Michigan Indian Family **Preservation Act at Seven Years**

By Norika L. Kida Betti and Cameron Ann Fraser

In January 2013, Michigan enacted the Michigan Indian Family Preservation Act (MIFPA),[1] a state version of the Indian Child Welfare Act (ICWA).[2] Passed in 1978, ICWA is a remedial statute designed to protect native families and ensure that native children remain connected to their communities through heightened protections and burdens of proof in child welfare proceedings. ICWA came in response to overwhelming evidence that states were removing an alarmingly high percentage of Indian children from their families and tribal communities for placement with non-Indian families and institutions.[3] MIFPA's goals were to incorporate the heightened federal standards into Michigan law, integrate federal requirements with state procedures and law, and provide state law guidance on some of the ambiguous or missing provisions of the federal act.[4] Since MIFPA's enactment, the federal government has twice updated its nonbinding guidelines and has enacted binding federal regulations.[5] These newer federal authorities provide guidance for interpreting ICWA, but they are not binding as to MIFPA.[6]

In the seven years since MIFPA was enacted, Michigan appellate courts have issued 11 relevant published opinions: three cover orders removing children from the care of their parents,[7] five cover orders that terminated parental rights,[8] and four cover post-termination issues.[9] The courts have not had to regularly dive into distinctions between state and federal laws because the protections offered have been in

At a Glance:

When differences arise between the Michigan Indian Family Preservation Act, the Indian Child Welfare Act, and regulations, the provision that is most protective of parents' rights should apply.

When inconsistences arise involving provisions that do not concern the rights of parents, the courts should continue to follow the Michigan Indian Family Preservation Act's stricter provisions.

harmony. However, although state and federal authorities were created with the goal of protecting native families and communities, differences between them have led Michigan courts on occasion to grapple with which law controls.

When differences arise between state and federal authorities, the provision that is most protective of parents' rights should apply. ICWA provides:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.[10]

Therefore, when the federal authority is more protective of parental rights, that authority should apply. For example, ICWA provides consideration of parental preference for placement: "Where appropriate, the preference of the Indian child or parent shall be considered: Provided, that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences."[11] MIFPA provides no similar provision. However, because this subsection of ICWA is protective of parental rights, it continues to apply despite its absence from MIFPA.

Michigan courts have consistently decided cases concerning parents' rights based on the higher standards afforded under MIFPA. The Michigan Supreme Court addressed one area where MIFPA standards exceed those under ICWA, explaining:

> ICWA sets a floor, establishing the minimum national standards that must be met before an Indian child may be removed from his or her family in the context of child protective proceedings. 25 USC 1902. MIFPA similarly provides special protections when an Indian child is involved in certain proceedings in Michigan courts. Sometimes the protections afforded under MIFPA are greater than those provided under ICWA, as with the issue we consider today: when may the parent of an Indian child withdraw consent to the termination of parental rights.[12]

The Court further explained that under MIFPA a parent has the right to withdraw consent to termination of parental rights for purposes of adoption at any time before entry of a final order of adoption while under ICWA,[13] and the parent's right to withdraw consent ends upon "entry of a final decree of termination or adoption, as the case may be…."[14] This statutory protection for parents can be found in MIFPA, but is not provided for in ICWA as the Michigan Court of Appeals had previously determined in *In re Kiogima*.[15]

When presented with differing standards under ICWA and MIFPA in situations not involving parents' rights, such as post-termination requests to transfer a case to tribal court, the Michigan Court of Appeals has also relied on the stricter provisions of MIFPA. In *In re Spears*, the Court's decision turned on the less flexible standards of MIFPA rather than the more flexible ICWA and federal regulations when resolving a question of what constitutes good cause to deny transfer to a tribal court. The Court noted that "[u]nlike the ICWA, the MIFPA provides circuit courts with a clear and unambiguous standard for determining what constitutes 'good cause to the contrary' when considering a petition to transfer an Indian child custody case to a tribal court."[16] In addition, *Spears* provided an opportunity for the Court to analyze a situation where the Bureau of Indian Affairs (BIA) guidelines and MIFPA were not in harmony. Applying MIFPA over the 1979 BIA guidelines that were in effect at the time of the case, the Court noted:

> Although the BIA guidelines provide separately that good cause not to transfer a case to a tribal court may exist if a request to transfer is made "at an advanced stage…and the petitioner did not file the petition promptly after receiving notice of the hearing," BIA Guidelines at 67591, § C.3(b)(i),

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> the Michigan Legislature chose not to include timeliness of the request for transfer as a basis for finding good cause under MCL 712B.7(5).[17]

In *In re KMN*, the Michigan Court of Appeals similarly rejected an argument that ICWA preempted MIFPA in a case concerning placement preferences, finding MIFPA's placement preferences "did not stand as an obstacle" to ICWA's stated purpose and instead "endeavored to further protect the Indian child's Indian culture—a purpose consistent with ICWA."[18] Although the Court found no ICWA violations, it vacated several of the trial court's orders based on the stringent standards for deviating from the placement preferences under MIFPA.[19]

One author has encouraged states to adopt the BIA guidelines and ICWA regulations as state laws to ensure consistent compliance with the minimum federal standards and defend against court challenges.[20] Although this suggestion might be useful in other states, Michigan has already enacted MIFPA, and Michigan courts have consistently decided cases based on the heightened protections. Therefore, adopting the current federal regulations without a detailed analysis of the distinctions between the state and federal legal authorities would not be the better course of action. Instead, when inconsistencies arise, Michigan courts should continue to comply with the authority that is more protective of parental rights and, when parental rights are not at stake, follow MIFPA's stricter provisions. ■

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ENDNOTES

1. MCL 712b.1 *et seq.*
2. 25 USC 1901 *et seq.*
3. 25 USC 1901.
4. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 Tulsa L Rev 529, 540–543 (2012), available at <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2827&context=tlr> [https://perma.cc/UH65-KV25] (site accessed September 25, 2019).
5. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed Reg 10,146 (February 25, 2015) and Guidelines for Implementing the Indian Child Welfare Act, 81 Fed Reg 96,476 (December 30, 2016) (codified at 25 CFR 23).
6. *In re Spears*, 309 Mich App 658, 673; 872 NW2d 852 (2015).
7. *In re Detmer/Beaudry*, 321 Mich App 49; 910 NW2d 318 (2017), *In re England*, 314 Mich App 245; 887 NW2d 10 (2016), and *In re McCarrick/Lamoreaux*, 307 Mich App 436; 861 NW2d 303 (2014).
8. *In re Beers*, 325 Mich App 653; 926 NW2d 832 (2018), *In re England*, 314 Mich App 245; 887 NW2d 10 (2016), *In re Johnson*, 305 Mich App 328; 852 NW2d 224 (2014), *In re Jones*, 316 Mich App 110; 894 NW2d 54 (2016), and *In re Payne/Pumphrey/Fortson*, 311 Mich App 49; 874 NW2d 205 (2015).
9. *In re JJW*, 320 Mich App 88; 902 NW2d 901 (2017), *In re KMN*, 309 Mich App 274; 870 NW2d 75 (2015), *In re Spears*, 309 Mich App 658; 872 NW2d 852 (2015), and *In re Williams*, 501 Mich 289; 915 NW2d 328 (2018).
10. 25 USC 1921. See also 25 CFR 23.106 and Guidelines for Implementing the Indian Child Welfare Act.
11. 25 USC 1915(c).
12. *Williams*, 501 Mich at 294.
13. MCL 712B.13(3) and 25 USC 1913(c).
14. *Williams*, 501 Mich at 298–299.
15. *In re Kiogima*, 189 Mich App 6; 472 NW2d 13 (1991).
16. *Spears*, 309 Mich App at 669.
17. *Id.* at 673.
18. *KMN*, 309 Mich App at 293.
19. *Id.* at 295.
20. Turner, *Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements*, 49 Colum J L & Soc Probs 501, 501 (2016), available at <http://jlsp.law.columbia.edu/wp-content/uploads/sites/8/2017/03/49-Turner.pdf> [https://perma.cc/9Y3E-PU5S] (site accessed September 25, 2019).