CHAPTER 8

TRIAL

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8.1. INTRODUCTION

"Trial" is defined as "the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court."[1] If respondents do not accept formal court jurisdiction by a plea of admission or no contest and if the petitioner does not wish to withdraw the petition, the petitioner is to go forward and present his or her proofs at trial. That is, the petitioner must prove that the facts alleged in the petition are true and that they rise to the level of legal neglect. If legal neglect is proven at trial, the court may adjudicate the matter by formally asserting its authority and making the child a temporary ward of the court. The trial is a contest where the respondents, and perhaps the child, will resist the assertions of the petitioner and ask the court to dismiss the petition. Since the respondents lose significant rights upon adjudication and because adjudication begins the time-limited process of disposition, review hearing and permanency planning hearing, which could lead to a termination of parental rights hearing, the adjudication is an extremely important legal step.

8.2. JUDGE OR REFEREE; DISQUALIFICATION OF JUDGE

The parties have the right to a judge at a hearing on the formal calendar.[2] A referee who is licensed to practice law in Michigan may conduct the trial unless a judge or jury is demanded.[3] A judge must preside at a trial by jury.[4] "Party" in child protective proceedings includes the petitioner, child, respondent, parent, and guardian or legal custodian.[5] A party may demand that a judge rather than a referee serve as fact finder at a non jury trial by filing a written demand with the court within 14 days of the court giving notice of the right to a judge or the filing of appearance of counsel, whichever is later, but no later than 21 days before trial.[6]

Disqualification of a judge is governed by MCR 2.003, which provides that a party may raise the issue of a judge's disqualification by motion or the judge may raise it.[7] A judge is disqualified when he or she cannot impartially hear a case. Among the grounds for disqualification are situations in which the judge is personally biased or prejudiced for or against a party or attorney, has been consulted or employed as an attorney in the matter in controversy, or is related to

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1. MCR 3.903(A)(26)
2. MCR 3.912(B)
3. *Id.*
4. MCR 3.912(A)(1)
5. MCR 3.903(A)(18)(b)
6. MCR 3.912(B)
7. MCR 3.912(D)

a party or an attorney acting for a party.[8] If a judge is disqualified, the matter is assigned to another judge of the same court or, if one is not available, the State Court Administrator's Office (SCAO) shall assign another judge.[9]

8.3. JURY

The Juvenile Code expressly provides for the right to jury trial when it says: "In all hearings under this chapter, any person interested in the hearing may demand a jury of 6 or the judge of probate on his or her own motion may order a jury of 6 to try the case."[10] The court rules, however, say that the right to a jury in a juvenile proceeding exists *only* at the trial.[11] The Michigan Supreme Court and the Michigan Court of Appeals have held that there is no *right* to a jury trial at disposition or at termination of parental rights hearing.[12] The question arises, however, whether the court on its own motion *may* order a jury to find facts in any other proceeding, including a termination of parental rights hearing. The statute seems to allow it; the rules and appellate decisions do not seem to preclude it.

A party may demand a jury by filing a written demand with the court within 14 days after the court gives notice of the right to a jury or 14 days after appearance of counsel, whichever is later, but no later than 21 days before trial; the court may excuse a late filing in the interest of justice.[13] The failure to file a timely written jury demand waives the right to a jury trial.[14] Presumably all parties, including the petitioner, have the right to demand a jury.

Jury procedure in juvenile court is governed by MCR 2.510-2.516 except as specifically provided in MCR 3.911, which deals with the number of peremptory challenges available to each party.[15]

Mathers speaks to the province of the jury in child neglect cases as being the traditional division of finding facts and applying the law.[16]

> Inasmuch as a jury trial is specifically authorized by the statute, when a jury is employed its use is limited to the conventional jury function, that of fact finding. Therefore, in construing the statute we hold that if the jury should find that a child is not within the provisions of the chapter (in this case, not neglected) then, by the language of the statute an order

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8. MCR 2.003
9. MCR 2.003(C)(4)
10. MCL 712A.17(2)
11. MCR 3.911(A)
12. *In re Mathers,* 371 Mich. 516 (1963); *In re Oakes,* 53 Mich.App. 629 (1974)
13. MCR 3.911(B)
14. *In the Matter of Hubel,* 148 Mich.App. 696, 699 (1986)
15. MCR 3.911(C)
16. *In re Mathers,* at 531-532

dismissing the petition is mandatory. If, however, the jury finds that a child is within the provisions of the chapter, then the court may enter an appropriate order of disposition, within the policy and provisions of the chapter.

Standard jury instructions for Child Protection Proceedings are available.[17]

8.4. TIME LIMITS

8.4.1. *63 Day Rule*

If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is removed from the home. If the child is not in placement, the trial must be held within 6 months after the filing of the petition.[18]

8.4.2. *Grounds for Postponement*

In keeping with an appreciation of a child's sense of time and the general need to move expeditiously in these matters when placement of the child is affected, the Juvenile Code provides limited grounds for postponing the trial beyond 63 days when the child is in placement. The court may postpone the trial[19]:

(1) on stipulation of the parties for good cause;
(2) because process cannot be completed; or
(3) because the court finds that the testimony of a presently unavailable witness is needed.

When trial is postponed pursuant to subrule (2) or (3) above, the court shall release the child to the parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child.[20] Since there is no general "good cause" reason for a postponement, parties interested in prompt resolution of the matter should insist on their rights to prompt trial and the discipline imposed by this rule.

8.5. NOTICE; COUNSEL; STANDARD OF PROOF; EVIDENCE; GROUNDS

8.5.1. *Notice and Presence at the Hearing*

For formal notice requirements *see* Chapter 7, **PRETRIAL**.

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17. SJI2d 97.01-15; SJI2d 197.01, Form of Verdict
18. MCR 3.972(A); MCL 712A.17(1)
19. MCR 3.972(A)
20. *Id.*

The court is required to determine that the proper parties are present. The respondent is entitled to be present but the court may proceed in the absence of the respondent if notice has been properly served on him or her.[21] The court may excuse a child from attending the hearing but may not restrict the child from attending.[22] The court is to read the allegations in the petition, unless waived, and explain the nature of the proceedings.[23] A respondent provided proper notice, incarcerated outside of Michigan, however is not guaranteed the opportunity to participate by telephone in termination proceedings.[24]

8.5.2. *Counsel*

All parties are entitled to representation by a lawyer at trial. *See* Chapter 18, **LAWYERS.**

8.5.3. *Standard of Proof -- Preponderance of the Evidence*

At trial the finder of fact must find by a preponderance of the evidence that the child comes within the jurisdiction of the court pursuant to MCL 712A.2(b).[25] Preponderance of the evidence is the standard for determining jurisdiction regardless of the relief requested by the petition for the dispositional phase. When an original petition for permanent custody has been filed, when termination is sought at the initial disposition, the same standard of proof is used as if it were a supplemental petition, clear and convincing evidence that one or more facts alleged in the petition are true and that one or more statutory grounds for terminating parental rights under MCL 712.19b(3) has been met.[26]

For jurisdiction, the standard of proof is always preponderance of the evidence. For termination, the standard of proof is always clear and convincing. The same evidence can establish both jurisdiction and termination.

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[21]. MCR 3.972(B)(1)
[22]. MCL 712A.12; MCR 3.972(B)(1)
[23]. MCR 3.972(B)(2)
[24] MCR 2.004, which allows for the telephonic participation of incarcerated parents at the termination trial, is applicable *only* to incarcerated parties under the jurisdiction of "the [Michigan] Department of Corrections." *Id*. at 75. *In re B.A.D*., 264 Mich. App. 66, 71 (2004)
[25]. MCR 3.972(C)(1)
[26]. *Id*.; MCR 3.977(E)

8.5.4. *Evidence*

The formal rules of evidence for civil proceedings apply at trial, except as specifically provided in the court rules.[27] Special provisions for protection of child witnesses are made in the Juvenile Code and court rules.

8.6. DOES THE CRIMINAL COURT OR FAMILY COURT GO FIRST?

Courts and parties in child protective proceedings are often faced with concurrent criminal and family court proceedings. Should the child protection proceeding wait until completion of the criminal action? The Michigan Supreme Court has answered that question by saying that the two actions can proceed independently without risk of collateral estoppel. As discussed above, the court rules do not provide such an exception to the time limits.

In *People v. Gates* the Michigan Supreme Court considered whether the criminal prosecution of the defendant for criminal sexual conduct was barred by collateral estoppel where a jury had earlier returned a verdict of "no jurisdiction" in a child protection proceeding. The court decided that there was no estoppel.[28] The *Gates* court determined that even if the juvenile court jury thought that a criminal offense had taken place, they were not required to return a verdict of "jurisdiction" so that the verdict did not necessarily determine the issue of criminal guilt or innocence.[29]

The court also based its decision on public policy. It recognized that the focus of juvenile court is on the protection of children, not criminal prosecution, and that there are conflicting procedural and scheduling requirements between the child protection and criminal proceedings.

> Thus, the petitioner or the prosecutor would face an unfortunate choice that is not in the public interest: whether to proceed on the petition in probate court because of concern for the child, or to delay the probate proceeding because of concern that a verdict of non jurisdiction would preclude criminal prosecution of the accused.
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> We are persuaded by public policy considerations that such an election between criminal and child-protective proceedings should not be judicially imposed through the application of collateral estoppel.[30]

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[27]. MCR 3.972(C)(1)

[28]. *People v. Gates*, 434 Mich. 146 (1990); collateral estoppel means that where the issue was determined in a prior legal proceeding, it could not again be litigated. Collateral estoppel is generally applied where there are two civil proceedings. Cases involving "cross-over estoppel" where an issue adjudicated in a civil proceeding is claimed to be precluded in a subsequent criminal proceeding, or vice versa, are relatively recent and rare. *Gates* at 155

[29]. *Id*. at 160

[30]. *Id*. at 163

A court's refusal to delay a termination of parental rights proceeding until completion of a criminal action in circuit court was also held not to have violated the defendants' rights against self-incrimination.[31] *See* discussion of *Stricklin* below.

8.7. SELF-INCRIMINATION RIGHTS IN CHILD PROTECTION PROCEEDINGS

The privilege against self-incrimination applies to a civil proceeding at which evidence is sought which might subject the witness to criminal prosecution.[32] In *Stricklin*, however, a court's refusal to adjourn a Child Protection Proceeding pending the outcome of the Circuit Court criminal action did not violate the defendants' rights against self-incrimination because, based on the parents' argument, any testimony would have been non-incriminating to the parents and the compulsion of non-incriminating testimony is not the sort of compulsion prohibited by the Fifth Amendment.[33] In *Stricklin* a mother and father were accused of sexual abuse in Juvenile Court and criminal sexual conduct in the criminal court. The juvenile proceedings took place first; the court refusing to adjourn until the criminal proceedings were completed. In the juvenile proceedings, the father was called to the stand but invoked his right to remain silent. The mother was called as an adverse witness but did not testify. The Michigan Court of Appeals held that the parents' rights against self-incrimination were not violated.

Appellants retained the unfettered discretion to testify or not to testify; had they chosen to testify, it would have been because their testimony would have increased their chances of retaining their parental rights, and not because of a penalty imposed by the State upon their refusal to testify. The choice not to testify was no more than appellants' tactical decision as to the best course to follow through the civil child protection and criminal proceedings.[34]

The *Stricklin* court also ruled that the adverse party statute (MCL 600.2159), which provides that a defendant in a criminal case shall be deemed a competent witness only at his own request, does not apply to juvenile proceedings; such proceedings are not deemed to be criminal.[35]
The U.S. Supreme Court has ruled that a respondent parent in a Child Protective Proceeding could not use the privilege against coerced self-incrimination to avoid revealing the location of her infant son who was a temporary ward of the court.[36]

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[31]. *In the Matter of Stricklin*, 148 Mich.App. 659 (1986)
[32]. *Berney v. Volk*, 341 Mich. 647 (1955)
[33]. *In the Matter of Stricklin*, 148 Mich.App. 659 (1986)
[34]. *Id*. at 665-666
[35]. *Id*. at 666
[36]. *Baltimore City Dept of Social Services v. Bouknight*, 493 U.S. 549 (1990)

> Even when criminal conduct may exist, the court may properly request production and return of the child, and enforce the request through exercise of the contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation.
>
> These orders to produce children cannot be characterized as efforts to gain some testimonial component of the act of production. The government demands production of the very public charge entrusted to a custodian, and makes the demand for compelling reasons unrelated to criminal law enforcement and as a part of a broadly applied regulatory regime. In these circumstances, Bouknight cannot invoke the privilege to resist the order to produce Maurice [the child].[37]

An order that a parent be examined or evaluated by a psychologist under MCR 3.923(B) for purposes of determining whether parental rights should be terminated does not violate a respondent's right against self-incrimination.[38] The court held that the Fifth Amendment does not apply and is not in issue here. The respondent is not being deprived of her physical liberty. "The objective of termination of parental rights proceedings is to protect the child, not to punish the parent."[39]

Additionally, in *In re Ellis*, the Court of Appeals held that a negative inference can be drawn from a witness's silence where a party to a civil proceeding claims the Fifth Amendment privilege.[40]

The Court of Appeals in an unpublished decision upheld a no-contest plea for the purpose of asserting jurisdiction where the parent was later deemed incompetent to stand trial for the criminal matter arising out of the same set of facts. The Court of Appeals held[41]:

> We first observe that a finding of incompetence in a child protective proceeding has different ramifications than in a criminal matter. While a finding of incompetence in a criminal case necessitates the suspension of the proceedings, child protective proceedings are not automatically suspended in such circumstances, as respondent concedes. Here it was undisputed that respondent was incarcerated and could not care for the children. Further, the same evidence that supported a finding of incompetence sufficient to vacate the no-contest plea established respondent was not able to provide proper care and custody for the children. While respondent is correct that the rules governing the

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[37]. *Id.*
[38]. *In re Johnson,* 142 Mich.App. 764 (1985)
[39]. *Id.* at 766
[40]. *In re Ellis*, 143 Mich.App. 456 (1985)
[41]. *In the Matter of Carpenter*, Michigan Court of Appeals, No. 257669 (Mich.Ct.App. August 11, 2005)

adjudication and disposition determinations are different, in the instant case, the outcome was not affected.