, governing campus reporting].”

Yearly verification (“misdemeanor listed offenses”). An individual who is not incarcerated and who registered for one or more “misdemeanor listed offenses” after January 15, 2000,* must verify his or her domicile or residence yearly in person, no earlier than January 1 and no later than January 15, at the local law enforcement agency, sheriff’s department, or state police post. MCL 28.725a(4)(a).

If an individual fails to report as required under MCL 28.725a(4)(a), the state police must notify the local law enforcement agency, and an
appearance ticket may be issued, as provided in MCL 764.9a to 764.9g. MCL 28.725a(8).

Under MCL 28.725a(4)(a), “misdemeanor listed offenses” are the following:

- accosting, enticing or soliciting a child for immoral purposes, MCL 750.145a;
- possession of child sexually abusive material, MCL 750.145c(4);
- disorderly person (indecent or obscene conduct), MCL 750.167(1)(f);
- soliciting and accosting, MCL 750.448;
- indecent exposure (other than violation committed by person who was, at the time, a sexually delinquent person, as defined in MCL 750.10a), MCL 750.335a;
- a local ordinance of a municipality substantially corresponding to any of the immediately foregoing crimes;
- a law of this state or local ordinance of a municipality that by its nature constitutes a sexual offense against an individual less than 18 years old if the violation is not specifically designated a felony and is punishable by imprisonment for one year or less;
- attempt or conspiracy to commit any of the immediately foregoing offenses; or
- an offense substantially similar to any of the immediately foregoing offenses under a law of the United States, any state, or any country, or under tribal or military law.

Effective October 1, 2002, 2002 PA 542 amended the definition of “misdemeanor listed offense” under MCL 28.725a(4)(a) to include the following offense:

- Accosting, enticing or soliciting a child under 16 for immoral purpose if committed before June 1, 2002, MCL 750.145a.

Note: This statutory change was made to incorporate the Legislature’s redesignation of MCL 750.145a from a misdemeanor to a felony, effective June 1, 2002. 2002 PA 45.
Quarterly verification (“felony listed offenses”). An individual who is not incarcerated and who is registered for one or more “felony listed offenses” after January 15, 2000,* must verify his or her domicile or residence quarterly in person, no earlier than the first day and no later than the fifteenth day of each April, July, October, and January, at the local law enforcement agency, sheriff’s department, or state police post. MCL 28.725a(4)(b).

If an individual fails to report as required under MCL 28.725a(4)(b), the state police must notify the local law enforcement agency, and an appearance ticket may be issued, as provided in MCL 764.9a to 764.9g. MCL 28.725a(8).

Under MCL 28.725a(4)(b), “felony listed offenses” are the following:

- accosting, enticing or soliciting a child for immoral purposes, second offense, MCL 750.145b;
- child sexually abusive activity, MCL 750.145c(2)–(3);
- kidnapping, MCL 750.349;
- kidnapping child under 14, MCL 750.350;
- pandering, MCL 750.455;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e;
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- indecent exposure (if committed by a person who was, at the time of the offense, a sexually delinquent person as defined in MCL 750.10a), MCL 750.335a;
- a law of this state that by its nature constitutes a sexual offense against an individual less than 18 years old if the violation is specifically designated a felony and is punishable by imprisonment for more than one year;
- attempt or conspiracy to commit any of the immediately foregoing offenses; or
- an offense substantially similar to any of the immediately foregoing offenses under a law of the United States, any state, any country, or under tribal or military law.
Effective October 1, 2002, 2002 PA 542 amended the definition of “felony listed offense” under MCL 28.725a(4)(b) to include the following offense:

- Accosting, enticing or soliciting a child under 16 for immoral purpose if committed on or after June 1, 2002, MCL 750.145a.

Note: This statutory change was made to incorporate the Legislature’s redesignation of MCL 750.145a from a misdemeanor to a felony, effective June 1, 2002. 2002 PA 45.

G. Public Notification and the Computerized Databases

The state police must maintain two computerized databases of registrations and notices, one containing information for private use by law enforcement agencies, and one containing information for public use, indexed by zip code. MCL 28.728(1)–(2). Under MCL 28.728(3)(a), the computerized compilation intended for public notification must contain the following information for each individual:

- name and any aliases;
- address;
- physical description;
- birthdate; and
- listed offense of which the individual is convicted.

Effective October 1, 2002, 2002 PA 542 amended MCL 28.728(3)(b) to require additional information that must be contained within the computerized compilation. Thus, the name and campus location of each institution of higher education to which the individual is required to report under MCL 28.724a [governing campus reporting] must also be contained in the compilation.

Public inspection at law enforcement agencies during regular business hours. A state police post, local law enforcement agency, or sheriff’s department must make the information from the computerized compilation, described in MCL 28.728(2), available for public inspection during regular business hours for the zip code areas located in whole or in part in its jurisdiction. MCL 28.730(2). These agencies may make this information available to the public through electronic, computerized, or other accessible means. MCL 28.730(3).
Public inspection via the Internet. Michigan’s sex offender registrations may be accessed through the world wide web at www.mipsor.state.mi.us (Michigan Public Sex Offender Registration) or through the Michigan State Police website at www.msp.state.mi.us.* The on-line sex offender registrations can be searched by the sex offender’s name, age, and 5-digit zip code. No information concerning victims is listed in the registrations or on the websites. The following sex offender information is listed on Michigan’s Public Sex Offender Registration website: name, sex, race, date of birth, height, weight, hair color, eye color, address (including city, state, and zip code), citation for “listed offense,” and title of “listed offense.”

H. Juvenile Offenders Exempt From Public Notification Requirements

Although juvenile offenders not tried as adults are subject to the same registration requirements as adult offenders, they are exempted from the Act’s public notification requirements and from having their registrations placed in the state police’s public database. See MCL 28.728(2) and In re Ayres, 239 Mich App 8, 12 (1999). However, this exemption does not apply to juvenile dispositions for either first-degree criminal sexual conduct, MCL 750.520b, or second-degree criminal sexual conduct, MCL 750.520c, after the juvenile offender becomes 18 years of age. Nor does it apply to juvenile offenders convicted under “automatic” or “traditional” waivers or by “case designation” methods. MCL 28.728(2) provides in pertinent part:

“The department [of state police] shall maintain a computerized data base separate from that described in subsection (1) to implement section 10(2) and (3) [MCL 28.730(2)–(3)]. The data base shall consist of a compilation of individuals registered under this act, but except as provided in this subsection, shall not include any individual registered solely because he or she had 1 or more dispositions for a listed offense entered under . . . MCL 712A.18, in a case that was not designated as a case in which the individual was to be tried in the same manner as an adult under . . . MCL 712.2d. The exclusion for juvenile dispositions does not apply to a disposition for a violation of [MCL 750.520b (CSC I) or MCL 750.520c (CSC II)], after the individual becomes 18 years of age.” [Emphasis added.]

I. Confidentiality of Registration and Criminal Penalties for Disclosure of Non-Public Information

Except as otherwise provided in the Act, a registration is confidential and shall not be open to inspection except for law enforcement purposes. MCL 28.730(1). Additionally, the registration, and included materials and
information, are exempt from disclosure under section 13 of the Freedom of Information Act, MCL 15.243. *Id.*

Effective October 1, 2002, 2002 PA 542 amended MCL 28.730(1) to also protect as confidential any “report under section 4a [MCL 28.724a, governing campus reporting]” in addition to the registration.

An individual other than the registrant who divulges, uses, or publishes nonpublic information concerning the registration in violation of the Act is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a maximum $500.00 fine, or both. MCL 28.730(4). Additionally, the registrant whose registration is revealed has a civil cause of action against the responsible party for treble damages. MCL 28.730(5).

Effective October 1, 2002, 2002 PA 542 amended the maximum penalties for an individual who violates MCL 28.730(4) (divulging, using, or publishing nonpublic information concerning registrations in violation of SORA) from 90 days and/or $500.00 to **93 days and/or $1,000.00.**

**J. National Reporting of Michigan Registrations**

Under MCL 28.727(8), the state police must *promptly* provide registration, notice, and verification information to the Federal Bureau of Investigation (FBI), and also to local law enforcement agencies and agencies of other states requiring the information, as provided by law. The information sent to the FBI is entered into a national database, known as the National Sex Offender Registry (NSOR), which was created through the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, 42 USC 14072.

Effective October 1, 2002, 2002 PA 542 added the following agencies that must receive SORA’s registration, notice, and verification information under MCL 28.727(8):

- Sheriff’s departments; and
- State Police posts.

The Lychner Act obligates the FBI to do the following: (1) to track the whereabouts and movement of each person convicted of a criminal offense against a minor victim or a sexually violent offense, or a person who is a sexually violent predator, 42 USC 14072(b)(1)–(3), and (2) to register and verify the addresses of sex offenders who reside in states that do not have “minimally sufficient sexual offender registration program.” 42 USC 14072(c). NSOR does contain registrations from states having “minimally sufficient” registration programs. While the Pam Lychner Act requires NSOR to contain registrations for states not having “minimally sufficient” programs, it does not preclude participation from states with “minimally sufficient” programs. Despite having a “minimally sufficient” program,
Michigan has legislation compelling the state police to forward sex offender registrations to the FBI for inclusion in NSOR. MCL 28.727(8).

The registration information in the NSOR must include the individual’s current address, current photograph, and fingerprints. 42 USC 14072(c). This information must be released to federal, state, and local criminal justice agencies for law enforcement purposes, to federal state, and local governmental agencies responsible for conducting employment-related background checks under 42 USC 5119a, and to the community in certain circumstances. 42 USC 14072(j).

Note: Registrations in NSOR may be accessed by contacting the Crimes Against Children Coordinator at your local FBI field office. General information about NSOR can be obtained via the world wide web at www.fbi.gov/hq/cid/cac/crimesmain.htm, which also has links to the individual state’s sexual offender registries.

K. Registration Violation Enforcement

Venue for prosecution. MCL 28.729(7)(a)–(c) establishes the following venues for prosecuting a failure to register, a failure to notify law enforcement within ten days of changing domicile out of state, and a failure to verify domicile or residence, as follows:

- the individual’s last registered address or residence;
- the individual’s actual address or residence; or
- where the individual was arrested for the violation.

Penalties. Willful violations of the Act are punished under MCL 28.729(1)–(6), as follows:

- No Prior Convictions

An individual having no prior convictions for a violation of this Act, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than four years or a maximum $2,000.00 fine, or both. MCL 28.729(1)(a).

- One Prior Conviction

An individual having one prior conviction for a violation of this Act, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than seven years or a maximum $5,000.00 fine, or both. MCL 28.729(1)(b).
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- **Two or More Prior Convictions**

An individual having two or more prior convictions for a violation of this Act, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than ten years or a maximum $10,000.00 fine, or both. MCL 28.729(1)(c).

- **Failure to Comply with Yearly or Quarterly Verification**

An individual who fails to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a maximum $500.00 fine, or both. MCL 28.729(2).

- **Failure to Comply with Registration Form Requirements**

An individual who willfully fails to sign a registration, notice, or verification as provided in MCL 28.727(4) (registration form), is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $500.00 fine, or both. MCL 28.729(3).

Effective October 1, 2002, 2002 PA 542 amended the maximum penalties for an individual who fails to comply with MCL 28.725a (yearly and quarterly verification) from 90 days or a maximum fine of $500.00 to 93 days or a maximum fine of $1,000.00. MCL 28.729(2).

Effective October 1, 2002, 2002 PA 542 amended the maximum fine for an individual who willfully fails to sign a registration, notice, or verification as provided in MCL 28.727(4) (registration form) from $500.00 to $1,000.00. MCL 28.729(3).

**Additional mandatory penalties.** In addition to any of the foregoing penalties, MCL 28.729(4)–(6) mandate the following sanctions, if applicable:

- The court shall revoke probation of an individual who willfully violates the Act while on probation.

- The court shall revoke the youthful trainee status of an individual who willfully violates the Act while assigned to youthful trainee status.

- The parole board shall rescind the parole of an individual who willfully violates the Act while released on parole.
L. Pertinent Case Law Challenging Registration Act

Retroactive application permissible. Retroactive application of the Sex Offenders Registration Act does not violate the Ex Post Facto Clauses of the Michigan or United States Constitution. See People v Pennington, 240 Mich App 188, 197 (2000), adopting the analyses in Lanni v Engler, 994 F Supp 849 (ED Mich, 1998) and Doe v Kelley, 961 F Supp 1105 (WD Mich, 1997), which both held that Michigan’s registration provisions are not punitive.

Not cruel and unusual punishment under U.S. Constitution. The Act’s registration and notification requirements are not “punishment” and therefore do not violate the U.S. Constitution’s Eighth Amendment prohibition against cruel and unusual punishment. Lanni v Engler, supra at 853–54 (ED Mich, 1998).

Not cruel or unusual punishment under Michigan Constitution. The Act’s registration requirements are not “punishment” and therefore do not constitute cruel or unusual punishment under Const 1963, art 1, § 16. In re Ayres, 239 Mich App 8 (1999). The Court of Appeals in In re Ayres ruled only on the Act’s registration requirements, not its notification requirements. However, it adopted, along with the Court in People v Pennington, supra at 197, the analyses in two U.S. District Court opinions, Lanni v Engler, supra, and Doe v Kelley, supra, which held that the Act’s registration and notification requirements do not constitute “punishment.”

No violation of Double Jeopardy, Equal Protection, or Due Process under U.S. Constitution. The Act’s registration and community notification provisions do not constitute criminal “punishment” and therefore do not violate the Double Jeopardy Clause of the U.S. Constitution. Lanni v Engler, supra at 854.

The Act does not violate the Equal Protection Clause of the U.S. Constitution because defendant, as a sex offender, is not in a “suspect class,” and the Act is reasonably related to the government’s legitimate interest of protecting the public. Id. at 855.

The Act does not deprive a sex offender of a protected liberty or property interest and therefore does not violate the procedural provisions of the U.S. Constitution’s Due Process Clause. Id. See also Doe v Kelly, supra at 1112.

The Act’s notification provisions do not deprive a sex offender of a right to privacy and therefore do not violate substantive due process, because “the information made public by the Act is already a matter of public record, to which no privacy rights attach.” Lanni v Engler, supra at 856. See also Doe v Kelly, supra at 1112.

Due process under Michigan Constitution. In a case of first impression, the Court of Appeals in In re Wentworth, 251 Mich App 560 (2002), held that SORA’s requirements are not an unconstitutional infringement of
defendant’s protected liberty, property, or privacy interests, and that the state is not required to engage in due process beyond that afforded in defendant’s juvenile court proceedings. The Court held that SORA did not deprive defendant of any privacy interest since the public dissemination of defendant’s personal information is truthful and already a matter of public record. *Id.* at 563–67. The Court further held that SORA did not deprive defendant of any liberty interest, and that any deprivation suffered by defendant flowed not from SORA but from the defendant’s own misconduct that resulted in the juvenile disposition. Further, the Court held that, “even if SORA deprived defendant of liberty, she was afforded due process, i.e., notice and opportunity to be heard, through the family court proceedings prior to entry of the order of disposition.” *Id.* at 565. Finally, the Court held that SORA did not violate the exclusive jurisdiction of the family division of circuit court since SORA’s requirements do not confer jurisdiction to the Michigan State Police over juveniles but rather only implementation and enforcement responsibilities.

**HYTA defendants must comply with Act’s requirements.** A defendant convicted of a “listed offense” and sentenced pursuant to the Holmes Youthful Trainee Act (HYTA), MCL 762.11 et seq., must comply with the requirements of the Sex Offenders Registration Act before and after discharge from youthful trainee status. *People v Rahilly*, 247 Mich App 108 (2001).

**Juvenile offenders.** Juvenile offenders not tried as adults are exempt from the Act’s public notification provisions. *In re Ayres*, *supra* at 12.

A juvenile offender and his parents were not denied the equal protection of laws when the juvenile listed his parents’ address as his address under the Act, because the information regarding the juvenile is not available to the public and does not constitute punishment. *In re Whittaker*, 239 Mich App 26, 31 (1999).

**Failure to register—mens rea requirement.** A violation of MCL 28.729 for a “willful” failure to register or notify a law enforcement agency of an address change within ten days of the change is not a specific intent crime. Instead, the crime requires proof of something less than specific intent, i.e., proof of a “knowing exercise of choice.” In *People v Lockett*, ***Mich App*** (2002), the defendant notified his Department of Corrections probation officer of his address change but failed to notify the local law enforcement agency. At the conclusion of defendant’s preliminary examination, the district court dismissed the charge, concluding that defendant had not acted “willfully” by failing to notify the local law enforcement agency of his address change, even though the probation officer testified to specifically telling each of his probationers that address change updates must be made at the police station, not the probation office. The circuit court affirmed. After acknowledging that the issue of whether an omission can constitute “willfulness” is “an extremely murky area,” the Court of Appeals held first that defendant’s notification to his probation officer was insufficient to
constitute notification to a “local law enforcement agency” under SORA. Next, the Court held that although it agreed with the district court’s conclusion that the term “willfully” under MCL 28.729 “requires something less than specific intent, [and] requires a knowing exercise of choice,” it disagreed with the district court’s conclusion that there was “no evidence” to support a finding of “willfulness.” The Court specifically found that the probation officer’s testimony was “sufficient to establish probable cause to believe that defendant knew he was required to update his address with the police department whenever he moved and that he purposely failed to do so.” *Id.* at ___. Thus, the Court remanded the case to the district court with instructions to bind defendant over for trial in circuit court.

25.19 DNA Profiling Requirements

Michigan’s “DNA Identification Profiling System Act,” MCL 28.171 et seq., which took effect on June 17, 1994, is part of the national Combined DNA Index System (CODIS) that links together existing state DNA databases. Michigan’s Act requires the collection of blood, saliva, or tissue samples from selected criminal and juvenile offenders, along with the retention of the resultant “DNA identification profiles.” The Act works in conjunction with five other statutes, each requiring a certain class of criminal and juvenile offenders to provide DNA samples for a type of offense. The classes of offenders are as follows:

- a person* convicted of any felony, attempted felony, or specified misdemeanor on or after January 1, 2002, MCL 750.520m (penal code);
- a juvenile found responsible for a specified offense on or after January 1, 2002, MCL 712A.18k(1) (juveniles); and
- a person in custody
  - a person in prison on or after January 1, 2002, MCL 791.233d (prisoners under jurisdiction of DOC);
  - a juvenile committed to the Family Independence Agency based on being convicted of or found responsible for a specified offense on or after January 1, 2002, MCL 803.225a(1) (juveniles committed to FIA);
  - a juvenile who is a public ward based on being convicted of or found responsible for a specified offense on or after January 1, 2002, MCL 803.307a(1) (public wards).

The remaining subsections discuss Michigan’s DNA Identification Profiling System Act, including the interplay with the foregoing statutes. Each subsection is generally broken down by class of offenders as listed above.
The requirements for the collection and retention of DNA samples and identification profiles are in addition to the testing/counseling requirements for communicable diseases, such as venereal disease, hepatitis, HIV, and AIDS. For more information on those requirements, see Section 25.20.

A. Persons Required to Provide Blood, Saliva, or Tissue Samples

All offenders meeting the requirements detailed below must provide a DNA sample, unless at the time the person is required to provide the sample the investigating law enforcement agency or state police already has a sample from the person that meets the requirements of the DNA Identification Profiling System Act, MCL 28.171 et seq. See MCL 28.176(3) (DNA Identification Profiling System Act), MCL 750.520m(2) (penal code), MCL 712A.18k(2) (juveniles), MCL 803.225a(2) (juveniles committed to FIA), MCL 803.307a(2) (public wards), and MCL 791.233d(1) (prisoners under jurisdiction of DOC).

Persons convicted on or after January 1, 2002. A person, including a juvenile “waived” into the criminal division of circuit court or “designated” to be tried as an adult in family division of circuit court, who is convicted on or after January 1, 2002, of any one of the following offenses is required under MCL 750.520m(1)(b) to provide a blood, saliva, or tissue sample for DNA testing:*

* a felony or attempted felony;*

* any of the following misdemeanors or local ordinances substantially corresponding to the following misdemeanors:

- accosting, enticing, or soliciting a child, MCL 750.145a;
- disorderly person (window peeping), MCL 750.167(1)(c);
- disorderly person (indecent or obscene conduct), MCL 750.167(1)(f);
- disorderly person (loitering in house of prostitution), MCL 750.167(1)(i);
- indecent exposure, MCL 750.335a;
- prostitution (first and second violations), MCL 750.451;
- leasing a house for prostitution, MCL 750.454; or
- female under 17 in house of prostitution, MCL 750.462.

Juveniles found responsible on or after January 1, 2002. A juvenile found responsible on or after January 1, 2002, for any one of the following offenses is required under MCL 750.520m(1)(a) to provide a blood, saliva, or tissue sample for DNA testing:*
• assault with intent to commit murder, MCL 750.83;
• attempted murder, MCL 750.91;
• first-degree murder, MCL 750.316;
• second-degree murder, MCL 750.317;
• manslaughter, MCL 750.321;
• kidnapping, MCL 750.349;
• first-degree criminal sexual conduct, MCL 750.520b;
• second-degree criminal sexual conduct, MCL 750.520c;
• third-degree criminal sexual conduct, MCL 750.520d;
• fourth-degree criminal sexual conduct, MCL 750.520e;
• assault with intent to commit criminal sexual conduct, MCL 750.520g;
• an attempted violation of kidnapping or any of the foregoing criminal sexual conduct offenses;
• disorderly person (window peeper), MCL 750.167(1)(c), and (indecent or obscene conduct), MCL 750.167(1)(f);
• indecent exposure, MCL 750.335a; or
• a local ordinance substantially corresponding to the foregoing disorderly person and indecent exposure statutes.

Persons in custody on or after January 1, 2002. A person in prison under the custody of the Department of Corrections on or after January 1, 2002, must not be released on parole, placed in a community placement facility, including a community corrections center or a community residential home, or discharged upon completion of his or her maximum sentence, until he or she has provided a blood, saliva, or tissue sample for DNA testing. MCL 791.233d(1). However, a prisoner is not required to provide a sample or pay an assessment fee if, at the time the prisoner is to be released, placed, or discharged, the state police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act. MCL 791.233d(1).*

A juvenile who is under the supervision of the Family Independence Agency or a county juvenile agency because of being convicted of an offense in Section 25.21(A), or found responsible for an offense in Section 25.21(A), must not be placed in a community placement of any kind until he or she has provided a sample for chemical testing. MCL 803.225a(1). However, a juvenile under FIA supervision is not required to provide a sample or pay an assessment fee if, at the time the juvenile is convicted or
found responsible, the state police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act. MCL 803.225a(2).

A public ward who on or after January 1, 2002, is under a youth agency’s jurisdiction because of being convicted of an offense in Section 25.21(A), or found responsible for an offense in Section 25.21(A), must not be placed in a community placement of any kind or be discharged from wardship until he or she has provided a sample for chemical testing. MCL 803.307a(1). However, a public ward is not required to provide a sample or pay an assessment fee if, at the time the public ward is convicted or found responsible, the state police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act. MCL 803.307a(2).

**B. Responsible Agency and Timeframe of Sample Collection**

The following subsections specify the agencies responsible for the collection of a person’s blood, saliva, or tissue sample for DNA testing, as well as the applicable timeframes for the collection of samples.

**Persons convicted on or after January 1, 2002.** For a person convicted on or after January 1, 2002, of an offense listed in Section 25.21(A), including a juvenile convicted through waiver, the court must order the county sheriff or investigating law enforcement agency to collect the blood, saliva, and tissue sample. MCL 750.520m(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency’s possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id.*

For a juvenile convicted in a designated proceeding on or after January 1, 2002, of an offense listed in Section 25.21(A), the court must order only the investigating law enforcement agency to collect the blood, saliva, and tissue sample. MCL 712A.18k(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency’s possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id.*

**Juveniles found responsible on or after January 1, 2002.** For a juvenile found responsible on or after January 1, 2002, for an offense listed in Section 25.21(A), the court must order only the investigating law enforcement agency to collect a blood, saliva, and tissue sample. MCL 712A.18k(3). The sample must be collected after a finding of responsibility but before disposition and promptly forwarded, along with any samples already in the agency’s possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id.*
**Persons in custody on or after January 1, 2002.** For a person in prison under the jurisdiction of the Department of Corrections (DOC) on or after January 1, 2002, the DOC is responsible for collecting a blood, saliva, or tissue sample before releasing the prisoner on parole, placing the prisoner in a community placement facility of any kind, including a community corrections center or a community residential home, or discharging the prisoner upon completion of his or her maximum sentence. MCL 791.223d(1). The sample must be promptly forwarded, along with any samples already in the agency’s possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id.* No court order or hearing is required to collect a sample, and it may be collected regardless of the person’s consent. MCL 791.233d(3).

For a juvenile who on or after January 1, 2002, is under the supervision of the Family Independence Agency or a county juvenile agency because of being (1) convicted of any offense listed in Section 25.21(A), or (2) found responsible for any offense listed in Section 25.21(A), the FIA or county juvenile agency, whichever applies, is responsible for collecting a blood, saliva, or tissue sample before the juvenile is placed in a community placement of any kind or before discharge from wardship. MCL 803.225a(1). The sample must be promptly forwarded, along with any samples already in the agency’s possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id.* No court order or hearing is required to collect a sample, and it may be collected regardless of the juvenile’s consent. MCL 803.225a(4).

For a public ward who on or after January 1, 2002, is under a youth agency’s* jurisdiction because of being (1) convicted of any offense listed in Section 25.21(A), or (2) found responsible for any offense listed in Section 25.21(A), the youth agency is responsible for collecting a blood, saliva, or tissue sample before the public ward is placed in a community placement of any kind or before discharge from wardship. MCL 803.307a(1). The sample must be promptly forwarded, along with any samples already in the agency’s possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id.* No court order or hearing is required to collect a sample, and it may be collected regardless of the public ward’s consent. MCL 803.307a(4).

**C. Retention of DNA Identification Profiles**

**Permanent retention.** If a person meets the requirements in Sections 25.21(A)–(B), above, the state police must permanently retain a DNA identification profile* obtained from a sample in the manner prescribed under the DNA Identification Profiling System Act. MCL 28.176(1).

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*See Section 25.8, above, for definitions of “public ward” and “youth agency.”

*See Section 25.19(H) for a definition of “DNA identification profile.”
**Temporary retention.** All other DNA identification profiles need only be retained as long as they are needed for a criminal investigation or prosecution. MCL 28.176(11). This temporary retention includes samples determined by the state police forensic laboratory to have been submitted by a person eliminated as a suspect in a crime. MCL 28.176(12).

**D. Disclosure Limitations**

The DNA identification profile* of a DNA sample shall only be disclosed as follows:

- to a criminal justice agency for law enforcement identification purposes;
- in a judicial proceeding as authorized or required by a court;
- to a defendant in a criminal case if the DNA profile is used in conjunction with a charge against the defendant; and
- for an academic, research, statistical analysis, or protocol developmental purpose.

MCL 28.176(2)(a)–(d) (DNA Identification Profiling System Act), MCL 750.520m(5)(a)–(d) (Penal Code), MCL 712A.18k(10)(a)–(d) (juveniles), MCL 803.225a(5)(a)–(d) (juveniles committed to FIA), MCL 803.307a(5)(a)–(d) (public wards), and MCL 791.233d(5)(a)–(d) (prisoners under jurisdiction of DOC).

**E. Ordering and Distribution of Assessment Fees**

**Persons convicted or found responsible.** A person who is required to provide a DNA sample under Sections 25.21(A)–(B), above, must pay a $60.00 DNA assessment fee. MCL 28.176(5) (DNA Identification Profiling System Act), MCL 750.520m(6) (Penal Code), and MCL 712A.18k(4) (juveniles).* However, a person is not required to provide a sample or pay the fee if a sample already exists and meets the requirements of the DNA Identification Profiling System Act. MCL 28.176(3) (DNA Identification Profiling System Act), MCL 750.520m(2) (Penal Code), and MCL 712A.18k(2) (juveniles).

The assessment fee is in addition to any fines, costs, or other assessments imposed by the court. MCL 28.176(5) (DNA Identification Profiling System Act), MCL 750.520m(6) (Penal Code), and MCL 712A.18k(4) (juveniles).

The assessment fee must be ordered on the record and listed separately in the adjudication order, judgment of sentence, or order of probation. MCL 28.176(6) (DNA Identification Profiling System Act), MCL 750.520m(7) (Penal Code), and MCL 712A.18k(5) (juveniles).
The court may, after reviewing a verified petition, suspend payment of all or part of the assessment fee if it determines the person is unable to pay the assessment. MCL 28.176(7) (DNA Identification Profiling System Act), MCL 750.520m(8) (Penal Code), and MCL 712A.18k(6) (juveniles).

The court must distribute all DNA assessments or portions of DNA assessments as follows:

- 10% to the court;
- 25% to the county sheriff or other investigating law enforcement agency that collected the DNA sample as designated by the court, which must be transmitted by the clerk of the court on the last day of every month; and
- 65% to the Department of Treasury for the State Police Forensic Science Division, which must be transmitted by the clerk of the court on the last day of every month.

MCL 28.176(8) (DNA Identification Profiling System Act), MCL 750.520m(9) (Penal Code), and MCL 712A.18k(7) (juveniles).

**Persons in custody.** A prisoner, juvenile, or public ward* who is required to provide a DNA sample must pay a $60.00 assessment fee. MCL 791.233d(4) (prisoners under jurisdiction of DOC), MCL 803.225a(6) (juveniles committed to FIA), and MCL 803.307a(6) (public wards). No court order is required. However, the prisoner, juvenile, or public ward is not required to provide a sample or pay the fee if a sample already exists and meets the requirements of the DNA Identification Profiling System Act. MCL 791.233d(1) (prisoners under jurisdiction of DOC), MCL 803.225a(2) (juveniles committed to FIA), and MCL 803.307a(2) (public wards).

The responsible department or agency must transmit the assessments or portions of assessments to the Department of Treasury for the state police forensic science division to defray the costs associated with the requirements of DNA profiling and retention. MCL 791.233d(4) (prisoners under jurisdiction of DOC), MCL 803.225a(6) (juveniles committed to FIA), and MCL 803.307a(6) (public wards).

**F. Criminal Penalties for Resisting or Refusing to Provide Samples**

A person who resists or refuses to provide a sample for DNA identification profiling that is required by law is guilty of a misdemeanor punishable by imprisonment for not more than one year or a maximum $1,000.00 fine, or both. MCL 28.173a(1). To be convicted of or found responsible for this offense, the person must be advised that resistance or refusal to provide a sample is a misdemeanor. *Id.* A person is not required to provide a sample if, at the time the person is required to provide the sample, the investigating
law enforcement agency or state police already has a sample from the person that meets the requirements of the rules promulgated under the DNA Identification Profiling Act. MCL 28.173a(2).

**G. Disposal of Samples and DNA Identification Profile Records**

**Person eliminated as suspect.** If the state police forensic laboratory has determined that a sample has been submitted by a person who has been eliminated as a suspect in a crime, it must dispose of the sample in accordance with MCL 333.13811 (disposal of medical waste). MCL 28.176(12)(a). Additionally, the disposal of the sample or DNA identification profile record must be done in the presence of a witness. MCL 28.176(12)(a). After disposal of the sample or DNA identification profile record, the laboratory must make and keep a record of the disposal, signed by the person who witnessed the disposal. MCL 28.176(13).

**Reversal of conviction by appellate court.** If a person has not more than one conviction reversed by an appellate court, he or she may petition the sentencing court to order the disposal of the sample and DNA identification profile record for that conviction. MCL 28.176(10). The person has the burden of proof by “clear and convincing evidence that the conviction was reversed based upon the great weight of the evidence,” which means specifically that “there was overwhelming evidence against the verdict resulting in a miscarriage of justice.” *Id.*

**H. Definition of Terms**

“DNA identification profile” means “the results of the DNA identification profiling of a sample.” MCL 28.172(b) (DNA Identification Profiling Act). See also MCL 750.520m(11)(a) (Penal Code), and MCL 712A.18k(11)(a) (juveniles). “DNA identification profiling” means “a validated scientific method of analyzing components of deoxyribonucleic acid molecules in a biological specimen to determine a match or a nonmatch between a reference sample and an evidentiary sample.” MCL 28.172(c) (DNA Identification Profiling Act). See also MCL 750.520m(11)(a) (Penal Code), and MCL 712A.18k(11)(a) (juveniles).

“Investigating law enforcement agency” means “the law enforcement agency responsible for the investigation of the offense for which the individual is convicted. Investigating law enforcement agency includes the county sheriff but does not include a probation officer employed by the department of corrections.” MCL 28.172(e) (DNA Identification Profiling Act). See also MCL 750.520m(11)(b) (Penal Code), and MCL 712A.18k(11)(c) (juveniles).

“Sample” means “a portion of an individual’s blood, saliva, or tissue collected from the individual.” MCL 28.172(f) (DNA Identification Profiling Act). See also MCL 750.520m(11)(d) (Penal Code), MCL
Chapter 25

25.20 Required Communicable Disease Testing

A. Mandatory Testing or Examination of Juveniles Bound Over for Trial in the Criminal Division

If a defendant is bound over to the Criminal Division for a violation of any of several enumerated offenses, and if the district court determines there is reason to believe the violation involved sexual penetration or exposure to the body fluid of the defendant, the district court must order the defendant to be examined or tested for venereal disease and hepatitis B infection and for the presence of HIV or an antibody to HIV. MCL 333.5129(3).

The enumerated offenses are:

- accosting, enticing, or soliciting child for immoral purposes, MCL 750.145a;
- gross indecency between male persons, MCL 750.338;
- gross indecency between female persons, MCL 750.338a;
- gross indecency between male and female persons, MCL 750.338b;
- aiding and abetting prostitution, MCL 750.450;
- keeping, maintaining, or operating a house of prostitution, MCL 750.452;
- pandering, MCL 750.455;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e; and
- assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 333.5129(3).

Two of the offenses, accosting, enticing, or soliciting child for immoral purposes, MCL 750.145a, and aiding and abetting prostitution, MCL 750.450, are misdemeanors, for which no bindover would occur.
Section 25.20

Because first-degree criminal sexual conduct, MCL 750.520b, is a “specified juvenile violation,” this provision is applicable to “automatic” waiver to the Criminal Division under MCL 712A.2(a)(1) and MCL 600.606, for 14, 15, and 16 year olds. This provision does not apply to “traditional” waiver cases because waived juveniles proceed directly to the Criminal Division for arraignment on an information, not to district court. MCL 712A.4(10). Nor does it appear to apply to cases that have been designated for criminal proceedings in the Family Division pursuant to MCL 712A.2d because MCL 333.5129(3) requires that the juvenile must be bound over to the Criminal Division, whereas in designated proceedings the trial occurs in the Family Division.

B. Mandatory Testing or Examination Following Juvenile Adjudication or Conviction

MCL 333.5129(4) states that upon conviction of a defendant or the issuance by the Family Division of an order adjudicating a child to be within the provisions of MCL 712A.2(a)(1) for a violation of any of the following offenses, the court having jurisdiction of the criminal prosecution or juvenile hearing must order the defendant or child to be examined or tested for venereal disease and hepatitis B infection and for the presence of HIV or an antibody to HIV.

Thus, testing is mandatory following an adjudication of delinquency or a conviction following a waiver proceeding or designated proceeding in the Family Division. The court must also order the juvenile or defendant to receive counseling regarding these diseases. MCL 333.5129(2) and (4).

The offenses are:

- accosting, enticing, or soliciting child for immoral purposes, MCL 750.145a;
- gross indecency between male persons, MCL 750.338;
- gross indecency between female persons, MCL 750.338a;
- gross indecency between male and female persons, MCL 750.338b;
- soliciting prostitution, MCL 750.448;
- admitting to place for purpose of prostitution, MCL 750.449;
- engaging services for purposes of prostitution, MCL 750.449a;
- aiding and abetting prostitution, MCL 750.450;
- keeping, maintaining, or operating a house of prostitution, MCL 750.452;
• pandering, MCL 750.455;
• first-degree criminal sexual conduct, MCL 750.520b;
• second-degree criminal sexual conduct, MCL 750.520c;
• third-degree criminal sexual conduct, MCL 750.520d;
• fourth-degree criminal sexual conduct, MCL 750.520e;
• assault with intent to commit criminal sexual conduct, MCL 750.520g;
• intravenous use of controlled substance, MCL 333.7404; and
• a local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance. MCL 333.5129(4).

C. Disclosure of Results to Victim

In cases involving sexual penetration, sexual contact, or exposure to the defendant’s or juvenile’s body fluids, if the victim consents, the court must provide the person or agency conducting the mandatory examinations or tests with the name, address, and telephone number of the victim, and the person or agency must notify the victim immediately of the results and refer the victim for appropriate counseling. If the victim is a minor or otherwise incapacitated, the victim’s parent, guardian, or person in loco parentis may give the required consent. MCL 333.5129(5).

D. Confidentiality of Test Results

Except as provided in MCL 333.5129(1) (disclosure by testing agency to defendant and health departments for partner notification), MCL 333.5129(5) (victim notification by testing agency), or in MCL 333.5129(6)–(7) (disclosure made part of court record but held confidential), the examinations or tests and results are confidential. All records, reports, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to partner notification under MCL 333.5114a are also confidential. MCL 333.5131(1).

MCL 333.5129(6) states that the examination or test results and any other medical information obtained from the defendant or child must be transmitted to the court and, after the defendant or child is sentenced or an order of disposition is entered, made part of the court record, but are confidential and shall be disclosed only to:

• the defendant or child;
• the local health department;
• the state public health department;
• the victim or person acting for the victim as provided in MCL 333.5129(5);
• to another person upon written authorization of the defendant or child found to be within the provisions of MCL 712A.2(a)(1), or the child’s parent, guardian, or person in loco parentis; and
• as otherwise provided by law.

MCL 333.5129(7) allows for transmission of the examination or test results to the Department of Corrections if the defendant is placed in its custody, and to the relative or public or private agency, institution, or facility with whom a child is placed by the Family Division. A person or agency that receives test results or other medical information pertaining to HIV infection or acquired immunodeficiency syndrome under MCL 333.5129(6)–(7) is subject to the provisions of MCL 333.5131 and may only disclose information pursuant to that provision. MCL 333.5129(7).

Test results or the fact that testing was ordered to determine the presence of HIV infection or acquired immunodeficiency syndrome are subject to the physician-patient privilege, MCL 600.2157. MCL 333.5131(2).
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