

**PROPOSED RESOLUTION—DIRECT APPEAL OF ORDERS VIOLATING  
THE INDIAN CHILD WELFARE ACT (ICWA) AND THE MICHIGAN INDIAN  
FAMILY PRESERVATION ACT (MIFPA) AND AMENDMENT TO MCR 3.993**

**Issue**

Should the State Bar of Michigan adopt the following resolution calling for an amendment to the Michigan Court Rules to broaden and clarify the scope of direct appeals of orders in violation of specific provisions of ICWA (25 USC 1914) and MIFPA (MCL 712B.39)?

The following amendment is proposed to MCR 3.993 by adding subsection (A)(4):

**Rule 3.993 Appeals**

**(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 order involving an Indian child that is subject to potential invalidation under the Michigan Indian Child Preservation Act section MCL 712B.39 or the Indian Child Welfare Act section 25 USC 1914, which includes, but is not limited to, an order regarding:**

**(a) recognition of the jurisdiction of a tribal court pursuant to MCL 712B.7, MCL 712B.29 or 25 USC 1911;**

**(b) transfer to tribal court pursuant to MCL 712B.7 or 25 USC 1911;**

**(c) intervention pursuant to MCL 712B.7 or 25 USC 1911;**

**(d) extension of full faith and credit to public acts, records, and judicial proceedings of an Indian tribe pursuant to MCL 712B.7 or 25 USC 1911;**

**(e) removal a child from the home, placement into foster care, or continuance an out-of-home placement pursuant to MCL 712B.9, MCL 712B.15, MCL 712B.25, MCL 712B.29 or 25 USC 1912;**

**(f) termination parental rights pursuant to MCL 712B.9, MCL 712B.15 and/or 25 USC 1912;**

**(g) appointment of counsel pursuant to MCL 712B.21 or 25 USC 1912;**

**(h) examination of reports pursuant to MCL 712B.11 or 25 USC 1912;**

**(i) voluntary consent to or withdrawal of a voluntary consent to a foster care placement or to a termination of parental right pursuant to MCL 712B.13, MCL 712B.25, MCL 712B.27, or 25 USC 1913;**

**(j) foster care, pre-adoptive, or adoptive placement of an Indian child pursuant to MCL 712B.23; and**

**(5) any final order.**

### **Synopsis**

The proposed resolution supports an amendment to the Michigan Court Rules to broaden the scope of direct appeals of court orders in violation of specific provisions of the ICWA and MIFPA. The amendment would create uniformity and consistency between the Michigan Court Rules and the provisions of the ICWA and MIFPA permitting direct appeals for specific violations. In *In re McCarrick/Lamoreaux*, 307 Mich. App. 436 (2014), the Michigan Court of Appeals suggested that the Supreme Court consider modifying MCR 3.993 in order to permit a parental appeal of right, at least under some circumstances, from a removal order when a child is removed from his or her parents at a stage prior to adjudication. This amendment makes clear what is appealable as of right under ICWA and MIFPA.

### **Background**

The ICWA created a right to petition a court to invalidate an action for foster care placement or termination of parental rights under state law when such action specifically violates any provisions of the title. The MIFPA also mirrors this provision. However, despite the right to a direct appeal, state courts have refused to hear cases based on the restrictive language of the Michigan Court Rules. As a result, Michigan litigants have had to seek permissive appeals and are at risk of being denied an appeal when the statutes provide the contrary, which may ultimately lead to the termination of parental rights.

The inconsistency of the Michigan Court Rules with the provisions of the ICWA and MIFPA is illustrated by *McCarrick/Lamoreaux*, where a mother was denied the initial appeal as of right of court orders removing her children from their home on the grounds that MCR 3.993(A)(1) does not apply to non-dispositional removal orders. However, both the ICWA and MIFPA permit the direct appeal of court orders in violation the Acts. Specifically, they provide that a trial court must consider the testimony of a qualified expert witness in order to determine whether the Indian child is likely to be severely damaged from the removal. Here, the trial court had erred in removing the children from the home without first obtaining the testimony of a qualified expert witness.

Further, in *McCarrick/Lamoreaux* the Court cautioned that the removal of the Indian child prior to adjudication substantially impacts an Indian child's protective proceedings, even when the initial concerns are eventually determined to have been overstated, as the parent often fails to comply with the Department of Human Service's directives and programs and may experience a loss of bonding due to a lack of parental visitation. In response to this issue, the Court of Appeals notably opined that "permitting a parent to appeal a removal order as a

matter of right may be one vehicle to minimize the likelihood of this unfortunate occurrence.”  
*Id.* at 492.

**Opposition**

None known.

**Prior Action by Representative Assembly**

None known.

**Fiscal and Staffing Impact on State Bar of Michigan**

None known.

**STATE BAR OF MICHIGAN POSITION**  
**By vote of the Representative Assembly on September 28, 2017**

Should the Representative Assembly of the State Bar of Michigan adopt the above resolution to amend and broaden the language of MCR 3.993?

(a) Yes

or

(b) No