

Report on Public Policy Position

Name of committee:

American Indian Law Committee

Contact person:

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Proposed Court Rule or Administrative Order Number:

[2008-43 - Proposed Amendments of Rules 3.800, 3.802, 3.901, 3.903, 3.920, 3.921, 3.931, 3.935, 3.961, 3.963, 3.965, 3.974, 3.975, 3.976, 3.977, 3.980, 5.125, 5.402, and 5.404 and Proposed New Rules 3.002, 3.807, 3.905, 3.967, and 5.109 of the Michigan Court Rules](#)

These proposed amendments were recommended by the Indian Child Welfare Act subcommittee in an effort to incorporate the specific provisions of the Indian Child Welfare Act into the relevant rules that relate to adoption and guardianships. The proposal incorporates provisions of the Indian Child Welfare Act into specific provisions within various rules relating to child protective proceedings and juvenile status offenses. The proposal is designed to make the rules reflect a more integrated approach to addressing issues specific to Indian children.

MCR 3.002(1)(c) defines “preadoptive placement” to mean the “temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and” The phrase “in lieu of adoptive placement” is not intended to mean that it is permissible to leave a child in foster care indefinitely, in violation of MCL 712A.19b(6) or (7) or 45 CFR 1355.20, 45 CFR 1356.21, or 45 CFR 1356.50. Rather, it addresses situations where the parental rights to a child have been terminated and there is no permanency plan for adoption of the child. One example is when the child has been placed with a juvenile guardian and the guardianship is subsequently revoked. In this situation, jurisdiction over the child pursuant to MCL 712A.2(b) will be reinstated and the child is placed in foster care.

The proposed amendment of MCR 3.905(C)(1) states that a court shall consider guidelines established by the Bureau of Indian Affairs (BIA) in determining whether good cause not to transfer exists (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. [November 26, 1979]). Some examples of good cause are that the Indian tribe does not have a tribal court or that the Indian child is over 12 years old and objects to the transfer. For additional examples of good cause and relevant case law, see the BIA guidelines cited above and A Practical Guide to the Indian Child Welfare Act. (Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act [Boulder, CO: Native American Rights Fund, 2007], 7.15 and 7.16, p 60.)

Date position was adopted:

December 7, 2009

Process used to take the ideological position:

The position was adopted after a combination of two (2) scheduled teleconference discussions on 9/25/09 and 12/04/09, electronic discussion and vote taken during the 12/04/09 teleconference and follow-up e-mail votes submitted by Committee members.

Number of members in the decision-making body:

19

Number who voted in favor and opposed to the position:

13 Voted for position

0 Voted against position

0 Abstained from vote

6 Did not vote

Position:

The Committee supports ADM 2008-43 with one recommended amendment and with one recommended staff comment to be included.

Explanation of the position, including any recommended amendments:

The Committee recommended one amendment to proposed Rule 3.967(A) to limit temporary emergency removal/placements (i.e. protective custody) of Indian Children to no more than 45 days vs. 90 days (as proposed in the Rule). The Committee believes the more restrictive limits on temporary emergency removal/placement for Indian Children is more consistent with the intent and purpose of the Indian Child Welfare Act (25 U.S.C. Section 1901 et seq.).

The Committee also recommended inclusion of a Staff Comment to proposed Rule 3.002(1), which would define "child custody proceedings" subject to the proposed Rules. The Committee believes practitioners and Courts applying the proposed Rules would benefit from a Staff Comment that alerts them to the fact that cases that might start out as delinquency proceedings outside the scope of the Indian Child Welfare Act may, under certain circumstances, come under the scope of the ICWA.

December 10, 2009

Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2008-43 Proposed Amendments of Rules 3.800, 3.802, 3.901, 3.920, 3.921, 3.931, 3.935, 3.963, 3.965, 3.974, 3.975, 3.977, 3.980, 5.125, 5.402, and 5.404 and Proposed New Rules 3.002, 3.807, 3.905, and 5.109 of the Michigan Court Rules.

Dear Mr. Davis:

This is a comment on behalf of the State Bar Standing Committee on American Indian Law regarding the above-referenced ADM File.

The Supreme Court published for public comment proposed amendments to Rules and proposed new Rules to incorporate specific provisions into various rules that relate to adoptions, child protective proceedings, certain juvenile proceedings and guardianships to incorporate provisions of the Indian Child Welfare Act (25 U.S.C. §§1901 et seq) and reflect a more integrated approach to issues specific to Indian children.

With the exception of the one substantive change recommended below, the Standing Committee on American Indian Law supports the proposed amendments to the Rules, as well as the proposed new Rules, referenced in the ADM File.

Proposed Rule 3.967(A) governs removal hearings involving an “Indian Child”, as defined by the Indian Child Welfare Act. The proposed Rule 3.967(A), which governs removal hearings involving an Indian Child who has been taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974 to assure compliance with the Section of the Indian Child Welfare Act governing emergency removal and place of Indian Children. Proposed Rule 3.967 would, under “extraordinary circumstances” permit a temporary emergency placement of an Indian Child to be continued for up to 90 days. The Standing Committee believes Rule 3.976(A) could better serve the purposes of the Indian Child Welfare Act if the proposed Rule were modified to permit temporary emergency placement of an Indian Child to be continued for no more than 45 days.

The Committee would recommend that the text of proposed Rule 3.967(A) be modified as follows:

- (A) Child in Protective Custody. If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974, a removal hearing must be held within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to 25 USC 1912(a). Absent extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than ~~45~~ 45 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

In addition to the above change to proposed Rule 3.967(A), the Committee also recommends that an additional Staff Comment accompany the final Rules to provide additional guidance to practitioners. Staff Comments recommended by the Committee are consistent with the *Indian Child Welfare Act of 1978: A Court Resource Guide* published by the State Court Administrative Office in September 2009. The Committee suggests a Staff Comment in the following area will assist practitioners and Courts regarding the application of the Indian Child Welfare Act in the following area:

The Committee suggests that a Staff Comment be considered for inclusion with Rules 3.003 to clarify that the Indian Child Welfare Act may apply if the investigation of a non-status (criminal) delinquency case reveals that the Indian child involved also suffers from child abuse or neglect. In such cases, a petition for child protective proceedings may also be initiated. Suggested Staff Comment:

Staff Comment: MCR 3.002(1): The definition of “child custody proceeding” is intended to apply the Indian Child Welfare Act to delinquency proceedings if an “Indian child” is charged with a so-called status offense in violation of MCL 712A.2(a)(2)-(4) or (d). Delinquency proceedings involving an Indian child charged with any other non-status offense are generally not subject to the Indian Child Welfare Act; however, if the initial investigation or subsequent review of a non-status delinquency case reveals that the Indian child involved suffers from child abuse or neglect, a separate child protective proceeding may be initiated which would be subject to the Indian Child Welfare Act.

If the Court has any questions regarding the above suggestion, feel free to contact me. The Standing Committee on American Indian Law very much appreciates the opportunity to comment on this important proposal.

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The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report. <http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-43-Order.pdf>

List any arguments against the position:

None that we are aware of. The Committee would note, however, that the 90 day limit on temporary emergency removal/placement in proposed Rule 3.967(A) is based on text in Guidelines for implementing the Indian Child Welfare Act published by the Bureau of Indian Affairs.