MICHIGAN FAMILY LAW JOURNAL

A Publication of the State Bar of Michigan Family Law Section • Carol F. Breitmeyer, Chair

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Special Theme Issue

Family Law Litigation

State Bar of Michigan
Family Law Section

Mission

The Family Law Section of the State Bar of Michigan provides education, information, and analysis about issues of concern through meetings, seminars, its website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan.

List of Council Meetings*

Saturday, April 9, 2016
Weber's Inn, Ann Arbor

Saturday, May 7, 2016
University Club, Lansing

Saturday, June 4, 2016
Weber's Inn, Ann Arbor

Annual Meeting
Thursday, September 22, 2016
DeVos Place, Grand Rapids

***All regular, monthly Council meetings start at 9:30 a.m. on Saturdays** and are preceded by a breakfast buffet starting at 9:00 a.m. The Annual Meeting customarily starts at 9:00 a.m. with breakfast buffet at 8:30 a.m. Family Law Section members who are not Council members are welcome at all Council meetings. However, if you know you are going to attend a meeting, kindly send an e-mail in advance so we are sure to have plenty of space and food. If a presenter or member wishes access to audio-video equipment, please let us know 7 days in advance.

—Carol F. Breitmeyer; breitmeyer@bcfamlaw.com

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The *Michigan Family Law Journal* welcomes letters to the Editor. Typed letters are preferred; all may be edited. Each letter must include name, home address and daytime phone number. Please submit your letters, in Word format, to the Chair of the Family Law Section, Carol F. Breitmeyer, c/o State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, MI 48933, soudsema@mail.michbar.org

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(E-mail Discussion Group)

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To All Prospective Family Law Journal Authors:

On behalf of the Family Law Council, I am encouraging our membership and readers to consider submitting an article to the *Family Law Journal*.

Article Contact Person: The primary contact person at the State Bar for *Journal* articles is Sue Oudsema (517) 367-6423 and soudsema@mail.michbar.org. Article submissions should be e-mailed to Sue in Word format. Please carbon copy me (aep@papistalaw.com) and Sahera Housey (houseys@oakgov.com) and write "Article for the Family Law Journal" in the subject line when you submit your article.

Article Deadlines: Please submit your articles to Sue Oudsema at her email address above no later than the last day of the month preceding the publication month. There are ten (10) published *Family Law Journal* issues each year. June/July and August/September are combined issues.

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Very Truly Yours,

Anthea E. Papista
Journal Committee Chair

Chair Message

By Carol F. Breitmeyer - Family Law Section Chair 2015-2016

Greetings and welcome to our special litigation issue. This month, our hard working editors have congregated fabulous articles reflecting a wide variety of skill sets in the realm of litigation of family law. The articles you will have the pleasure of reading run the gamut from the power of persuasive arguments to the technical issues of protective orders and the admission of evidence.

Black's Law dictionary defines LITIGATION as "A judicial controversy. A contest in a court of justice, for the purpose of enforcing a right." Excepting a minority of practitioners who devote their practices exclusively to mediation and collaborative law, the majority of practitioners still view litigation or "contest in a court of justice" as the touchstone of their practice(s). Whether it is advising a client or in the actual drafting of a trial brief, litigation is the backbone of our practices. It informs our approach from our first interaction with a potential client through trial when "proofs" are presented to the court. When a client seeks advice about a particular issue most of us consider "what would the court do" before we begin to counsel our clients. This is a benchmark for most practitioners, though for most practitioners, a full-blown trial is a last resort. A court's ostensible reaction forms the basis to most of our settlements. This is the litigation paradigm at work –even without the actual litigation!

Despite the growth of alternative dispute resolution, litigation is still the mainstream paradigm. While very few cases are actually taken to a full trial, many cases have litigation components–many motions regarding specific issues, evidentiary hearings, and the like all prior to any trial. These miscellaneous hearings test trial skills like those explored in this month's issue. Trial and litigation expertise provides the confidence one needs to settle a case. Understanding not only what the court might do, but how you will fare in such a setting can bring closure to an otherwise unruly case.

In our office, only a handful of cases go to trial each year out of the scores that we settle. Nonetheless, we are constantly in "trial preparation mode." Our collaborative friends may find this appalling, but it is still the reality for most attorneys in the realm of family law. Arguably, ensuring sterling representation of our clients requires complete preparedness for trial.

Be sure to take a look at John Urso's article this month. He offers insight into the effects our daily practice can have on our psyche. John comes to this knowledge from painful personal loss. It is well worth reading his good words and consider joining him and national experts at what will be an important seminar regarding suicide with national experts. The seminar will be held at The Inn at St. John's in Plymouth on April 7-10, 2016. For more information go to *www.kevinssong.org.*

As the Chair of the Section, I have the opportunity to watch and be a part of the changes in our law as they unfold. Currently, our eyes are on the so-called "Shared Parenting Act" which will be shortly introduced into the legislature. This legislation would dramatically change the Child Custody Act and would doubtless spawn a vast amount of litigation, despite the fact that its sponsor claims otherwise. Legislation relative to the permissibility of post-judgment arbitration of personal property, changes in Court Rules regarding notice and subpoenas, and legislation which would affect creditors rights in premarital trusts are all in the queue. *Allard v Allard,* 308 Mich App 536; 594 NW2d 143; 864 N.W.2d 143 (2015), was be argued at the Supreme Court on March 10, 2016. *Allard* has the potential to make significant changes in the world of prenuptial agreements. Remember that oral arguments from the Michigan Supreme Court are live-streamed and fun to watch.

Stay tuned, take good care of yourselves and until next month,

—*Carol F. Breitmeyer*

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What's Mine is Mine; *What's Yours is Mine*

Litigating Invasion of Separate Property Issues in Michigan

By Devin R. Day
RizzoBryan, PC

Few issues have greater potential to make a divorce lawyer into a "hero" than successfully invading separate property (or, correlatively, defending against invasion claims). Indeed, there are perhaps no issues on the property-side of marital dissolution that trigger a more visceral "right and wrong" response from clients. The proverbial "what's mine is mine, and what's yours is mine" type arguments naturally raise the temperature of almost any divorce case.

Moreover, Michigan divorce law appears to be trending toward invasion. Recent and somewhat controversial decisions of the Court of Appeals have addressed invasion even where the parties have an enforceable prenuptial agreement purporting to keep their separate property separate–a concept that is currently under review by the Michigan Supreme Court.[1] The wealthy client in particular, therefore, may be more susceptible to invasion arguments than she or he may think.

To effectively litigate these issues, an advocate must have a strong plan from the earliest stages of the litigation, be a detailed historian, and thoroughly develop themes that will help ensure that your client's reasonable expectations can be satisfied. This article will provide some of the basic legal analyses, as well as some tips for practitioners as they work to develop their client's cases.

There are a number of wonderful journal articles published on the subject of litigating separate property, most of which focus on the proper classification of property as separate or marital under Michigan law.[2] Few, however, have focused specifically on the analysis that may follow: whether a spouse's "separate property" can and should nevertheless be awarded to the other. The answer may be more difficult to assess than most clients, and some lawyers, suspect.

In order to best serve your client, it is important to have a thorough understanding of the source of the Court's authority to invade, and the extent to which invasion concepts dovetail with classification-of-property and other legal theories.

The Legal and Equitable Grounds for Invasion of Separate Property

Although it may seem elementary, the first thing to recognize is that invasion arguments can only follow a finding that a particular asset is *separate* property. "Marital property" obviously need not be invaded (making "commingling" arguments, discussed briefly at the end of this article, so attractive). For this reason, property earned and received after the judgment of divorce cannot be invaded (which raises particularly interesting issues when it comes to corporate assets and double-dip type arguments).[3] This means that the analysis is necessarily sequential; practically speaking, your invasion arguments must be grounded either in concession that a certain asset is separate, or couched in the alternative.

Moreover, once an asset or set of assets is deemed "separate," the invasion advocate must contend with the familiar axiom: "[n]ormally…property received by a married party… but kept separate from marital property, is deemed to be separate property not subject to distribution.[4] It is this principle, which most clients *think* they understand, that makes understanding invasion arguments so critical.

When crafting invasion arguments either "for" or "against" invasion, it is well to start your thinking from first principles. Begin here: the trial court's authority to divide property in a divorce is purely statutory.[5]

Case law, however, has recognized that there are two statutory sections that allow a trial court to award one spouse's separate property to the other: MCL 552.23 and MCL 552.401 *- - even though neither section mentions either "separate property" or "invasion" at all.*[6] Each "invasion" statute is distinct, both in terms of legal analysis and the facts that will justify or defeat invasion. Each will, therefore, be discussed separately below.

"Suitable Support and Maintenance" - Invasion Under Section 23

The first "invasion" section, and thus the first source of authority to invade a spouse's separate assets, is MCL 552.23. Section 23 provides:

> **552.23. Further award of real and personal estate.**
>
> Sec. 23. (1) Upon entry of a judgment of divorce or separate maintenance, **if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party**

> **and any children of the marriage as are committed to the care and custody of either party**, the court *may* further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to the other party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. [Emphasis added.]

There are several key phrases in the text of Section 23 that should affect the way you think about its application. First, it should be understood that applying the statute is discretionary with the trial court; it "may" invade *if* the right arguments are made and accepted. This means you must manage your client's expectations, and above all, present arguments that will persuade your particular judge.

Second, note that the statute contemplates a retrospective approach: the trial court should only apply this section if it concludes - *after* dividing the marital estate - that the award to one of the spouses is insufficient for "suitable support and maintenance." In other words, it can only be considered *after* the Court properly characterizes and equitably divides the marital estate, and presumably considers an award of spousal support. This means that your approach must be nimble enough to account for variables in the court's dispositional rulings. It also means that your opponent has an opening to argue that the trial court's initial disposition was either not actually equitable, or if it was, the need to invade is eviscerated – in other words, that invasion should be reserved for only the most extraordinary of cases.

Third, likely for this reason, the statute asks the trial court to determine, in its own mind, exactly what is "suitable support and maintenance." We largely know what support and maintenance are, because they are the familiar foundation of spousal support.[7] But what is "*suitable*" support? The term is not defined by the statute. Practically speaking, it is what the litigants convince the Court it *ought* to be.

Consider how all of this may affect your arguments. The first and most obvious scenario where the statute would tend to apply is in lifestyle-type claims, where the invading spouse is seeking to continue in the "lifestyle to which he/she has become accustomed," but needs resources beyond the marital estate to make that possible. The natural counter, of course, is the spendthrift argument: that the invading spouse tended to live beyond his or her means, and enjoyed a lifestyle that should not have been – and thus should not now be – supported.

Other situations may justify invasion under Section 23 as well. Consider the situation where a couple relies heavily on the fact that one spouse has or will inherit significant assets in the future, and in so doing decides not to make meaningful contributions toward retirement savings. In other words, situations where the separate property is effectively, or has always been, the couple's *de facto* retirement plan. Here, too, the trial court should be considering whether invasion is proper, in order to correct for the unfulfilled reliance.[8]

Keep in mind, too, that invasion under Section 23 can be based on the suitable support of not only the invading spouse, *but the children as well*. For this reason, the Court can consider special needs of the parties' children when awarding property in addition to child support.[9] Thus, Section 23 has an interesting convergence, and potential overlap, with not only spousal support, which is equally an argument based on need,[10] but also the Michigan Child Support Formula Manual's criteria for deviation.[11] Think about tailoring your arguments to those factors. Conversely, if you represent the non-invading spouse, consider framing the issue to address whether your opponent's approach is really asking the Court to *double* tap the support factors.

A dutiful trial court should view these corresponding alimony and invasion issues together, to ensure an overall equitable result; a busy trial court may inadvertently look at them in isolation, and potentially double-dip. (The same could be said of settlement, particularly partial settlements). A careful trial lawyer will be mindful of this potential, and have a strategy to try to control the situation.

Ultimately, to receive an additional award under Section 23, the party's theory must both justify the award on equitable grounds and satisfy the trial court as to why traditional support is not enough. Counter arguments, again, may be spendthrift-oriented, be based on insufficient or unreliable proofs, or may focus on tax ramifications. Consider all of these angles as you develop your approach to the case.

Once you have chosen your arguments, you must then do your discovery homework. It should go without saying that all "need" arguments should be carefully constructed and supportable. Bear in mind that trial courts have been known to render awards bordering on the punitive for litigants who misrepresent their financial needs during the pendency of divorce actions.[12] Reach, but don't *over* reach.

Craft detailed and well-tailored written discovery, and do not underestimate the power of requests for admission. If you are torn on whether to take depositions, don't be. Take them. These cases are decided based on feel as much as fact, and it is imperative that you understand what you are dealing with, and with whom. Consider, too, taking depositions of those family members and friends who can testify about donative intent, lifestyle, budget and spendthrift issues, to narrow and solidify your evidence. If cost is an issue, ask the court to award attorney fees.[13] Make charts and timelines and spreadsheets. Consider utilizing experts who can project into the future and testify as to present value of assets and tax ramifi-

cations. Do your homework better than your opponent and you will greatly improve your odds of success.

Once you have identified your themes, chosen your arguments, and done your discovery homework, make sure that you do what is necessary to allow the Court to not only find in favor of your client, but also to withstand appellate scrutiny. In order to properly invade a separate asset under MCL 552.23, the Court is *required* to make a finding regarding what constitutes sufficient support and maintenance for the non-invading spouse, and must further decide whether joint assets can be allocated in such a way as to avoid invasion. A failure to make specific findings on those issues can be reversible error.[14] Moreover, reference by the Court to "general principles of equity," rather than the recitation of specific findings and justifications, particularly under *Reeves*, may be insufficient to withstand appellate review.[15] Thus, as an advocate, the lawyer must provide sufficient proofs to enable the Court to make those determinations, and on occasion, perhaps remind the Court that such findings are necessary to support and justify the decision. Alternatively, the lawyer advocating against invasion should argue, in the appropriate case, that a disproportionate property division, or an award of spousal support (which may be tax deductible), obviates the need to invade separate assets.[16]

The level of proofs a party must present is dependent on the assets involved, and the legal theories utilized by the Court. For example, in *Shaffner v Shaffner*, the husband appealed a trial court's invasion of his separate assets under Section 23, complaining that his wife presented no evidence of "need" (no evidence was presented regarding bills, expenses, earnings statements, budgets, etc.) during trial. The Court of Appeals appears to have agreed that no such evidence was presented, but upheld the trial court's invasion because the *entire estate was held to be husband's separate property* – and thus, there was no marital estate to distribute. On these facts, it was enough to have shown that the wife had no assets and no job. Moreover, because the invasion was made solely based on Section 23, and not on Section 401, it did not matter that the wife did not present any evidence regarding the appreciation of value attributable to the various assets. While the *Shaffner* case is unusual (and obviously would be persuasive if you had a case where there literally was no marital estate), it is probably more instructive in regards to what the divorce lawyer should attempt to prove at trial where there *is* a marital estate. Financial records and budgets are the gold standard of proofs; a well-positioned lawyer will plan to present such evidence, or some adequate substitute, to justify invasion in virtually every case.

Contribution to the "Acquisition, Improvement, or Accumulation" of the Other Spouse's Separate Assets – Invasion Under Section 401

The second source of the trial court's authority to "invade" the separate assets of one spouse is MCL 552.401. Section 401 provides:

> 552.401. Property awards to spouses in decrees of divorce or separate maintenance
>
> Sec. 1. The circuit court of this state *may* include in any degree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, **if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property.** The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party. [Emphasis added.]

As with Section 23, key language in the statute provides insight into its original intent. First, as with Section 23, the provision is discretionary; the court "may" invade *if* the right evidence exists and the right arguments are made and accepted. Again, this means you must manage your client's expectations, and craft arguments that will persuade your particular judge.

Second, note that the invading party must present evidence that he or she "contributed to" at least one of three modifiers of the property proposed to be invaded. The verb "contributed" is not specifically defined by the Section, meaning that its nature is open to argument by the lawyers and interpretation by the Court. Note that it is phrased in the past tense, suggesting that the Court must look historically at what the parties did over time. How does one contribute to the acquisition of an asset? How does one contribute to the improvement or maintenance of something? Passive contributions are sufficient under *Hanaway*[17] when it comes to dividing the marital estate; a spouse that "enables" the other to work or build or maintain assets by fulfilling other obligations that the spouse may otherwise have to attend to may entitle the non-owning spouse to share in accretions - - but is something more required in order to invade the corpus of the asset itself?

Be mindful of the extent to which these ideas correspond with some of the familiar *Sparks* factors that guide the court in deciding whether property is marital rather than separate.[18] Similarly, the distinction between "active" and "passive" appreciation, used by our Courts to determine whether an asset is marital or separate,[19] shares obvious kinship with the idea of "contribution to the acquisition, improvement, or accumulation of the property" under Section 401. In other words, invasion arguments will often be familiar – perhaps differing only as a matter of degree.

Does Section 401 require *more* compelling evidence, or less, than *Sparks* factor 2? Consider that if Section 401 required what *Sparks* contemplates, or more, presumably the trial court would, on balance, have concluded that the property was marital rather than separate, thus rendering invasion moot. So, it stands to reason that the quantum of contribution contemplated by Section 401 should be less than is contemplated by *Sparks*. Yet, this naturally seems to frustrate the reasonable expectations of most clients, who view their separate property as "theirs" and theirs alone – and seems to result in Factor 2 of *Sparks* being the tail wagging the proverbial dog. Be aware of this interplay as you develop your arguments and conduct your discovery.

Ultimately, as with Section 23, once you have settled on your themes and done your discovery homework, you must remember to help the trial court make all of the required findings to allow your winning argument to withstand appellate scrutiny. To invade under Section 401, the trial court must make specific findings regarding the "acquisition, improvement, or accumulation" of the asset.[20] Under Section 401, it is incumbent on the lawyer to present evidence of *significant* contribution before invasion will be justified. Merely helping to select carpet, doing chores, and "buying stuff" for the home, is probably not enough.[21] Likewise, paying property taxes on a separate real property with marital funds, for example, may not be considered significant enough to justify an invasion analysis.[22] Moreover, evidence of contribution to the acquisition must be concrete rather than speculative, particularly when the theory is an indirect *Hanaway*-type contribution.[23]

In the end, to support invasion under Section 401, the advocate must present a cogent documentary about how the assets came to be, how they were treated, the parties' roles and what *should*, in an equitable world, be done to rightly respect those considerations. It is no easy task, but such is the lifeblood of a capable trial lawyer.

Commingling

Although not technically an invasion theory, no discussion of invasion would be complete without also considering the ever evolving concept of "commingling." After all, perhaps the best way to "invade" property is to *avoid having to invade* under Sections 23 and 401—that is to say: avoid invading by convincing the Court that the property had *become* marital property from the get-go.

Commingling has been held, in certain instances, to change the character of an asset from separate to marital, thus obviating the need to engage in an "invasion" analysis. In *Cunningham* and *Pickering*, the Court of Appeals concluded that separate assets can "transform into marital property if they are commingled with marital assets and 'treated by the parties as marital property.'"[24] Legal title to an asset, in one party's name or the other, is no longer dispositive.[25] In the more recent *Lagalo v Lagalo*, the Court of Appeals actually held that it was reversible error for the trial court to treat inherited property as marital when it had been commingled – even where the commingling could be easily traced.[26]

Note, however, that there are *two* prongs to the commingling argument: (1) the assets must be commingled; and (2) they must be treated as marital property. Too often, this second prong of the analysis is either under-developed or overlooked completely. Remember: this is not actually an invasion argument; you are arguing that this property has *lost its character as being separate*, which requires evidence of intent, pattern and practice. A good case to review when developing your themes is *Powers v Powers,*[27] a two-to-one decision that, due to the unique facts, presents many of the competing commingling arguments.

Note too, the convergence between the commingling argument and the "acquisition, improvement, or accumulation" considerations under Section 401. Here again, as with the *Sparks* factors discussed above, there is a distinct and perceptible overlap to the theories, and thus to the types of proofs required to justify the Court's action. Here again, the prudent advocate will develop themes and theories that fit the facts and take advantage of these nuances; craft discovery to put the proverbial meat on the bones, and give the Court the tools it needs to reach an equitable result in his or her client's favor.

Conclusion

Whether presented during facilitation, at a motion for summary disposition or at trial, an effective family law advocate must be truly comfortable litigating invasion of separate property issues. Understand the law, disabuse your clients of their misconceptions, and do your homework. Start early, understand the ways in which the various legal theories overlap, use discovery, and develop your themes. Done right, invasion arguments are fertile ground for turning trial advocates into heroes.

About the Author

Devin R. Day *concentrates in Civil Litigation, both Trial and Appellate practice, primarily in the fields of Domestic Relations, Insurance Defense, and Personal Injury. He regularly represents individuals and large corporations before all of the State and Federal Courts in Michigan, at both the trial and appellate levels. Mr. Day is an accomplished trial lawyer, legal writer and oral advocate, whose record on behalf of his clients speaks for itself.*

Endnotes

1 In *Reed v Reed*, the Court of Appeals upheld the trial court's finding that a prenuptial agreement was valid, and thus certain property controlled by that agreement was properly categorized as "separate" property, but then remanded to determine (in

part) whether statutory invasion was nonetheless appropriate. *Reed v Reed*, 265 Mich App 131, 142-143, 156; 693 NW2d 825 (2005). The same theory was applied more recently, and certainly more explicitly, in an unpublished decision, *Shariff v Shariff*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 18, 2014 (Docket No. 314824). A thoughtful concurrence to *Shariff* by Judge Murray succinctly identified, and subtly lamented, the often conflictory interplay between enforcing such agreements, which are intended to be determinative of property division, and the Court's statutory authority to ultimately disregard them on an invasion theory.

In the more recent *Allard* decision, the Court of Appeals disavowed the idea that a trial court could first find a prenuptial agreement valid, but then be required to decide whether to invade under MCL 552.23 or MCL 552.401. *Allard v Allard,* 308 Mich App 536; 867 NW2d 866 (2014), lv gtd at 497 Mich 1040; 864 NW2d 143 (2015). According to *Allard*, the *Reed* Court's discussion was mere *dicta,* and because prenuptial agreements are specifically enforceable under MCL 557.28, the trial court was not required to disregard the agreement in favor of invasion to determine an "equitable division of property." This decision is largely viewed as restoring the expectation of parties who live under prenuptial agreements, but the case is currently pending before the Michigan Supreme Court on leave granted. Keep your eye on the *Allard* decision.

2 See, for example, Cunningham, *Family Law: Separate Property in Michigan: Eating Jello with Chopsticks*, 87 Mich B J 20 (June 2008); Schaefer, *Family Law: The Uncertain State of Michigan Equitable Distribution Law Post-Reeves*, 79 Mich B J 168 (Feb 2000); Mastrangel, *The Family Jewels*, 73 Mich B J 552 (1994).

3 *Skelly v Skelly*, 286 Mich App 578, 584; 780 NW2d 368 (2009) (citing *Reeves* for the proposition that only assets that the spouse "takes away" from the marriage is considered his or her separate property; thus, the third and final installment of a retention bonus, partly earned during the marriage, but received after the divorce judgment was entered, was not subject to invasion.).

4 *Dart v Dart,* 460 Mich 573, 584-85; 597 NW2d 82 (1999) (citing *Lee v Lee*, 191 Mich App 73; 477 NW2d 429 (1991)); *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997).

5 *Charlton v Charlton*, 397 Mich 84; 243 NW2d 101 (1992). Compare, however, *Lee v Lee*, 191 Mich App 73; 477 NW2d 429 (1991); *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995); MCL 552.19.

6 *Deyo v Deyo*, 474 Mich 952; 707 NW2d 339 (2005); *Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999); *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997).

7 See *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

8 In this regard, note the extent to which there is a significant conceptual overlap between the invasion standards in Section 23, and several of the property division factors from *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992), specifically factors (5) the parties' life status; and (6) the parties' needs and circumstances.

9 See *Wray v Wray*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 13, 2012 (Docket No. 307714).

10 See *Lippincott v Lippincott*, unpublished opinion per curiam of the Michigan Court of Appeals, issued November 12, 2015 (Docket No. 324250), at pp. 8-9 (observing, in the context of a Section 23 invasion argument, that "principles similar to those applicable to the issues of spousal support apply.").

11 2013 MCSFM § 1.04.

12 See, for example, *Hertzberg v Katz*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 8, 2013 (Docket No. 306208) at pp. 3-4.

13 MCR 3.206(C)(2)(a); *Richards v Richards*, 310 Mich App 683; __ NW2d __ (2015).

14 See *Lee v Lee*, 191 Mich App 73, 78; 477 NW2d (1991); *Davey v Davey*, 106 Mich App 579, 583; 308 NW2d 468 (1981); *Knight v Knight*, unpublished opinion per curiam of the Michigan Court of Appeals, issued July 2, 2002 (Docket No. 229041); *Hampson v Hampson*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 27, 1997 (Docket No. 189784).

15 *Schneider v Schneider*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 28, 2003 (Docket No. 245578) (trial court's invasion based on "general principles of equity," without making specific findings regarding the exceptions discussed in *Reeves* justified remand).

16 See *Stoudemire v Stoudemire*, 248 Mich App 325, 342; 639 NW2d 274 (2001) (finding that the spousal support adequately provided for the wife, such that further invasion of the husband's separate property would not be required under either Sections 23 or 401).

17 *Hanaway v Hanaway,* 208 Mich App 278; 527 NW2d 729 (1995).

18 *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992). See, most specifically, Factor (2) "the source of the property or the parties' contributions toward its acquisition. One of the fundamental realities that must be recognized is the fact that the *Sparks* factors account, independently, for the same facts and issues that would be relevant to, and support, a claim for invasion of separate assets. This convergence makes invasion a unique concept, allowing a court in some instances to pay lip service to the separate character of a spouse's assets, while still arriving at what it believes is an equitable result. A good trial advocate will understand this convergence, and use it to his or her advantage. A less studied advocate may have to explain to his or her client why they could "win" on the separate character of the asset, only to ultimately "lose" on an invasion theory.

19 See *Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999); *Reeves v Reeves*, 226 Mich App 490, 497; 575 NW2d 1 (1997). Compare *McNamara v Horner*, 249 Mich App 177, 183-184; 642 NW2d 385 (2002), (analyzing "wholly passive" appreciation), with *Henderson v Henderson*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 9, 2011 (Docket No. 295765) (finding active appreciation attributable to the

husband's work as co-CEO, as enabled by his wife under *Hanaway* and *Reeves*, sufficient to support a finding that growth of inherited corporate assets were marital rather than separate).

20 *Golowic v Golowic*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 18, 2011 (Docket No. 298973) (holding that once the trial court determined that an asset was separate property, it had to consider and make findings about whether the property should be invaded under Section 401).

21 *Gentile v Graybill*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 15, 2009 (Docket No. 284639).

22 *Grotelueschen v Grotelueschen*, 113 Mich App 395, 400-401; 318 NW2d 227 (1982); *Gentile v Graybill,* unpub op at n. 1; *Bowditch v Bowditch*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 3, 2007 (Docket No. 270647).

23 See, for example, *Friend v Friend*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 21, 2009 (Docket No. 284330). There, the wife argued for invasion of her husband's inheritance from his father, based on a claim that she was instrumental in repairing her husband's estrangement from his father – essentially maintaining that without her, the father may never have made the bequest to his son. Ultimately, because of the facts of that case (including that the other son had also been estranged and the father distributed his estate to both equally), the theory was held too speculative to justify invasion under Section 401.

24 *Cunningham v Cunningham,* 289 Mich App 195, 201; 795 NW2d 826 (2010); *Pickering v Pickering*, 268 Mich App 1, 11; 706 NW2d 835 (2005).

25 *Cunningham,* 289 Mich App at pp. 201-202.

26 *Lagalo v Lagalo*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 26, 2012 (Docket No. 303929) (reversing the trial courts effort to "back out" inherited funds that were used to pay off the mortgage on the marital home, based on the theory that by paying off the mortgage, the inherited funds had been commingled and thus lost their character as separate assets). See also *Boots v Vogel-Boots*, unpublished opinion per curiam of the Michigan Court of Appeals, issued February 5, 2013 (Docket No. 309265) (premarital contributions by both parties could not be traced and "backed out" for either party, because of conclusion that they intended to commingle the funds for marital purposes).

27 *Powers v Powers*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 5, 2012 (Docket No. 301868).

Evidence in Domestic Relations Cases

By Hon. Joseph J. Farah

Introduction

Jumbo shrimp. The quintessential oxymoron? Some might say the title of this article runs a close second. That the rules of evidence provide obstacles not pathways to sound decision making and because family courts are one big court of equity, the rules on the admission or exclusion of evidence are, for lack of a better term, irrelevant.

This article disagrees.

Except for a couple limited situations, the Michigan Rules of Evidence provide no general exception for domestic relations cases, whether they involve divorce, custody, parenting time, or support. Accordingly, the rules apply with equal vigor to a domestic trial as they do to the most adversarial murder or medical malpractice case. The domestic litigator is therefore charged with knowledge of the rules, their meaning, and their application. The domestic practitioner can gain both tactical and substantive advantages—as can any practitioner—with a good working knowledge of the rules.

The focus here will be to identify—in various types of *domestic* cases—where knowledge of the rules of evidence gives the litigator an edge in the presentation or defense of a case. While some might bemoan such knowledge will be of little practical use given the infrequency of domestic trials, this low rate of trials is nearly matched in other areas of the law and would never excuse a lack of knowledge of the evidence rules. Simply put, you don't forego insurance because you don't get in many car accidents.

Avoiding Higher Degrees of Difficulty

The most difficult venue for making evidentiary objections, responding to them, and deciding them is on-the-spot in the trial. While everyone tries their best, it can be said with more than a modicum of accuracy that lawyering and judging in those conditions is not at its zenith. But those scenarios are easily avoided by a three-pronged attack on evidentiary issues.

The Stipulation

Not a single word in the rules of evidence prevents one lawyer calling another and reaching an understanding about a piece of evidence's admissibility. While lawyers can always not get along,[1] such disharmony should not prevent one lawyer from calling another to gain a stipulation–and avoid a courtroom spectacle. Getting a stipulation is worth the effort because one fewer witness may be needed, expense may be saved, and–now here's a beauty–your opponent will know you are thinking about your case before the trial date.

Pretrial Determination

Although you won't be served tea and crumpets in the judge's office for doing so, make a pretrial motion to gain or prevent admissibility of questionable evidence. A "win" in this regard may shape the presentation of proof in your trial to your advantage. Tea and crumpets aside, you may actually earn points for having not left to the trial such determinations as an expert's qualification to testify or the extent of the expert's opinion. You may reveal that your opponent's theory is built on a case calling, inappropriately, for the admission of hearsay evidence, thereby prompting a settlement on more favorable terms. In any event, pre-trial determination provides a favored forum for deciding evidentiary issues than does the trial. Make your motion.

Anticipation and Preparation

The rules of evidence govern how cases are proven in court. A well-prepared case involves not only knowing what to prove but *how* to prove it. The rules of evidence erect barriers to certain kinds of proof (e.g., hearsay, unqualified opinions, and documents without foundation). While tedious and maybe boring, mapping out what you are going to prove, how you're going to prove it and anticipating and preparing for objections will streamline your presentation of your case, making it more efficient and likely more successful.

Particular Evidence Issues

Two points to be made here. First, as with nearly all types of litigation, the rules of evidence need not be applied for preliminary questions of fact. MRE 1101(b)(1). This rule references MRE 104(a) regarding preliminary questions of admissibility. Under these rules, the Court is called on to determine,

for example, the qualifications of an expert or expertise; the existence of privilege; or the admissibility of particular forms of evidence. In making these rulings, the Court is not bound by the rules of evidence. In a significant three-way custody dispute tried in my court, a preliminary determination as to the extent an expert was allowed to opine on whether the child in question had been abused, the case was won—and lost—in a hearing *before* the trial even started. So, the point to remember is that the rule allows for pre-trial determinations of the admissibility of evidence without resort to most of the evidence rules. While the circumstances may be infrequent to "knock out" the other side's expert, a vehicle to do so is provided if those rare circumstances arise.

Second, and from the totally opposite perspective, two portions of 1101 *specifically exclude domestic matters* from the evidentiary rules application. MRE 1101(b)(6) allows the Court to obtain the child's express custody preference, MCL 722.23(i), unfettered by the rules, *in camera*. In this regard, the *Molloy* wars were fought some time ago.[2] Care should be taken here. Recall the difficult path the holdings of those cases travelled. Our system was—and is—antithetical to receipt of evidence *ex parte*, without in-court testing for accuracy and outside the hearing of the parties. But greater good was found in the atypical method because it served the very people whom the divorce concerned: the children of the divorce. Having children testify in open court "for or against a parent" was anathema to their best interest. MRE 1101(b)(6) allows this to take place to serve their best interests, but grounds that goal in the limited purpose of the evidence: the child's preferences. To the extent the judge receives, *in camera*, "evidence" transcending this limited evidentiary purpose, such receipt runs afoul of the language of the rule and extinguishes the moorings of admissibility, if that evidence is allowed to be used for other purposes.

The second delineated exception is for Friend of the Court Reports under MRE 1101(b)(9). While difficulties can always crop up regarding these reports, this exemption should be easier to apply. Moreover, if for some reason a report's admissibility arises, in-court witnesses can be easily presented as to the substance of the report and any recommendation. Finally, in this judge's experience, reports were not always relied on per se, and in many instances reports came in a bit tardy due to the press of the volume of cases many workers faced.

Particular Rules in Domestic Cases

Because of their nature, domestic cases often are proven by a broad set of witnesses and occurrences. They stand apart from a robbery or car accident case because, in those cases, a single generating occurrence gives rise to a cause of action. In domestic actions, typically, an accumulation of occurrences, or the passage of time or even a particular occurrence as a culmination atop lesser developments generate a domestic relations action. Yet, despite their nature, domestic trials and hearings still embrace certain recurring rules of evidence as do most trials. A brief discussion below.

Hearsay

When was the last time you tried a case, second-chaired a case, or even watched a case where there was *no* hearsay objection? Admit it. Making such objections is still in your bloodstream, imbedded there in law school and revived at a moment's notice. All good traits.

Yet many out-of-court statements are *not* hearsay. When your opponent asks a question that calls for quotation of an out-of-court statement, you should be prepared to object on the right basis, or to respond accurately. The framework for this courtroom action starts with MRE 801(a)(b) and (c), the very definition of hearsay. Hearsay is characterized initially by a "statement," but not any old statement will do. The statement must be characterized as an "assertion." Many things—including commands, questions, and warnings—may not be considered assertions at all. No assertion, no hearsay.

Relatedly, a statement – even one that <u>is</u> an assertion – cannot be deemed hearsay unless "offered in evidence to prove the truth of the matter asserted," under MRE 801(c). When you make your hearsay objection and your opponent responds, "I am not introducing it for the truth of its content," hold them to it by (1) asking for what *purpose* it *is* to be introduced, (2) that the proffered purpose is relevant, and (3) limiting the evidence to that purpose.

Hearsay Exceptions

In this author's experience, witnesses in a domestic trial are not strangers. From relatives, to classmates, to day-care providers, medical doctors, business partners, this broad spectrum of people produces a body of evidence often fraught with quotation of out-of-court statements. This is where you make your money in the hearsay realm: getting statements into evidence for the truth of their content because a hearsay exception applies.[3]

A handful of exceptions under 803 come to mind in the domestic milieu and, by chance, they are the first four. Counsel would be well-served by a working familiarity with (1) present sense impressions, (2) excited utterances, (3) "state of mind," and (4) statements made for medical diagnosis and treatment.[4] Many, many things are done and <u>said</u> leading up to the filing of a divorce, after separations and through litigation of the case. A quotable statement may be significant to proving a salient point in trial. Racking down from a hearsay objection due to unawareness of how to contest the objection may undercut one's proofs. A hearsay objection does not make automatically inadmissible the evidence sought. There is nothing overarching about hearsay objections. As one commenta-

tor once said, how strong a rule can the hearsay bar be (802) when there are thirty or so exceptions to it? My suggestion: know the basics of each often used hearsay exceptions, much like knowing elements[5] to crimes as you did in law school. Remember, though, if it is the *opposing party's* statement you want to introduce, you do not need a hearsay exception, as that type of statement is not regarded as hearsay.[6]

Opinion Testimony

Lay Opinion: What must be remembered here is that the witness is *not* testifying as an expert. No specialized knowledge is needed based on skill, knowledge, experience, education or training.[7] There is no such thing as a "lay expert witness." Rather, under 702, the opinion witness must base that opinion on "rationally based perception" of the events forming the opinion or inference. In domestic matters, the rule would allow a witness, such as a party in a divorce case, to opine on the value of the marital home or vehicle; about whether a spouse was intoxicated; or how a child reacted to a parent or parenting time. Two caveats: a judge may not be impressed with this type of opinion testimony and because the opinion testimony must be helpful to the trier of fact (similar to MRE 703), a given judge may even decline to consider it. Pick your spots wisely for lay opinion testimony.

Expert Opinion: By far the much more difficult—and prevalent—area for expertise, business valuations, home appraisals, psychological evaluations, and custody recommendations, fall under the umbrella of MRE 703. As such, challenges to the expert *and the expertise* must be considered. In the great majority of cases, these components of MRE 703 will not come into play (no boat-rocking). However, in a given case, the proffered expert may not pass 703 muster, *and* the expertise or science may have difficulty with so-called *Daubert*[8] requirements as well.

Social Media/Electronic Evidence

Finally, a brief word on this "cutting edge" evidence: First things first. While our rules of evidence do not necessarily specifically address e-mails, text messages, cell phones and the like, a sound approach to these types of evidence will provide, hopefully, a guide. Three focal points are involved. First, what is the purpose for admission of the evidence? In this vein, is the purpose a proper one? If the evidence has no proper purpose, the right format will not be a sufficient reason for admissibility. Second, are these shortcomings to the format of proof? Does it call for hearsay (without an exception); are there authentication problems (is the evidence what its proponent claims it to be under MRE 901); is the evidence subject to alteration, calling into question the need for an "original" under 1001-1004? Finally, where does expertise come into play if the evidence is challenged? Many unpublished cases address these questions, but whether published

or unpublished, the decisional process in the cases is likely to follow this or a similar approach, i.e., is the statement hearsay? Is there an exception? Is there a problem with authentication? Can an expert truly establish the author of such a statement, begging a relevance question?

Conclusion

No case can be made that it is preferable for an attorney who tries cases to not know the rules of evidence. How much time one can invest in acquiring that awareness is subject to many variables, the number of trials conducted, the complexity of the domestic cases involved, the approach of the trial judge to the conducting of trials and other things. But, two points remain aloft at sea of varied approaches: the rules of evidence do apply and your lack of knowledge in that regard should not be made vivid in an open courtroom in trial or in an appellate brief or decision.

No scenario may be more disquieting than entering a trial with a loosey-goosey approach to evidentiary matters against one skilled in the application of the rules in front of a judge who knows them. While a more casual approach to domestic cases may serve well in ushering resolution in-chambers, when all efforts fail, the courtroom is for litigation.

Jumbo shrimp is not on the domestic relations menu. Don't show up for trial wearing casual-Friday, when your opponent is wearing Armani.

The author wishes to thank Genesee County Referee Shelley Spivack for submitting the author's name for the article for the Family Law Journal. *In turn, the author wishes to extend his appreciation to the* Family Law Journal *for allowing a return to the author's judicial roots in family court. Finally, the author expresses gratitude to Jillian Peterson, my law clerk, for contributions and scholarly work in the formulation of this article.*

Endnotes

1 Lawyers quarrel no matter the type of case and discord is not endemic to domestic cases.

2 See *Molloy v Molloy*, 243 MichApp 595 (2000); *Molloy v Molloy*, 247 Mich App 348 (2001); and 466 Mich 852 (2002).

3 See MRE 803 and 804.

4 The latter two have been shortened for brevity.

5 Just a quick score-card. Present sense impressions demand contemporaneousness or immediacy, *usually* within 30 minutes of the event or condition producing the statements. Excited utterances are not measured by time, but rather influence from a *starting* event or condition. "Statement of mind" deals with existing emotion, future plans, but not retrospectively. Medical diagnosis and treatments are typically the patient or someone on their behalf, not the treater.

6 MRE 801(d)(2).

7 Contrast MRE 702 with 703.

8 *Daubert v Merrell Dow Pharms, Inc*, 509 US 579 (1993).

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Persuasion Points: Becoming The Master Advocate Of The Core Message

By David C. Sarnacki

This article presents persuasion points, an overview of the principles of persuasion applicable to motions, trials and ADR presentations. More detailed information on these persuasion points can be found in trial advocacy treatises and best-selling books on communication and presentations.

To win, we must persuade, and persuasion centers on both the messenger and the message. To be persuasive in court, our primary goal is to become a master advocate of the core message. Our effectiveness will depend on three benchmarks: we must establish ourselves as the guide on the journey into the case; we must establish our efficiency; and we must establish a memorable roadmap.

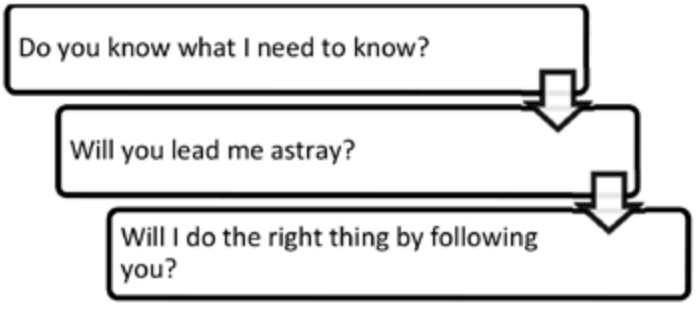
The problem for most messengers is getting everyone lost in the case details. We touch on a tree here and a tree there, without showing the forest. The questions "where are we going" and "why should I care" are never answered. The journey into the case becomes an unremarkable wandering. And the decision-maker is left either to give up the journey, follow the adversary, or arrive at some entirely different destination.

The solution is to become the master advocate and to have a core message for the case. We do this by satisfying the three benchmarks.

Being the guide

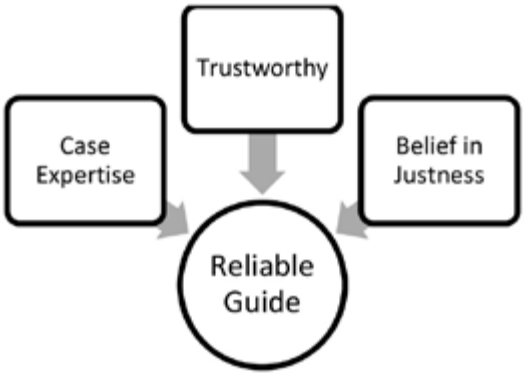
The decision-maker wants to follow the leader. In any given case, who exactly is the leader? The decision-maker sees two advocates, sees one pointing left and the other pointing right, and sees each advocate beckoning to follow.

The decision-maker wonders about each messenger, and three questions surface:



We must establish ourselves as the reliable guide for the journey into the case. We do so by: (a) demonstrating that we know the most about this particular case; (b) acting professionally at all times, preserving and protecting our position as leader to the truth; and (c) using the power of confidence, knowing we have something worth saying and saying it without wasting time.

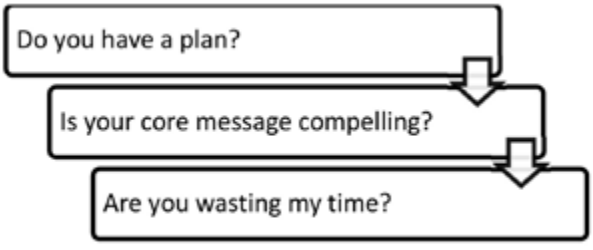
The single most important piece of evidence in a trial is the messenger. We are constantly conveying something about our case. We are explaining, asking, responding, arguing and projecting. To be more persuasive, we demonstrate our expertise of the facts and of the law. We demonstrate trustworthiness in ourselves. We demonstrate faith in the justness of our position.



Working efficiently

For the decision-maker, following the leader is not a one-time choice. It involves a continual reassessment of the chosen guide's performance. There are many pressures, including time. Time is a precious commodity, and there is a penalty to be paid for wasting it.

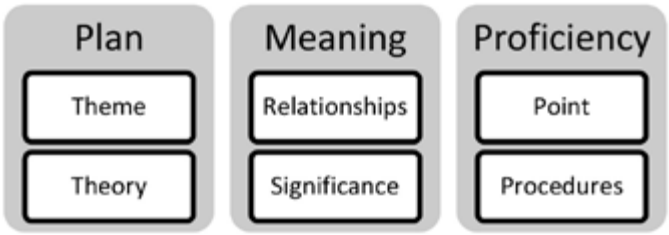
As the journey progresses, the decision-maker reassesses each messenger, and three questions surface:



We must establish our efficiency for the journey into the case. We show that we have a plan, and we get to the point. We highlight relationships, meaning and significance. We reveal a proficient ease of working in the courtroom. We promote learning by keeping the focus on what is important and by organizing our structure around what is important. We remove barriers by eliminating what is not important to our core message.

Our plan centers on theory and theme. A simple overall theory is our guiding light throughout the journey. If admissible witnesses and documents do not relate to our theory, we must drop them from our case and not look back. We display unity and control by keeping the focus on what is so compelling about our client's position. We answer what happened and why (theory), and we justify the moral authority of our client's position in one sentence or headline (theme). Then we condense our theme and theory into a 30-second message.

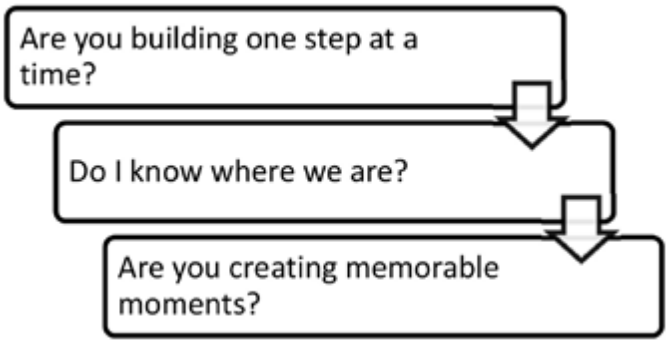
Once we have our core message, we advocate that message with laser precision and focus. We highlight relationships, meaning and significance. We make connections and get to the point. We satisfy courtroom procedures and conventions with proficiency.



Sharing our map and markers

The decision-maker does want to follow the leader, but also has strong preferences for the journey. The easy over the difficult. The simple over the complex. The memorable over the forgettable.

The journey progresses, and the decision-maker wonders about three questions:



We must show our map and our markers for the journey into the case. We organize our advocacy into segments and order them for persuasive effect. We orient everyone with signs. We mark memories for our journey with signifiers.

To be persuasive, we must divide our proofs into bite-sized segments. We like digestible pieces of information. Whenever possible, we like information organized in accordance with the Rule of Three. We honor the K.I.S.S. principle when we find three good organizing categories under which all our details fit well.

Persuasive organization involves the principles of primacy, recency and argumentation. Primacy is reflected in the advice to start strong. To keep attention, you need to get attention. In real life, we do judge books by their covers, and first impressions really do last. We want to know why we should listen. We begin making up our minds as soon as possible. Our first impressions color our thinking. As the messenger, we can create new beginnings, just as an author can create many chapters in a novel. Each new beginning brings renewed interest and focus to our presentation.

Recency is reflected in the advice to end strong. We want to know why we have listened, and we like summaries of key points. A crisp, clean conclusion will linger in the decision-maker's mind. The last impression often is the most clear and the easiest to recall. We can create new endings (each time we close out a chapter), and every ending presents an opportunity to bring an emotional climax to mark that closing.

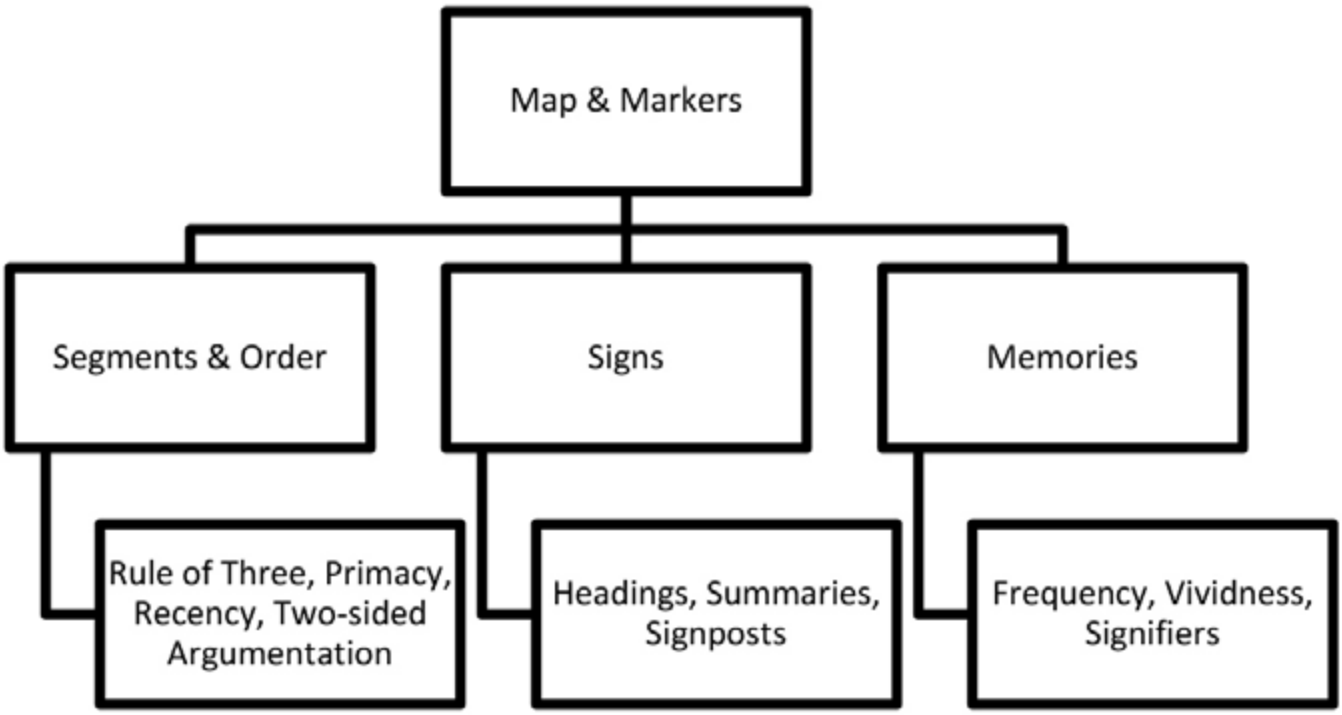
Good court-related argumentation is two-sided. Our arguments should be structured to include and refute the adversary's argument. A simple two-step format works by considering Why Not and Why. First, we explain what the adversary's theory is and why it does not work. Second, we show what our theory is and why it does work.

Along the road, we must point out the signs. We expressly mention our outline headings. We close out our chapters with mini-summaries. We regularly point to signposts, signaling where we are going, where we are and what is coming next.

We must mark memories for our journey with signifiers. We do this by using quote repetition, word pictures and exhibits. We renew interest and focus whenever we make sure something changes and something interesting is happening. Doing something different attracts attention.

Memory is influenced by both frequency and vividness. We remember and we rely upon key points that are made multiple times in slightly different ways. Ideally, we build emphasis with each repetition by arranging points in an order of mounting significance.

Vividness enhances credibility by providing striking details. We learn from verbal and visual illustrations. We will understand better and will remember longer when we hear the



point and see the point. Our memory is enhanced whenever we experience show-and-tell time, so we consider options for multimedia. We visualize with words, things and pictures, so we use visualization to add dramatic emphasis to our points.

To win, persuasion must be the focus of all we do. Everything that happens in the courtroom should be designed to reach the mind and heart of the decision-maker. Being the guide, being efficient, and sharing our map markers for the journey into the case are the keys to becoming a master advocate of the core message.

About the Author

David C. Sarnacki *practices divorce, family law and mediation in Grand Rapids, Michigan. He has been named one of the Best Lawyers in America and a Michigan Super Lawyer. And he is a past Chairperson of three State Bar Sections: Family Law, Litigation, and Law Practice Management Section.*

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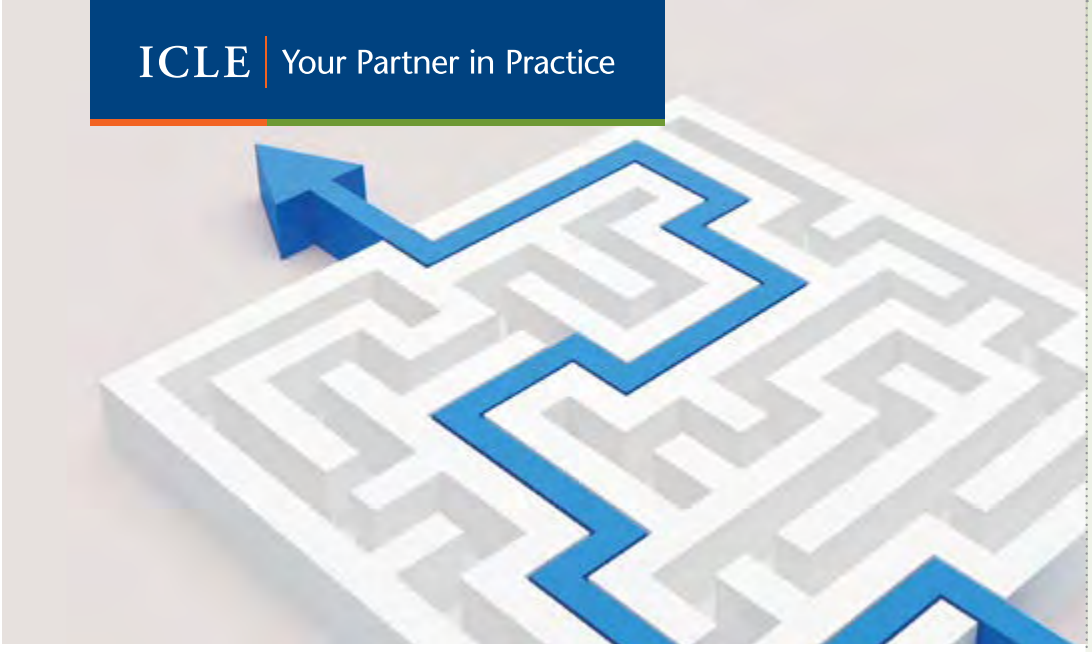

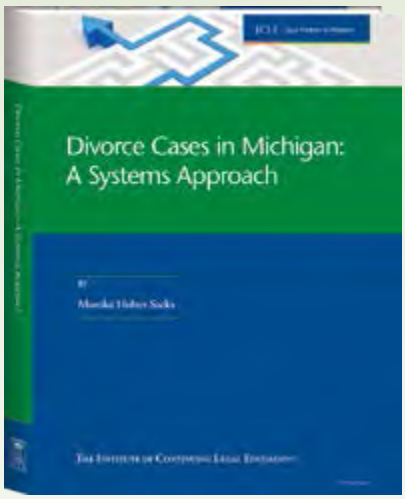

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Family Law Appellate Trends

By Liisa R. Speaker

Practitioners have not seen a shortage of interesting family law decisions from the appellate courts in the past several years. Individual cases may intrigue and provide fodder for discussion (such as *In re AJR*, 496 Mich 346; 852 NW2d 760 (2014), regarding stepparent adoptions or *Allard v Allard*, 308 Mich App 563; 867 NW2d 866 (2014), *lv granted*, 497 Mich 1040; 864 NW2d 143 (2015), regarding the validity of prenuptial agreements. This article, however, explores the overall trends in domestic relations appeals.

Without citing a litany of unpublished opinions, one trend is clear. If a party appeals the trial court's failure to follow well-established procedures or statute, the Court of Appeals has been willing to reverse or vacate, and then remand for the trial court to re-do its analysis by following the correct procedures. *See, e.g., Donohue v Donohue*, unpublished per curiam opinion of Court of Appeals, issued May 13, 2014 (Docket No. 318230) (vacating trial court's decision which changed custody without any analysis of the established custodial environment or best interests of the child). Those types of errors are also frequently the subject of peremptory reversals by the Court of Appeals, which means that there is no opinion to guide practitioners in future cases.

Another broader trend, which applies to appeals in general, is that the Court of Appeals and Supreme Court take interest in cases involving the interpretation of court rules and statutes. Those types of issues more frequently result in a published opinion or leave granted by the Supreme Court. Appeals in family law cases that challenge the trial court's fact findings are difficult, but not impossible, to obtain reversals.

The categories of family law opinions delineated below represent many of the areas with frequent appellate litigation and published opinions.

Revocation of Paternity Act

One of the hottest areas in family law appellate litigation involves the Revocation of Paternity Act ("RPA"), which went into effect June 12, 2012. MCL 722.1431 *et seq.* Regardless of the outcome on any individual case, two trends can be observed–the majority of the Court of Appeals' decisions in this area are published, and the Supreme Court is extremely interested in this new legislative scheme.

The first significant decision under the Act was *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013), rev'd in part, vacated in part, and remanded, 495 Mich 944; 843 NW2d 220 (2014), involved a revocation of an acknowledgment of paternity. When the child was born, the mother and Moiles knew there was a chance that he was not the biological father of the child in question, yet the couple signed an acknowledgment of parentage affirming that he was the child's natural father. Sometime later, the mother moved to revoke Moiles' paternity, providing DNA results to support her claim. The trial court revoked paternity under MCL 722.1437(2)(d), finding that Moiles misrepresented to the court that he was the natural father of the child. The Court of Appeals agreed that Moiles had made a misrepresentation to the court when he signed the acknowledgment of parentage knowing that he was not the biological father of the child at issue. The Court of Appeals further held that the trial court did not err by failing to consider the child's best interests when revoking Moiles's paternity because an acknowledgment of parentage is not a "paternity determination," and therefore, a best interests analysis is not required under the Act, MCL 722.1443(4). The Supreme Court peremptorily reversed the Court of Appeals. It noted that under the Acknowledgment of Parentage Act, an acknowledging father is not required to attest that he is the biological father. Therefore, the Court of Appeals erred in concluding that both Moiles and the mother's knowledge that Moiles may not be the biological father of the child demonstrated fraud or misrepresentation under RPA, MCL 722.1437(2). The Supreme Court vacated the portion of the opinion relating to the best interests analysis since such analysis would not have been necessary had the court properly determined that there was no fraud or misrepresentation.

Following the then-binding Court of Appeals' decision in *Moiles*, the Court of Appeals issued a plurality opinion in *Helton v Beaman*, 304 Mich App 97; 850 NW2d 515 (2014), another case involving revocation of an acknowledged father. The trial court had declined to set aside an acknowledgment of parentage. The Court of Appeals affirmed. The majority opinion concluded there is no best interests analysis required under the RPA when there is a revocation of an acknowledgment of paternity, but then proceeded to rely on the Child Custody Act for two propositions–whether there was proper cause or

change in circumstances to revoke paternity, MCL 722.27, and the best interests of the child, MCL 722.23. The Supreme Court granted leave, but after full briefing and oral argument,[1] the Supreme Court issued an order affirming the Court of Appeals. *Helton v Beaman*, __ Mich ___; 861 NW2d 621 (2015). The Supreme Court stated: "We agree with the Court of Appeals authoring and concurring judges that *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013), wrongly held that a trial court is not required to make a best interest determination under MCL 722.1443(4) in deciding whether to revoke an acknowledgment of parentage . . . we hold that an order revoking an acknowledgment of parentage constitutes an order "setting aside a paternity determination" and, therefore, is subject to a best interest analysis under MCL 722.1443(4). We also agree with the lower courts that in this case in which the defendants have raised the child who is now eleven years old from birth, and in which the plaintiff has had little to no meaningful interaction with the child during that time, it is not in the child's best interests to revoke the acknowledgment of parentage."

The appellate courts have also explored the revocation of a presumed father's paternity. In *Parks v Parks*, 304 Mich App 232; 850 NW2d 595 (2014), the trial court held, and the Court of Appeals agreed, that the mother failed to establish that she, the biological father, and the legal father had mutually acknowledged that the legal father was not the biological father of the child, which is a requirement to allow for the trial court to consider revocation of the legal father's paternity under MCL 722.1441(1)(a)(*ii*). In fact, the presumed father asserted that the minor child was his son. The Court of Appeals defined the terms "acknowledge" and "mutual" as used in Section 1441 of the RPA.

The Court of Appeals in *Glaubius v Glaubius*, 306 Mich App 157; 855 NW2d 221 (2014), reversed the trial court's holding that the judgment of divorce presented a res judicata bar to the mother's motion to revoke the paternity of her ex-husband, the presumed father. The Court of Appeals determined that the divorce proceeding did not determine the defendant's fatherhood because it was never an issue during the divorce, therefore, the defendant qualified as a presumed father. Moreover, the Act allows a person to bring a motion "at any stage of the proceedings," which includes post-judgment. MCL 722.1443(1). Even after the judgment of divorce, the trial court has "continuing jurisdiction over child custody and support determinations, including the authority to revise, alter, or amend the original divorce judgment." The Court of Appeals remanded for the mother to seek determination under MCL 722.1441. The Supreme Court granted leave, but the parties settled and dismissed the appeal. 497 Mich 929; 856 NW2d 554 (2014); 498 Mich 899; 870 NW2d 69 (2015).

In *Grimes v Van Hook-Williams*, 302 Mich App 521; 839 NW2d 237 (2013), the Court of Appeals held that an alleged father failed to satisfy the RPA when he sought to establish paternity under MCL 722.1441(3) because he knew mother was married at the time of conception.

The Court of Appeals also addressed the revocation of a presumed father in *Demski v Petlick*, 309 Mich App 404; __ NW2d __ (2015). The trial court revoked a husband's paternity and entered an order of filiation in favor of the alleged father. The Court of Appeals held that the trial court failed to find by a preponderance of the evidence that granting paternity to the alleged father was in the child's best interest under the factors of permanence of a family unit, moral fitness, and mental and physical health. The alleged father did not display stability as a parent, he did not prove that he genuinely wanted to be in the child's life rather than just being known as the child's father, and he was shown to have substance abuse issues as well as anger and violence issues. The Court of Appeals reversed the trial court because there was greater evidence to show that the child's best interest were best served with the presumed father.

With many more areas of the Act yet to be interpreted by the courts, it is likely that practitioners will continue to see a lot of appellate activity in their Revocation of Paternity Act cases.

Reasonable Preference of Child

The appellate courts have recently addressed how the trial court should approach factor (i) of the best interests analysis—the reasonable preference of the child. MCL 722.23(i). In *Kubicki v Sharpe*, 306 Mich App 525; 858 NW2d 57 (2014), the parents agreed not to submit their child to an in camera interview, and the trial court accepted that stipulation. The Court of Appeals vacated the trial court decision, holding that the trial court was affirmatively required to consider the child's preference regardless of what the parents wanted. Given the child's age of ten years, his preference has weight and the trial court erred in failing to interview him. The case was remanded with instructions to reevaluate the child's custodial environment and his best interest in placement.

Following *Kubicki*, the Court of Appeals clarified its decision in *Maier v Maier*, __Mich App __; __NW2d__ (Docket No. 322109, issued June 25, 2015). The trial court had refused to interview the nine-year-old child, determining that it knew the child's preference was to live with his mother, but that the preference was not reasonable. The trial court found that the child could not formulate or express a reasonable preference that was not based upon emotional distress or coaching. The Court of Appeals noted that a reasonable preference excludes those preferences that are arbitrary or inherently indefensible. The Court of Appeals held that the child's fragile emotional state and the efforts made to influence his preference prevented him from forming a reasonable preference. The

Court of Appeals further clarified that *Kubicki* does not stand for the proposition that an interview must occur in every case, but only that a trial court "may not abrogate its responsibility to consider each of the enumerated best interest child custody factors based upon a stipulation of the adults in a case."

Areas of continuing interest regarding the reasonable preference of a child include a trial court adopting a referee recommendation as to the child's preference without actually speaking to the child.

Change of Domicile

With Michigan's economic downturn, there have been several domicile appeals, as parents contemplate moves out of state for steady employment. The major domicile decision is *Rains v Rains*, 301 Mich App 313; 836 NW2d 709 (2013), in which the Court of Appeals set forth the proper framework for evaluation of a motion for a change of domicile. First, the trial court must determine if the party seeking the change has established, by a preponderance of the evidence, that the change is warranted using the factors from MCL 722.31(4). If this burden is met, then the trial court determines the established custodial environment. Then, if the trial court finds that a change of domicile would modify or alter the child's established custodial environment, the trial court must determine whether the change in domicile would be in the child's best interests, by clear and convincing evidence, using the best interest factors from MCL 722.23. Here, the Court of Appeals concluded that the proposed move from Detroit to Traverse City was not in the child's best interests when the parents essentially had shared time equally with the child.

In *Sulaica v Rometty*, 308 Mich App 568; 866 NW2d 838 (2014), the trial court granted the mother's motion to change the child's domicile to Florida, but did not analyze the domicile factors under MCL722.31(4) because the mother had sole legal custody of the child. The Court of Appeals agreed that when a parent has sole legal custody, there is no need for the trial court to analyze domicile. However, the Court of Appeals concluded that the trial court erred by failing to consider whether the move to Florida changed the established custodial environment, MCL 722.27(c)(1). This analysis was necessary because the parents shared physical custody. The burden lied with the proponent of the domicile change to show that move was in the child's best interest. MCL 722.23.

In *Eickelberg v Eickelberg*, 309 Mich App 694; __ NW2d __ (2015), the Court of Appeals interpreted when a moving parent is required to obtain court permission under MCL 722.31. After divorce, the father moved twice to areas far away from the children's residence in Clinton Township. First, the father moved 86 miles away to Perry, and then another 71 miles to Marshall (for a total of 126 miles from mother's home in Clinton Township). The move caused problems with communication about the children, and mother asserted that the second move changed domicile because it was more than 100 miles away from the original domicile. The trial court focused on the children's residence immediately before the move at issue. The trial court granted the father's motion to change the parenting time, exchange location, and schedule. The Court of Appeals reversed. MCL 722.31 states that when a court order governs a child's parental custody, the child has a legal residence with each parent. A parent may not change the legal residence to a location that is more than 100 miles from the residence *at the time of the commencement of the action* in which the order was issued. The children's legal residence at the time of the divorce judgment was Clinton Township and the disputed location is Marshall, which is over 100 miles away, thus the father needed to seek court approval. The Court reversed and remanded the case for the trial court to reconsider the father's move using MCL 722.31.

The Court of Appeals decision in *Evans v Evans*, unpublished opinion issued February 15, 2015 (Docket 323126), sheds further light on the interplay of the domicile provisions when a parent has successive moves. Following the judgment of divorce, the mother obtained permission to move from Michigan to Kentucky. She later moved from Kentucky to Alabama (without seeking permission) and then from Alabama to Michigan. The children had been in Michigan for 15 months when the mother and her husband decided to move to Texas. Again, the mother did not seek permission, but the father filed a motion to change custody based on the anticipated move. The trial court held that there was not proper cause or change of circumstances to decide custody and that the mother's husband's military status should not require her to forfeit custody. The Court of Appeals held that MCL 722.31(1) requires court permission when the move is more than 100 miles from the original custody order, even if a parent had permission for a previous move. However, permission is not required when the move brings the children closer to the other parent. MCL 722.31(3). Furthermore, the Court of Appeals held that the move to Alabama in violation of MCL 722.31 by itself constitutes a change of circumstances. The Court of Appeals reversed and remanded.

Final Orders for an Appeal by Right

One of the ways to have an appeal by right in a family law case is for the order to qualify as a "post judgment order affecting custody." MCR 7.202(6)(a)(iii). This provision has generated much appellate litigation and uncertainty among practitioners. The Court of Appeals brought some clarity to what type of order qualifies as a "post judgment order affecting custody" under MCR 7.202(6)(a)(iii) in *Wardell v Hincka,* 297 Mich App 127, 132; 822 NW2d 278 (2012). The Court of Appeals held that an order denying a motion to change custody satisfied MCR 7.202(6)(a)(iii). The Court of Appeals

clarified that the court rule employed the term "affecting custody," which does not require a change in custody. *Id.* at 132. The Court of Appeals observed that a "decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is." *Id.* at 133.

Although *Wardell* clarified the difference between "affecting custody" and "change in custody," whether an order qualifies as a final order under MCR 7.202(6)(a)(iii) continues to be a regular source of angst for appellate practitioners due to the Court of Appeals' inconsistent treatment of that court rule. This area has been particularly problematic for appeals from parenting time orders, orders affecting legal custody, and orders arising from the noncustodial parent challenging a custody or change of domicile order

Other important decisions from the Court of Appeals on this final order issue include *Rains*, 301 Mich App at 321, in which the Court of Appeals held that an order denying a change of domicile qualifies as a post judgment order affecting custody. *Glaubius*, 306 Mich App at 163 n1, in which the Court of Appeals held that the trial court's order denying the mother's motion to revoke her ex-husband's paternity was a "post judgment order affecting custody" because the mother had specifically requested that the trial court vacate the award of custody and parenting time from the judgment of divorce; and *Varran v Granneman*, __ Mich App __ (October 13, 2015; Docket 321866; 322 437), in which the Court of Appeals held that a trial court order awarding grandparenting time affected custody "because the award of grandparenting time overrides a parent's legal decision to deny grandparenting time, a grandparenting time order interferes with the parent's fundamental right to make decisions concerning the care, custody, and control of his or her child."

Grandparenting Time

There has been a fair amount of appellate activity on grandparenting issues in the past several years, mostly in unpublished opinions. Several of the issues that had been recurring in these unpublished grandparenting cases were recently resolved by the Court of Appeals published opinion in *Varran v Granneman*, ___Mich App ___(October 13, 2015; Docket 321866; 322 437). The maternal grandparents sought time after their daughter died. The trial court awarded temporary visitation every other weekend and scheduled an evidentiary hearing. The trial court found that the child would suffer a substantial risk of harm if grandparenting time was denied and that grandparenting time was in the chid's best interests. The Court of Appeals rejected many of the father's arguments on appeal.

First, the Court held that MCL 722.27b is not unconstitutional due to the preponderance of the evidence standard. The statute requires a trial court to give deference to a fit parent's decision to deny grandparenting time and there is a presumption that a denial of grandparenting time will not pose a substantial risk of harm. To rebut the presumption, the grandparents must prove by a preponderance that there will be a substantial risk of harm. "Thus, the grandparenting time statute does not allow a trial court to grant grandparenting time simply because it disagrees with the parent's decision."

Second, the Court of Appeals held that the trial court had subject matter jurisdiction to hear the grandparent's motion. Trial courts have subject matter jurisdiction over child custody disputes. Under the act, the grandparents could file a motion in an existing case, or institute a new action. The trial court had the right to exercise judicial power over the request by the grandparents.

Third, the father claimed he did not "deny" grandparenting time; thus, the grandparents were not eligible for relief under MCL 722.27b. However, nothing in the statute requires that there be a denial of grandparenting time before a grandparent may seek visitation.

Finally, as to substantial risk of harm, the trial court properly relied on the child's statements to Dr. Fishman. The child's statement showed by a preponderance of the evidence that denying grandparenting time would create a substantial risk of harm. The child said he "merely exists until the next time he gets to see his grandparents and is very sad about losing his grandparents." He also said he felt like he "lost his only home" and likened having to live with his father as being "kidnapped." He felt homesick (for his grandparents' home). The evidence supported the trial court's award of grandparenting time.

Attorney Fees

A party's entitlement to attorney fees continues to be an area for frequent appellate review and relief in the domestic relations field. Typically, the attorney fee issue is one of many issues on appeal, so practitioners have to wade through lengthy and complex decisions to reach the attorney fees analysis.

In *Loutts v Loutts*, 309 Mich App 203; 871 NW2d 298 (2015), the Court of Appeals reviewed the trial court's decision to deny a wife attorney fees, which was based on her claim that she was unable to bear the expense of the litigation. The trial court based its denial on the fact that the wife received a cash award of $310,000 in the judgment of divorce, plus an award of spousal support for four years. The Court of Appeals affirmed, noting that MCR 3.206(C)(2)(a), allows an award of attorney fees "only as necessary to enable the party to prosecute or defend a suit." The requesting spouse had raised many unsubstantiated claims that were "not necessary to defense the divorce action." *Id.* at 219.

In *Diez v Davey*, 307 Mich. App. 366; 861NW2d 323 (2014), the trial court awarded $118,000 in attorney fees to

the wife. The husband challenged the award of attorney fees on the ground that the wife "did not have an inability to pay her attorney fees." The Court of Appeals affirmed the trial court, concluding that the wife was unable to bear the expense of litigation when her annual income was less than $8,000, while her attorney fees were $118,000. In contrast, the husband was the sole shareholder of a profitable corporation.

In a child custody case, *Riemer v Johnson*, __ Mich App __ (2015), the Court of Appeals rejected the argument that the trial court awarding fees under MCR 3.206 had to go through a detailed analysis under *Smith v Khouri*, 481 Mich 519, 530-531; 751 NW2d 472 (2008). The Court of Appeals noted that *Smith* arose from an award of attorney fees as a sanction for not accepting a case evaluation award under MCR 2.403, while an award of fees in the domestic relations context is intended to either assist a party who is unable to bear the expense of litigation when the other party is able to pay, or to reimburse a party for attorney fees that are incurred due to the other party's violation of court orders. The trial court did not err in failing to follow the detailed procedures of *Smith* when it awarded attorney fees under MCR 3.206. The Court of Appeals affirmed the trial court's award of attorney fees, which it decided by analyzing MRPC 1.5(a) and the factors articulated by the Supreme Court in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982).

Richards v Richards, 310 Mich App 683; __ NW2d __ (Docket 319753, June 2, 2015), arose from hotly contested divorce proceedings. During the litigation, husband had repeatedly violated the trial court's orders. The trial court declined to award attorney fees to the wife because the wife had an ability to pay for her own attorney fees. The Court of Appeals reversed the trial court and clarified that MCR 3.206(C)(2) provides two independent grounds to request attorney fees: first is the spouse's inability to pay for fees, and the other spouse's ability to pay; second is a case in which attorney fees "were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." The trial court erred by denying attorney fees to the wife because she requested fees under MCR 3.206(C)(2)(b) for her husband's violation of court orders. Reversed and remanded for an evidentiary hearing on the issue of attorney fees.

Concluding Remarks

As seen in the above cases, the interpretation of statutes and court rules continues to provide fodder for appellate litigation and published decisions. The family law decisions noted above should help practitioners scrutinize the issues in their cases and determine which issues might increase the likelihood that the trial court decision will be challenged in the appellate courts, as well as issues which are more likely to be reversed or vacated.

About the Author

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Endnote

1 The Family Law Section also submitted an amicus brief in the Supreme Court.

Litigating Support Issues: Pass-Through Entities And K-1 Income

By Kyle J. Quinn

Introduction

The determination of income is the crux of child support investigations. Determining the income for self-employed individuals and/or business owners can be the most taxing type of engagement. Casual bookkeeping procedures, lack of internal controls, and tax regulations make the area challenging. However, there are common tactics and procedures for ascertaining and dealing with the necessary information during litigation. The purpose of this article is to aid family law practitioners tasked with determining income from "pass-through" entities (i.e., S-corps and partnerships) and provide a general guide to litigating these issues. However, it is important to keep in mind that each case is different and there is no "one size fits all" approach.

"Pass-Through" Entities: The Basic Tenets

At the onset, one needs to understand the basic tenets of "pass-through" entities. Rather than the entity paying tax on its income, the income passes through the entity to the individual owner(s) who report the income (or losses) on their individual tax returns and pay the tax on it. While the income passes through to the owners, the actual cash distributed from the entity may be drastically different. It is common for many entities to only distribute sufficient funds to cover the individual owner's tax liability on the income passed through to him/her. In other words, the cash actually distributed may be more or less than the income. The two most common pass-through entities you will encounter are S-corps and partnerships.

The Legal Framework

With the above understanding, it is helpful to turn to the Child Support Formula Manual and its most current Supplement ("MCSF"). There are a number of key provisions within the MCSF relevant to pass-through entities, but the two of the most important are 2.01(C) & (E).

Section 2.01(C) is of particular interest.[1] Section 2.01(C) provides that income includes "[e]arnings generated from a business, partnership… self-employment, or other similar arrangements"… and income (or losses) "should be carefully examined to determine the extent to which they are historically passed on to the parent or merely used as a tax strategy."[2]

Section 2.01(E)(4) instructs one to pay special attention to certain forms of compensation including but not limited to (a) distributed profits, (b) in-kind income or perquisites, (c) redirected income, (d) reduced or deferred income, and (e) deductions for taxes.[3] When dealing with pass-through entities, one should refer to Section 2.01(E), especially (E)(4).

In 2014, the Court of Appeals published *Diez v. Davey*.[4] *Diez* provides specific guidance to family law practitioners dealing with pass-through entities. Joseph W. Cunningham authored an excellent article for the Family Law Journal in December 2014 providing an in depth analysis of the *Diez* opinion (and dissent).

In *Diez*, the Court of Appeals was tasked with determining income for the sole owner of an S-corp.[5] Two specific issues were addressed: 1) To what extent are undistributed earnings retained by a business treated as income available for support; and 2) Whether funds distributed by the business to an owner to meet his/her tax burden may be treated as income available for support.[6]

On the issue of retained earnings, the Court of Appeals held that funds retained for necessary and legitimate business reasons are not available to the owner and should *not* be included as income under the MCSF.[7] If the retention is "in keeping with historical practices, those practices can be described as the reasonable exercise of business judgment, and there is no evidence of improper effort to make funds unavailable" for support, retained earnings should not be included as income available for support."[8]

On the issue of distributions, the Court of Appeals held that funds distributed to offset payments of taxes on earnings retained by the business should *not* be included as income under the Guidelines.[9] Instead, they are a necessary business expense, properly excluded from the owner's income.[10]

Tax Documents – Obtaining And Understanding

Armed with this background, one's first step when litigating these matters should be to obtain and analyze the neces-

sary documents. Tax returns and supporting documentation are often a starting point for defining and quantifying income. However, they should not be construed as the end-all, be-all.

One may be able to obtain the tax returns and supporting documentation directly from the client. However, if one represents the non-owner spouse, he/she may not be able to gain anything more than a basic understanding. If this is the case, one can obtain the tax returns and supporting documentation through informal or formal discovery. Whatever discovery method is chosen, it is important to get complete copies of the individual and business tax returns, with all attachments, schedules and supporting documentation.

Consider engaging an independent CPA or financial expert early in the litigation as he/she can help analyze and craft your discovery, and help educate you and the court on these complicated issues.

Individual Tax Returns

When determining income for support, one should obtain and analyze the individual tax returns. For pass-through entities, one should essentially focus on three documents: Form 1040, Schedule E, and Schedule K-1.

The Form 1040 serves as the foundation for most income investigations. It summarizes all of the income the taxpayer has received in a calendar year. All of the income contained in other forms filed by the individual flow to it. In discovery, a simple request for the federal tax return filed by a party should produce the Form 1040.

The Schedule E is also important when analyzing pass-through entity income. The individual owner must report his/her share of the entity income on the Schedule E. Generally, the individual will receive a Schedule K-1 from the entity that reports his/her share of income, losses, and deductions. The information on the K-1 is used to prepare Schedule E.

A Schedule K-1 is issued by the entity to each individual with an ownership interest. It will not contain information as to any of the other owners. When analyzing pass-through income, the K-1 will be an essential piece of the puzzle as it reports the taxpayer's share of the business income upon which he/she will be taxed. Box 1 of the K-1 reports the taxpayer's share of the entity's income. Do not take this figure at face value, as he/she may have additional sources of income, including but not limited to personal expenses run through the business and deducted before arriving at this figure. Box 16 (S-corp), Code D, or Box 19 (Partnership) of the K-1 represents the actual cash distributions by the entity to the individual owner. This will not include perquisites or personal expenses run through the business.

The basic calculation for income available for support starts by determining the individual owner's tax liability generated from the income in Box 1 of the K-1. Once the tax liability is determined, it is compared to the actual cash distributions reported in Box 16, Code D, or Box 19. If the amounts are the same, there may be no K-1 income for support. It may be that the distribution was solely for the purpose of offsetting the tax liability. If the distributions are less than the tax liability, there may be no K-1 income for support. If the distributions are more than the tax liability, the surplus should be treated as income for support. The resulting surplus should be added to the individual owner's other income, which may include W-2 wages, interest, dividends, and other miscellaneous income. Since the tax liability was already deducted, make sure it is not taxed again when running the Formula.

For example, one's calculations would look similar to the following:

Year	Entity	Business Income	Tax Rate	Tax	Distributions	Income for Support
2015	A	$100,000	30%	$30,000	$50,000	$20,000
2015	B	$100,000	30%	$30,000	$30,000	$0

In the above example, the distributions from Entity A exceeded the individual's tax liability, which results in $20,000 cash available for support. However, the distributions from Entity B were only enough to cover the individual's taxes on the business income and, as a result, there is no cash available for support. This is a basic example of pass-through entities and an individual owner in the context of determining income available for support.

Business Tax Returns

In addition to the individual returns, one should also obtain and analyze the entity's actual business tax return, specifically Form 1120S (S-Corp return) or Form 1065 (partnership return). Even though a pass-through entity does not pay income tax, it has a responsibility to file an annual tax return (Form 1120S or Form 1065). These returns are for informational purposes and provide the IRS with an aggregate view of the entity's total income and expenses. They will contain a balance sheet and show gross receipts, cost of goods sold, compensation of officers, salary/wages, depreciation, bad debts, and other deductions/expenses.

One can use this to springboard an analysis of the entity's deductions/expenses. Are each necessary for legitimate business purposes? Are each characteristic of the entity? Are each consistent with historical practices? If not, they should be added back into the related earnings for distribution purposes relative to support.

Since the business returns identify the entity's total income, dividing it amongst its individual owners according to their respective interests should equal the income shown in Box 1 on their respective K-1s. Look to see if the distributions also follow suit. Were distributions made on a pro-rata basis among the owners? If not, this should be a red flag.

Using the business return, follow the income from one document to the other. The income (or loss) should flow from the 1120S or 1065, to the K-1, to the Schedule E, to the front of the 1040. Go with the flow. If things don't match up, you need answers.

Historic Analysis

During discovery, one should obtain documents for multiple years. Unlike wages, business income (and especially K-1 income) can significantly fluctuate from year to year. Obtaining documentation for multiple years provides one with the ability to seek a midpoint between the highs and lows of the entity. Looking at multiple years provides one with a basic understanding of the entity's historical practices, e.g., whether or not the entity distributed income or retained it. If it historically distributed income and is now retaining it, one should inquire whether there was a legitimate business reason for doing so (see *Diez*). Remember, however, the past is not always a good indicator of the future. As such, one should also consider future prospects on income and how the income scenario may change following the support analysis.

The historical analysis should also consider whether there is a history of audits or status letters from the entity's CPA. If they exist, they should be considered red flags.

Internal Control

As part of one's analysis, attention should be paid to the entity's control structure. At the onset, assume that the party is in complete control of the records. This means he/she can initially record transactions or change the recording of transactions to suit his/her needs. The presence of multiple owners may indicate that each will protect his/her own interest by making sure owner A receives the same as owner B. In other words, the more owners, the better the odds the books are accurate. This is an extremely effective internal control. However, there are situations where this type of control may be lacking which may increase the possibility of collusion. This may occur in family-owned businesses and/or those with close bonds between owners. Putting things in perspective, if an owner does not have a controlling interest (more than 50%) he/she arguably does not have the requisite control to make determinations such as decisions to distribute funds, retain working capital, etc. Even so, one should inquire as to whether the party has made any related agreements behind the scenes – "unofficial" agreements to help the party relative to the divorce litigation.

Additional Investigation & Analysis

In addition to obtaining and analyzing the tax returns and supporting documentation, one should examine bank accounts and credit card statements. These can provide a glimpse into the individual's lifestyle and whether it can be supported by the income reported on the returns and supporting documents. When reviewing the statements, ask: Is the income reported on the returns reflected in the bank deposits? Are the credit cards paid from the individual's bank accounts? If not, are the charges characteristic of the entity? Are the charges for necessary and legitimate business reasons?

One should also consider interviewing/deposing the party, bookkeeper, other owners, entity CPA, etc. This can help provide explanations and further analysis of the historical practices and internal control mechanisms used by the entity.

Presentation

The key to litigating these issues is organization. If one's analysis is laid out in a logical and consistent manner, the process will be simplified. The best way of doing so is preparing (with the help of your CPA) a spreadsheet which summarizes the income available for support. Whatever format is chosen, there should be two themes: 1) clarity–spreadsheets that are confusing, unclear or mathematically incorrect undermine one's position, and 2) referencing–link each item on the spreadsheet to the supporting documentation, include page and line numbers. The goal should be to present one's analysis in a clear and concise manner simplifying these complicated concepts for the audience (i.e., the court). If the matter proceeds to trial, make sure the court receives and understands the summary. Retain a CPA or financial expert to help prepare the summary and submit it into evidence through him or her. The expert can also help explain the nuances of income from pass-through entities. At the very least, the summary can be used as a demonstrative exhibit (not for admission). If submitting a written closing statement, one can submit it to the court at that time laying out your analysis clearly and succinctly.

About the Author

Kyle J. Quinn *focuses his practice in the area of family law. He is a trained and certified family law mediator and domestic collaborative practice lawyer. He is active in the State Bar of Michigan and the Grand Rapids Bar Association (GRBA). Within the GRBA, Mr. Quinn has held a variety of position with the Family Law Section and served as the 2015 Chairperson. In 2016, he was appointed by the Kent County Board of Commission as the Family Law Attorney to the Kent County Friend of the Court Citizens Advisory Committee. Mr. Quinn has lectured on family law issues for the GRBA and ICLE. As a family law attorney, Mr. Quinn has been recognized a "Michigan Rising Star" by Super Lawyers Magazine. He is licensed to practice in state and federal courts in Michigan and Wisconsin.*

Endnotes

1 2013 MCSF 2.01(C).

2 2013 MCSF 2.01(C)(2) & (a)

3 2013 MCSF 2.01(E)(4)

4 *Diez v. Davey*, 307 Mich. App. 366; 861 NW2d 323 (2014).

5 *Id*.

6 *Id*. at 380-381.

7 *Id*. at 384.

8 *Id*. at 384-385.

9 *Id*. at 387-388.

10 *Id*. at 387-388.

Family Law Arbitration: Successful Strategies & Tactics

By James J. Harrington, III
Harrington Law, PLC

Overview

Divorce arbitration is the "Super Bowl" for divorce clients: the process is an "all or nothing" and "winner take all"– "there is no tomorrow." Divorce arbitration is governed by the Domestic Relations Arbitration Act ("DRAA")[1] and is well worth reading in detail before agreeing to submit a divorce action to *binding* arbitration.

Practitioners who view Divorce Arbitration as an "informal Binding Mediation" are in for a rude surprise when their dissatisfied clients pursue collection of their professional negligence claims against the individual and business assets of the attorney because their lawyer did not understand either the process or the procedure.

The decision to permit a single attorney [without benefit of appeal] to decide all or major issues in a divorce case should **never** be the product of (a) fear of the trial court or opposing counsel; (b) fear of inadequate or incomplete discovery; (c) or, as an attempt to delay the inevitable.

Careful and prudent *risk assessment* and *process analysis* must precede entry into binding arbitration. Proactive strategies and tactics can maximize the prospects for client success in this form of ADR.

The *process analysis* must include the strict statutory time deadlines for the arbitration proceeding. Under §5078, a Motion for Errors and Omissions *must* be filed within fourteen (14) days of the arbitrator's decision. Similarly, §5079 mandates filing a Motion to Settle The Judgment[2] within twenty-one (21) days from entry of the award. §5081 of the DRAA mandates the filing of a Motion to Vacate or Modify an Arbitration Award within twenty-one (21) days from the decision.

One or more the following "Strategies & Tactics" may constitute a *Killer Tip*[3] and assist with your successful arbitration under the DRAA.

#1. Review Section §5071 & §5072 of the DRAA and the (proposed) Order for Arbitration and Arbitration Agreement with Your Client before agreeing to Arbitration.

A client is entitled to *informed consent* throughout the divorce process and particularly in domestic relations arbitration. A prerequisite to binding arbitration is execution of an Arbitration Agreement, and entry of an Order for Arbitration.

Prudent practice suggests that the Arbitration Agreement be reviewed by and with client well in advance of the hearing. Do not risk an allegation that "the attorney forced me to sign it and I didn't have the chance to review it."

There is no "one size fits all" form for an Arbitration Agreement. Pay particular attention to an Arbitration Agreement drafted by the other party, rather than the Arbitrator.

#2. The Arbitration Agreement is NOT "boiler plate" — Restrictions in the Powers of the Arbitrator Are Critical to Protecting Clients Best Interests.

Even experienced practitioners can fall prey to simply "signing off" on the Arbitration Agreement, particularly if tendered on the day of the Arbitration. Deadly traps can arise out of uncertainty or ambiguity in the following areas:

- **DOES** the arbitrator have the same powers as the trial court under Michigan law?
- Some arbitrators view their powers as **greater** than the trial court. Prudence and common sense command limiting the arbitrator powers to the same as your trial judge.[4]
- **DOES** the arbitrator have the power to insert a *Staple v Staple*[5] alimony award in the absence of consent of the parties?
- **DOES** the arbitrator have the power to make a binding ruling upon future child support or spousal support, even though the future facts and circumstances are unknown at the time of the arbitration?
- **DOES** the arbitrator have the power to award spousal support based on a "percentage of income" when courts uniformly order spousal support on a specific dollar amount per month?
- **DOES** the arbitrator have the "power to determine language disputes" in the Judgment of Divorce implementing the arbitration award? What are the limits on the arbitrators reservation of this unspecified power? At what

point does exercise of this power change the scope and rulings of the arbitrator?

Attorneys are well advised to think through these issues, their implications and consequences, **before** execution of the arbitration agreement.

#3. Thoroughly "vet" the Arbitrator prior to entry into Arbitration.

True enough, arbitrators are neutrals, and sworn to decide the case upon the law and facts before them. However, arbitrators have their own unique and individual philosophy regarding spousal support, child support deviations, custody & parenting time, "fault," business valuation issues, "double dip" and the host of other issues commonly arbitrated.

The single best way to *check out* an arbitrator is to speak directly with respected attorneys regarding an arbitrator or review the published record of the arbitrator. Some pertinent inquiries might be:

- How far down the road is the arbitrator scheduling arbitrations? If it takes months to get on the arbitration schedule, how much further down the road will an adjournment push the case?
- How flexible is the arbitrator with scheduling and adjournments?
- Will the arbitrator work past 5:00 p.m. if the case calls for it?
- What is the underlying philosophy of the arbitrator? Has the arbitrator been published in the Family Law Journal or the State Bar of Michigan Journal regarding arbitration or significant family law issues?
- What is the underlying philosophy of the arbitrator? Was the arbitrator the lead counsel or trial counsel in a significant case involving similar issues in your dispute?

#4. Schedule An Early Pretrial to Narrow Issues and Focus for Arbitration.

Attorneys should always be cautious of the *hidden ball trick* from opposing counsel trying to expand (or significantly narrow) the jurisdiction of the arbitrator and scope of the hearing—usually disclosed for the first time in the opposition arbitration statement.

Not only does an early pretrial, in compliance with MCL 600.5076, provide an opportunity to educate the arbitrator regarding the disputes in the case, but also to avoid *"gotchas"* by the other side.

Think through your goals and objectives in advance of this conference. Express your procedural concerns to the arbitrator during the pretrial. Follow up with a confirming "letter of understanding" or even a "pre trial Order" me-

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morializing any significant rulings made by the arbitrator in the conference.

#5. *A Miller v Miller* "separate room" Arbitration can be a double-edged sword.

Before agreeing to a "separate room" arbitration in accord with *Miller v Miller*[6] consider the advantages or disadvantages of this format.

If you represent a party who is the victim of an unequal balance of power in the marriage relationship, separate rooms may afford your client the courage and confidence to openly testify to the arbitrator without the intimidation and anxiety associated with in- room testimony.

Conversely, where there are major credibility issues, and claims of fraud or dissipation of assets, never gratuitously yield the opportunity for in-person cross examination.

Attorneys should never opt for a *Miller v Miller* format because it is "easier" on the attorney, who may not be fully prepared for thorough and probing cross- examination.

#6. To Order or not To Order a Transcript.

Many attorneys act as if they have a right to have a transcript of the arbitration, irrespective of the issues. Wrong.

If child related issues are involved in an arbitration, then a transcript is mandated by §5077(2). What if non custody/ parenting/child support issues are involved?

Section 5077(1) is explicit: "a record shall *not* be made of the arbitration proceeding. The other party's insistence upon a transcript "to assist with proposed findings of fact and conclusions of law" may be part of a larger ploy to foist the testimony upon a reviewing court.

Sound practice suggests refusing to stipulate to a transcript regarding non-child related issues. If opposing counsel wants to tape record the proceedings, then insist upon a ruling by the arbitrator that this recording cannot be used in future proceedings.

If necessary to protect your client, bring the matter before the trial court. The statute is clear.

#7. Do not routinely waive closing argument.

Submission of written closing argument, in contrast with oral argument at the conclusion of the arbitration hearing is a case-by-case decision. In all probability, opposing counsel is not prepared for oral argument of the case, which provides you with a tactical advantage if you proceed with closing argument. This can be particularly advantageous if you are prepared and opposing counsel is not.

However, submission of written closing argument, perhaps in conjunction with Proposed Findings of Fact and Conclusions of Law, can provide a vital one-two punch maximizing your prospects for prevailing.

#8. Prepare Carefully Crafted "Proposed Findings of Fact" & "Conclusions of Law"

The skilled arbitration attorney should endeavor to actually write the opinion for the arbitrator.[7] This can be accomplished by a *building block* approach in which the legal issues are laid out, in A to B fashion.

The testimony and evidence is then cited which supports factual findings and the ultimate application to the legal issues. Testimony and evidence at issue with the proposed Findings can be distinguished and neutralized—but it should be acknowledged.

Your author is a strong proponent of "Summaries" whether it be a Summary of an Answer, a Summary of a Motion, or in an Arbitration a Summary of the Proposed Findings. You want the arbitrator to see where you are going, and not have to write twenty or thirty pages or attach hundreds of pages of exhibits to get there.

In an ideal world, your Proposed Findings of Fact and Conclusions of Law are well under way prior to calling your first witness at the arbitration hearing.

#9. Strategize your §5078 "Errors & Omissions" and §5081 "Motion To Vacate Arbitration Award" in anticipation of the Court of Appeals.

In the unfortunate event of an unsuccessful arbitration award, all is not lost. Both the Errors and Omissions procedure and Motion To Vacate are critical steps in triggering appellate intervention.

Grounds not raised with the arbitrator or the trial court will not trigger appellate intervention if brought up for the first time in the appeal brief.

Few trial attorneys engage in appellate practice. Encourage client to authorize an appellate specialist to weigh in, and join your team, at both the §5078 and §5081 stages.

Also bear in mind that many trial courts have a subtle (or not so subtle) antagonism toward DRAA arbitration. Not all judges favor arbitration.

Some may feel it is a challenge to their authority and jurisdiction. Others may feel that an attorney's choice of arbitration negatively reflects upon the integrity or wisdom of the trial court. The bottom line is that an adverse arbitration decision may find a favorable ear in the trial court.

Conclusion

An arbitration pursuant to the DRAA is *not* "binding mediation." It is not for the inexperienced attorney or a substitute for failure of due diligence by the family law lawyer.

In the appropriate circumstances, with the right client and the right issues and the right arbitrator, domestic relations arbitration can be substantially more rewarding than a full trial in front of a judge, subject to the strict application of the Rules of Evidence, with the certainty of an appeal no matter who prevails.

Last but not least, experience dictates[8] this final "Bonus Tip." Judges and referees (and arbitrators) are people too. They are not immune to the toxicity associated with high conflict family law cases.

Judges and referees (and arbitrators) have a family, or friends, hobbies, and/or activities outside the four corners of the hearing room and after testimony concludes. Accordingly:

- Control yourself in the arbitration hearing;
- Control your client in the arbitration hearing;
- Try (very hard) to control your interchange with opposing counsel or their client; and,
- Never, ever (not once) personally attack the arbitrator[9] who is going to decide your case.

The object of family law litigators should be to conduct an arbitration with serious thought, proactive planning**,** and a thorough presentation of the facts and law governing their client's case. Embracing the concepts set forth above increases the probability of a successful arbitration and a loyal client.

About the Author

James J. Harrington, III *of the Law Offices of James J. Harrington III, PLC in Novi, Michigan. A fellow in the American Academy of Matrimonial Lawyers, he has been named a Super Lawyer, and has presented, lectured, or moderated for the Institute of Continuing Legal Education on scores of occasions in the last several years.*

Endnotes

1 The DRAA is a compact statute, containing twelve sections; MCL 600.5070 to MCL 600.5082. The DRAA absolutely controls process and procedure in the divorce arbitration.

2 This Motion is frequently, and more appropriately described, as a "Motion To Confirm Arbitration Award."

3 Blaine B. Johnson, Jr., Jackson, MI was a mentor to countless Michigan attorneys including the undersigned. His passionate reference to "*killer cases*" and "*killer tips*" are fresh in the memory of family law advocates.

4 §5081(3) of the DRAA provides that the fact that the "relief" granted by the arbitrator exceeds the relief that could be granted by a court of law or equity is **not** grounds to set aside an arbitration award. Query: does this conflict with §5081(c) permit setting aside an arbitration award on the ground that "the arbitrator exceeded his or her powers."

5 *Staple v Staple* provides for a knowing waiver of the statutory right to petition the Court for modification of spousal support.

6 *Miller v Miller,* 474 Mich 27; 707 NW2d 341 (2005), affirmed the use of "separate rooms" in an arbitration hearing.

7 Enclosing a flash drive with a Word/Word Perfect draft of your Proposed Findings makes it very, very easy for the arbitrator to start cutting and pasting from your submission, and incorporating it into the actual arbitration award. In one successful arbitration, my arbitrator cut and pasted twenty-six of my thirty pages of proposed findings of fact and conclusions of law.

8 It wasn't until my experience as an arbitrator in several high conflict, contentious, toxic cases that I realized how much trial courts and referees absolutely hate the nit-picking, sniping, accusing, and inflammatory conduct of an evidentiary hearing. Arbitrators react the same way.

9 This *caveat* includes not personally attacking the arbitrator in the Errors & Omissions or Motion To Vacate; for all you know, the arbitrator and judge may have a close professional or personal relationship.

Litigation Involving the Valuation of a Parties' Interest in a Closely Held Business

By Harvey I. Hauer and Mark A. Snover
Hauer & Snover

Perhaps the most complex issue involved in divorce litigation, relating to property distribution, is the valuation of a spouse's interest in a closely held business. Your initial determination must be, does the business justify an appraisal? Once it is determined that there should be an appraisal, the process should commence.

The client needs to understand the necessity of retaining an expert to determine the value of the business interest. Clients, at times, will question the need for utilizing an expert witness, suggesting instead that the business interest be split equally. Absent an agreement by the parties to divide the ownership interest of the closely held business, the trial court must determine the value of the interest. See *Olson v Olson*, 256 Mich 619**,** 671 NW2d 64 (2003), where at trial, there was a large discrepancy between the expert's valuations.

> The trial court then ruled with regard to the valuations of the business:
>
> At this time the court will not set it's [sic] own value on Defendant-Husband's interest in the John M. Olson Corporation. Instead, the court will award Plaintiff-Wife one-half of Defendant-husband's stock in the John M. Olson Corporation. This will not cause any problems in running the Corporation since she will be a minority shareholder. *Id*. at 623.
>
> The Court of Appeals stated in part:
>
> Moreover, it is settled law that trial courts are required by court rule to include a determination of the property rights of the parties in the judgment of divorce. MCR 3.211(B); *Yeo v Yeo, 214* Mich App 598, 601, 543 NW2d 62 (1995). As a prelude to this property division, a trial court must first make specific findings regarding the value of the property being awarded in the judgment. *Beaty v Beaty,* 167 Mich App 553, 556; 423 NW2d 262 (1988). There are numerous ways in which a trial court can make such a valuation, but the most important point is that the trial court is obligated to make such a valuation if the value is in dispute. Accordingly, we have held that a trial court clearly errs when it fails to place a value on a disputed piece of marital property. *Steckley v Steckley,* 185 Mich App 19, 23-24; 460 NW2d 255 (1990) (the trial court clearly erred in failing to determine value of the plaintiff's interest in McDonald's franchises)[.] *Id.* at 627-628.
>
> ***
>
> For these reasons, and considering Kurtz, we conclude that the trial court abused its discretion under the circumstances of this case by failing to make a finding regarding the value of the corporation and instead ordering the parties to split the stock of defendant's closely held corporation. We therefore vacate the provision in the judgment of divorce that orders a division of the stock and remand this matter to the trial court to make a finding regarding the value of the stock and to grant plaintiff a cash award in an amount equal to one-half of the value of defendant's stock interest in the corporation. *Id* at 629.

Clients, at times, also question the need to obtain a valuation expert for the reason that they do not have readily available resources to retain an expert and that the other spouse controls the parties' funds. The client should be informed that MCR 3.206(C) states in part:

> (C) Attorney Fees and Expenses.
>
> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay[.]

It is not uncommon for someone to suggest that the most

cost-efficient manner in which to proceed is to stipulate to the use of a joint-expert. Although this may appear to be a good idea, it may have substantial negative consequences. Easy solutions are not necessarily good solutions.

The primary problem with utilizing a joint-expert is that often, as in *Olson*, experts have substantial differences in their opinions of the value of the business interest. Where the jointly agreed upon expert's opinion of value substantially favors the other spouse, and your newly engaged expert believes the joint-expert's report is flawed, there is a risk that the trier of fact might give the joint-expert's testimony undue weight. Jointly appointed experts, at times are imbued with instant credibility. How many times has it been said, *"you agreed to the joint expert, you must believe he or she is credible?"* A neutral opinion is not necessarily a good opinion. In the authors' experience, however, in those cases that they have tried or settled, where they have retained their own expert to challenge the joint-expert's report, the court or the mediator gave no deference to the fact that the joint-expert was mutually agreed upon. If, however, one should decide to stipulate to the use of a joint-expert, it would be prudent to provide in the order appointing the joint-expert, that by so stipulating they are not waiving their right to retain their own expert.

Another practical problem in utilizing a joint-expert occurs when the joint-expert's report is completed at the eleventh hour, and your client is outraged with the joint-expert's opinion. You are now left with virtually no time for a new expert to do as thorough a valuation as the joint-expert.

Once it is determined that it is necessary to hire a valuation expert, that process should commence as soon as possible. In most cases, a scheduling order will be entered that will likely establish the deadline within which to conduct discovery. You will want to provide your expert with as much time as possible to fulfill his/her responsibilities.

In selecting an expert, be mindful that at trial you will have to qualify that expert in accordance with MRE 702 which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The expert needs to be knowledgeable about applicable law. Make certain your expert is familiar with *Kowalesky v Kowalesky*, 148 Mich App 151, 384 NW2d 112 (1986). Wherein the court held, in part, that:

> …neither Revenue Ruling 59–60 nor any other single method should uniformly be applied in valuing a professional practice. Rather, this Court will review the method applied by the trial court, and its application of that method, to determine if the trial court's valuation was clearly erroneous. *Id.* at 155-156.

The *Kowalesky* court determined that "*[s]ince it appears that [the husband] would continue the dental practice, the valuation of the practice should be the value of the practice to [the husband] as a going concern." Id.* at 157. It is noteworthy that in other arenas such as probate or business sales, businesses are not valued in this manner. Most C.P.A.s are not familiar with the *"going concern"* methodology for valuing businesses. Therefore, it is important for your expert to be experienced in business valuations in divorce cases.

Inform your expert that the valuation date is typically the date of trial. See *Woodington v Shokoohi*, 288 Mich App 352, 792 NW2d 63 (2010), *[f]or the purposes of dividing property, marital assets are typically valued at the time of trial or the time judgment is entered, although a court may, in its discretion, use a different date. Byington, 224 Mich.App. at 114 n. 4, 568 N.W.2d 141. Id. at 365.*

Once the expert is selected, you should commence the discovery process. The threshold matter should be whether a Confidentiality or Protective Order is necessary. Most business owners do not want the fine points of their business and other financial interests to be made public. Your client should be advised that should the case be tried, a Confidentiality or Protective Order will no longer be effective as the trial will occur in open court, and, therefore, become a public record. That fact alone could have an impact on a client's position regarding trial.

It is essential that a meeting be arranged with the expert and the client. Even if the client is not the owner-spouse of the interest, the client likely possesses invaluable information related to the business such as the nature of the business; the manner in which the other spouse is compensated e.g., cash, check, credit card; other financial benefits received by the other spouse and their family; tax returns; and financial records.

When representing the owner-spouse make sure your expert speaks with the businesses' accountants, tax attorneys, and any other persons connected with the business that the expert deems necessary.

The expert can be an invaluable resource during the discovery process. In preparing for discovery, it is essential that you obtain from the expert all information and documents the expert requires to properly value the business interest. Likewise, you are going to want your expert present during

any deposition that relates to the business valuation. When propounding interrogatories to the opposing party and when deposing the other party's expert witness, you will want to discover and receive all documents given to that expert. You will also want to obtain a copy of that expert's curriculum vitae. An analysis of the curriculum vitae could prove helpful, in those rare cases, where you want to object to the witness being qualified as an expert by the court.

At trial, courts typically grant requests for sequestration of witnesses. You should make certain that your expert is not sequestered. The rationale for your request is contained in MRE 703, which provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.

There is no better way to ensure the expert's knowledge of the facts and data of the case that were placed into evidence then to have the expert in court when evidence is taken.

It is imperative that your expert be present during all trial testimony because your expert may be needed to present rebuttal testimony and beneficial to you in conducting your cross examination of the other expert.

About the Authors

Harvey I. Hauer, *Hauer & Snover, PC, is a Fellow of the American Academy of Matrimonial Lawyers and the former president of the Michigan Chapter. He has also served as chairperson of the State Bar of Michigan Family Law Section, the Michigan Supreme Court Domestic Relations Court Rule Committee and the Oakland County Bar Association Family Law Committee. He has been named by his peers to Best Lawyers in America, Super Lawyers and Leading Lawyers. He is a co-author of Michigan Family Law.*

Mark A. Snover, *Hauer & Snover, PC, has been named by his peers to Best Lawyers in America and Leading Lawyers in Family Law. He was named to the National Advocates, top 100 Lawyers. Mr. Snover is listed in Martindale Hubbell's Bar Register of Preeminent Lawyers. He was also selected to the American Society of Legal Advocates, Top 100 Lawyers, and the National Association of Distinguished Counsels, Top 1 Percent. Mark served on the State Bar of Michigan Family Law Council. He is a frequent author in the family law arena.*

Leverage in Litigation

By Amy M. Spilman
Alexander, Eisenberg, Middleditch & Spilman, PLLC

Leverage -- noun -- le·ver·age:
influence or power used to achieve a desired result.

What is leverage? As Mirriam-Webster tells us, leverage is power, and the use of that power to get what you want. When we think about leverage in the context of litigation, however, we are really talking about negotiation and using that power toward the optimal resolution of a dispute in your client's favor. The litigation process itself is structured to encourage settlement, with Early Intervention, Conciliation and Settlement Conferences, the required appointment of mediators, and the empowerment of the Friend of the Court to conduct investigations and recommendations to assist not only the triers of fact, but the parties' assessments of their positions. Indeed, in the civil realm, financial penalties can attach when settlement figures recommended settlement after case evaluation are rejected in favor of trial.

This article is intended to explore how leverage is used in the context of achieving an outcome in family law cases, but since power and control are the currency of abuse, a caveat must be made that this article is in no way intended to condone, encourage or favor the use of leverage in an abusive manner or as a result of an abusive relationship. Rather, the author wishes to highlight "power" variables that come into play in every divorce filing. Recognizing these dynamics will help shape a family lawyer's decisions in planning the best course of action on the client's behalf and, it is hoped, will provide a reality check on the parameters of divorce proceedings.

"Money is power, freedom, a cushion, the root of all evil, the sum of blessings."

Carl Sandburg

Leverage derives from several sources. First, and perhaps most obviously, is the power that comes from having superior financial resources than the opposing party. The financially-dependent spouse without an income of his/her own, or without access to assets or credit, may not be able to afford representation, or may not be able to afford to engage in the discovery or advocacy necessary to affect the outcome. The court's ability to award fees based on income-disparity pursuant to MCR 3.206(C) may level this playing field somewhat, but while many judges are willing to award attorney fees to enable a party to secure representation, it is generally not feasible to repeatedly return to court seeking more fees once the initial retainer is depleted. In many cases, attorney fees may not be recoupable until the case is resolved, or assets sold, which is a risk an attorney may not be willing to accept. Moreover, this court rule is of no help whatsoever when one party has the financial support of parents or other third parties that cannot be compelled to assist the less-moneyed spouse.

The prospect of having to spend additional attorney fees if the matter is not settled is often a useful motivation for parties to reach an agreement, not only as a practical consideration (there simply is not enough money to pay for that trial or evidentiary hearing), but also from a cost-benefit analysis (it makes little sense to spend many thousands of dollars in attorney fees for a trial when the amount in controversy is less), and based on the parties' own evaluation of how they wish to deploy their resources (not everyone wishes to spend $10,000 on a business evaluation or psychological evaluation, or trial even if they can "afford" it). The parties' own attitudes, preferences and financial realities are fair game to exploit to your advantage in steering the matter to a favorable settlement for your client. Clients often proclaim their refusal to settle is based on "the principle," but those principles often have a price.

"When you combine ignorance and leverage, you get some pretty interesting results."

Warren Buffett

Knowledge is certainly power and in litigation knowing more about the case or the parties can be a significant advantage leading to better results for your client. Many times, one party simply has more access to or information about the parties' assets or financial resources. Examples of the situations we commonly see are abundant: the financially-dependent spouse may have no idea about the monthly bills, and relied on the other spouse to take care of the financial side of the marriage in their division of labor; perhaps the parties maintained separate accounts and shared little information with each other; the self-employed spouse most likely has far more

knowledge about the inner-workings and finances of her business than the non-employed spouse.

Many an article has been written exhorting lawyers to take the time to engage in full and complete discovery. Of course, if your client is in the position of knowing very little about the marital estate, then discovery will be crucial. The best way to reduce the other party's advantage is to engage in discovery and obtain as much information as you can. The extent of the financial resources that can be brought to bear may require you to be targeted and efficient in the discovery you conduct. Thus, a subpoena to an employer may be far more fruitful than sending a big packet of interrogatories requesting documents and hoping that the other side answers fully, completely and timely. A well-drafted set of requests for admissions may be more valuable than the standard set of interrogatories asking questions regarding known information.

Informational leverage also applies to the more salacious things parties know about each other–or do not know want the other party to know. Exposing marital "bad acts" is part of the landscape of family law matters, and therefore the party with the "goods" on the other may feel he/she has the upper hand. The "Sparks" factors[1] and the best interest factors[2] suggest that the court is to consider the parties' conduct, and their moral fitness. But, as one factor among several, the impact these types of facts will have on the overall outcome is debatable. While the court may award the at-fault party a smaller percentage of the marital estate, in real dollars, a five-percent difference of a marital estate worth, say $100,000, usually will cost more to litigate to prove that fault than the attorney fees incurred in the process. Moreover, as perhaps a sad commentary on the state of our culture today, it is hardly shocking that a spouse has been unfaithful during the marriage. In the context of child custody, the moral fitness factor is not a contest between who is a better person, but requires a nexus between the conduct and how parties will function as a parent.[3]

However, we quite often encounter situations where the client(s) have engaged in illegal behavior (tax improprieties, questionable immigration status, wiretapping or eavesdropping violations, are common examples). If both parties are at risk, then perhaps there is more incentive for them both to settle the case, or at least to keep their matter private by arbitrating rather than proceeding to trial. But, if only one party is at risk, then the lawyer is faced with the dilemma of how to leverage that information to his client's advantage. Does this raise any ethical concerns? Can a lawyer threaten criminal prosecution as a tool to induce a more favorable settlement? Michigan law prohibits the threat of criminal prosecution for the purpose of extorting money or pecuniary advantage,[4] as well as the taking of money to conceal certain offenses.[5] Yet, in an informal ethics opinion, the Standing Committee on Professional Ethics stated "there would appear to be no direct ethical prohibition upon a lawyer's making good-faith representations on behalf of a client designed to obtain a client's legitimate pursuits, even if those representations include calling to the attention of others applicable criminal law, asserting in good faith a reasonable belief of possible criminal culpability, and requesting commencement or discontinuation of criminal proceedings when and where supported and appropriate."[6] While "threatening" may be considered coercive, it is not unethical to warn your opponent of the possible consequences that may result from criminal prosecution as part of negotiations, provided that there is a connection between the improper conduct and the behavior for which redress is sought.

Leverage may also exist in the parties' differences in educational attainment, financial sophistication, emotional stability or physical disabilities that may give one spouse an unquantifiable advantage–whether through a better appreciation or understanding of the process, a superior ability to make the financial decisions, a greater tolerance for risk, or merely the personal fortitude to handle the stress that is inherent in pending litigation, particularly in the emotional battlefield of family law. In this regard, a compassionate, patient and understanding attorney, who is willing to spend the time explaining things thoroughly, educating the client (or referring him to outside resources such as financial planners and therapists) may make a real difference for the client who may be more inclined to succumb to the pressure and uncertainty.

Unfortunately, this situation is also ripe for potential abuse. It is not uncommon, nor necessarily inappropriate for spouses to discuss settlement amongst themselves; indeed, it is beneficial for the parties and their children to reach an amicable resolution. But, if you have ever had a client come to you with a signed settlement that you had no part in negotiating which is grossly inequitable or unfair, it is easy to see how these personal differences can be improperly exploited. In fact, if you have actually directed your client to tender a settlement proposal to his spouse who is represented by counsel without that attorney's knowledge, you may be unwittingly engaging in unethical behavior. MRPC 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The application of this fairly straightforward rule in the special context of the domestic relations arena has been explored and distinguished:

> This is not to prohibit counsel from drafting a settlement proposal for his or her client, even when counsel knows that the client may, and probably will, discuss the proposal with the spouse who is represented by counsel. Counsel has no duty to furnish a copy

of the proposal to opposing counsel unless the client approves of sending the proposal. The drafting of a settlement proposal for discussion with a client differs from obtaining signatures to a final document. The former is ethical, the latter is not.[7]

Counsel is advised to be careful of not overstepping the bounds between undermining the attorney-client relationship of the opposing party and encouraging parties to resolve their own differences.

If you can't get rid of the skeleton in your closet, you'd best teach it to dance.

George Bernard Shaw

Finally, what can one do if the other side simply has more leverage that cannot be minimized or equalized to secure a fair and equitable resolution for the client? Roger Fisher, William Ury, and Bruce Patton, co-founders and directors the Harvard Negotiation Project, advise that under these circumstances, the focus should be on two objectives: (1) protect your client against making a deal that should be rejected and (2) make the most of the assets your client does have.[8] To accomplish the first, the client must identify The Best Alternative to a Negotiated Agreement (BATNA), as the standard against which any proposed agreement should be measured. This will rule out a solution that is too unfavorable to accept, and prevent the client from rejecting terms it would be better to accept.

To maximize your client's assets, the BATNA needs to be fully developed and evaluated against possible alternatives. To do this, the authors advise three steps. First, create a list of actions he might take if agreement is not reached, second, improve the best ideas into practical alternatives, and third, tentatively accept the alternative that seems best. All offers need to be weighed against this fully developed BATNA. The better the BATNA, the more likely you can improve the terms of any negotiated agreement. Also consider the other side's BATNA–if it is overly optimistic or unreasonable, you may be able to lower their expectations; perhaps there is an opportunity to propose a resolution that is an improvement for them as well. In most cases, litigation is so uncertain and expensive financially and emotionally, that any settlement may be better than the risk and cost of a trial. If both sides accept this truism, you may have all the leverage you need.

About the Author

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Endnotes

1 *Sparks v Sparks,* 440 Mich 141; 485 NW2d 893 (1992)

2 MCL 722.23

3 *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994), (this factor did not favor father where there was no evidence that mother's extramarital affairs had any adverse effect on her ability to raise children).

4 MCL 750.213

5 MCL 750.149

6 RI-78 dated March 14, 1991 (informal ethics opinion).

7 CI-920, dated September 1, 1983 (informal ethics opinion interpreting the former Michigan Code of Professional Responsibility).

8 Fisher et al, *Getting to Yes – Negotiating Agreement without Giving In* (New York: Penguin Books, 2nd ed, 1991).

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Litigating Domestic Relations Cases Under Michigan's Medical Marihuana Act

By Natalie Alane
Alane & Chartier, PLC

Love it or hate it, growing and using marijuana for certain medicinal purposes is protected activity in Michigan. Michigan citizens voted to enact the Michigan Medical Marihuana Act (MMA),[1] [2] which became effective on December 4, 2008. Currently, Michigan stands with 23 other states and Washington, D.C., in permitting the use of medical marijuana.

The MMA protects qualified patients and caregivers (those who grow marijuana for patients) from adverse action—such as prosecution—for using or growing medical marijuana *in compliance with the act*. Pertinent to domestic relations, the MMA prohibits interference with the custody or parenting time of a medical marijuana user or provider as follows:

> A person shall not be denied custody or visitation of a minor *for acting in accordance with this act*, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.[3]

Before one can identify the appropriate litigation tools that may bring to bear in a family law case involving medical marijuana, it is critical that the family law attorney have a strong grasp of the MMA, including what it permits, who it protects, and what it prohibits. This is essential because if a parent is not in strict compliance with the act, the parent's custody or parenting time rights are not protected.[4]

Thus, one's litigation strategy should begin with investigation and discovery into whether the parent at issue is entitled to the act's protections. If the parent is in violation of the act, the case is no different than one involving a parent using illegal drugs. When representing the patient-parent or caregiver-parent, demonstrating the parent's entitlement to the act's protection is essential. When representing the non-using parent, the other parent's legal protection may evaporate if that parent can be shown to be in non-compliance with the MMA.

This article sets forth how the litigator should demonstrate or disprove compliance and, once compliance is demonstrated, thoughts on what might constitute an unreasonable danger to the minor that can be clearly articulated and substantiated. It concludes with a few other additional topics that may arise and some final thoughts.

Compliance with the MMA

Who qualifies to use medical marijuana?

A "qualifying patient" under the MMA must have a registry identification card issued by Michigan's Department of Licensing and Regulatory Affairs and can possess no more than 2.5 ounces of usable marijuana or, if growing the marijuana, no more than 12 plants in an enclosed, locked facility.[5]

If you are attempting to demonstrate that the opposing parent is not in compliance with the act, discovery is vital. Consider having your client photograph the marijuana, plants, and storage method if possible. Alternatively, seek an ex parte order for inspection under MCR 2.310.

What qualifies a person to use medical marijuana?

The parent desiring the custody-related protections of the MMA must have a demonstrable debilitating medical condition. The qualifying conditions are one or more of the following:

1. Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.
2. A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.
3. Any other medical condition or its treatment approved by the department, as provided for in section 6(k).[6]

For the first time since the MMA's enactment, the department has approved an additional condition—post-traumatic stress disorder.

The astute litigator representing the non-patient parent will discover the nature of the other parent's debilitating medical condition through a discovery request to the parent requesting a list of all the parent's treating medical providers and a signed HIPAA release. One should also request a copy of the parent's medical marijuana application, on which the claimed medical condition is identified. If the parent does not possess a copy, a copy can only be obtained by submitting the form found on LARA's website,[7] signed by the patient. The application will not be released without this form, and LARA will not comply with a FOIA request or a subpoena accompanied by a HIPAA release.

If the parent refuses to waive his or her physician-patient privilege, file a motion in limine under MCR 2.314 seeking a court order preventing the parent from introducing any testimony regarding the parent's medical condition.

When representing the parent-patient, be prepared to show evidence of the parent's qualifying medical condition, which should be much easier to obtain with the cooperation of your client.

The medical condition component of the MMA can be quite tricky in custody cases because once the debilitating medical condition is asserted, the response will likely be that the parent's medical condition negatively affects the ability to parent under the statutory child custody best-interest factors.[8] When advocating for the patient-parent, be prepared to demonstrate that while the condition may require medication, it does not inhibit safe and appropriate parenting of the minor child.

What is a "caregiver"?

A parent supplying medical marijuana to a registered patient is called a "caregiver"[9] and is also protected by the MMA. A parent can be both a patient and a caregiver. A caregiver can assist no more than five qualifying patients[10] and can possess no more than 2.5 ounces of usable marijuana for each patient cared for and no more than 12 marijuana plants for each, for a total of 60 plants, which must be kept in an enclosed, locked facility.[11]

When representing a caregiver-parent, be prepared to demonstrate the parent's compliance with the above requirements to invoke the custody protections of the MMA. If the opposite parent is the caregiver, the same sort of discovery used to ascertain compliance as a patient, discussed above, should be employed here. Note that the names of the caregiver's patients are private health information that cannot be divulged under HIPAA.

What is an "enclosed, locked facility"?

As stated, the MMA requires both patients and caregivers to keep marijuana plants (not product) in an "enclosed, locked facility." This lengthy definition is set forth in MCL 333.26423(d). Be prepared to demonstrate that storage of the patient's or caregiver's plants either meets or fails to meet the criteria set forth in the statute, depending on which parent you represent. The strongest evidence is likely to be photographic in nature.

What is a "bona fide physician-patient relationship"?

Finally, a patient must be able to demonstrate a "bona fide physician-patient relationship" with the physician who has signed off on the patient's application. The rules governing the physician's involvement are outlined in MCL 333.26423(a). In short, the physician is supposed to review medical records, examine the patient, create and maintain records of the visit, and have a "reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition."[12]

Because very few patients' primary physicians are willing to sign a medical marijuana application, most patients use doctors hired by medical marijuana dispensaries who are supposed to meet with the patient and take the steps outlined above. The cottage-industry nature of this process makes it challenging to locate and procure the cooperation of many of these physicians. Proving or disproving the existence of a bona fide physician-patient relationship may be best accomplished by questioning the patient along the lines of the criteria set forth in MCL 333.26423(a). But the mere inability to locate the physician or the physician's lack of cooperation may speak volumes about the "bona fide" nature of the physician-patient relationship.

These are the highlights of the MMA's requirements, but not an exhaustive discussion. Read the whole act carefully, as well as its interpreting cases, and do not hesitate to consult with a criminal defense attorney who is well-versed in the MMA.

Does the Parent's Behavior Pose an Unreasonable Danger to the Minor?

As explained, if non-compliance with the MMA is proved in a custody case, the parent asserting the act's protections is not entitled to them, so that parent's use or possession of marijuana is illegal and must be treated as such. But if compliance with the act is proved, the litigator must then assert or defeat a claim that the medical marijuana activity "creates an unreasonable danger to the minor that can be clearly articulated and substantiated."[13]

Although seven years have elapsed since the MMA became effective, there is not yet one Michigan appellate case interpreting this phrase in the context of a divorce or custody matter.[14] The terminology is not mirrored in current custody or parenting time statutory language and contains no reference to the best interest factors. Nor does the phrase reference the terms "proper cause" or "change of circumstances." Compare Maine's sister provision, which states simply that "a person may not be denied parental rights and responsibilities with respect to or contact with a minor child as a result of acting in accordance with this chapter, unless the person's conduct is contrary to the best interests of the minor child."[15]

Accordingly, the mandate appears to be a threshold question to the other threshold questions involved in child custody determinations (best interests, proper cause, and change of circumstances) that imposes an additional and different burden on a person seeking to raise a medical marijuana-use concern in a custody or parenting time matter. Certainly the provision requires specific, identifiable, and admissible evidence on the record regarding the danger asserted and the unreasonableness of that danger.

Like a best interest analysis, what may constitute an "unreasonable danger" to a minor is an intensely fact-specific question, and the arguments and findings can be uniquely prone to the reviewer's subjectivity, beliefs, and own personal experiences (or lack thereof).

In a change of custody or parenting time situation, a parent requesting a change to a court's prior custody or parenting time order must demonstrate either proper cause or a change of circumstances. Is an "unreasonable danger" to the child's welfare per se proper cause or a change of circumstances? Quite possibly.

Does the "unreasonable danger to the minor child" language of the MMA take this particular issue completely out of the realm of the best-interest analysis? It seems so. If a parent's involvement with medical marijuana poses an unreasonable danger, then the court can consider the parent's medical marijuana use in a custody or parenting time decision, which would become part of the best-interest analysis. If no unreasonable danger can be shown, the court simply cannot consider the parent's involvement with medical marijuana at all.

In a custody or parenting time modification case, it seems that the "unreasonable danger" question would be addressed as part of the threshold question whether there is proper cause or a change of circumstances sufficient to revisit custody.

Given the absence of appellate authority, the proofs surrounding "unreasonable danger" is a wide-open field. The following are aspects to consider for either side of the argument.

Secondhand smoke

On one hand, exposing children to secondhand medical marijuana smoke has been cited as a justifiable concern in a parenting time case in at least one case from another state.[16] On the other hand, exposing children to second-hand tobacco smoke does not seem to merit much appellate concern.[17] Is this a double-standard? An impressive number of controlled studies have failed to demonstrate a connection between marijuana smoke and the variety of illnesses proved to be caused by tobacco smoke.[18]Nonetheless, this is sure to be an oft-cited issue in support of proving the presence of an unreasonable danger.

Before you counsel your client to use methods of ingestion other than combustion, be aware that the MMA does not protect the use or possession of so-called "medibles," such as butters, oils, tinctures, and topicals. A bill is currently pending in the state legislature to encompass the wide array of alternatives to combustion.[19] Vaporizing, however, which does not produce smoke, is currently permissible.

Inability to function; likelihood of abuse or neglect

It has been hinted at, if not held outright, that using marijuana so incapacitates the user that the user becomes essentially incapable of parenting[20] or that the use will likely result in abuse or neglect of the child.[21] Yet, at least one litigant has argued that he needed medical marijuana to effectively parent.[22] This is not actually far-fetched if a person has a debilitating medical condition that medical marijuana successfully alleviates. Does a parent's use—or misuse—of prescription drugs get nearly as much traction as medical marijuana has in cases around the nation? It does not seem so. Even so, this is likely to be the most relied-on argument in attempting to prove unreasonable danger.

To defeat such a claim, the parent's frequency and timing of use will be key. A parent who "wakes and bakes," so to speak, smokes while a child is present, or remains under the influence of marijuana during the majority of parenting time might face some challenges. A parent who uses his or her medicine judiciously as it relates to parenting will be in the best position to defeat this sort of claim.

Breastfeeding

In a case that swept across international media, a California mother faced criminal child endangerment charges for, among other things, breastfeeding an infant while using medical marijuana.[23] Studies suggest that there are negative ramifications on a breastfeeding infant from the mother's marijuana use.[24]

Raids, federal prosecution, and crime

The MMA's protection of medical marijuana use directly

conflicts with—and does not supersede—federal law. Federal law classifies marijuana as a Schedule 1 substance, rendering marijuana-related activity, including possession and manufacture, illegal.[25] Media outlets release news of raids, confiscations, and arrests regularly. Many of these "take downs" are conducted by surprise and in a manner more befitting to nabbing members of a drug cartel.[26]

However, tucked into a 1,603-page federal spending bill passed in December 2015 was a passage prohibiting the Department of Justice from interfering with "the use, distribution, possession, or cultivation of medical marijuana" in states that have legalized marijuana for medical use or otherwise.[27] Pundits differ on whether this truly lifts the ban on medical marijuana; caution is still warranted.

In a highly publicized Michigan case in 2013, Baby Bree Green was six months old and breastfeeding when her home was raided by the Auburn Hills Police. Despite that her parents were licensed caregivers in full compliance with the MMA, they were charged with manufacturing marijuana. An Ingham County referee ordered Bree's removal, and the infant was relegated to supervised visits with her parents. The referee concluded that marijuana in the home is "inherently dangerous" to children because the presence of marijuana in a home is a supposed target for criminal activity. However, charges were ultimately dropped against the Greens, and Bree was returned to her parents after a traumatic separation and media frenzy lasting over six weeks.

Is the potential to be raided, robbed, or federally prosecuted an "unreasonable danger" to a child?

Driving

Certainly a non-using parent may point to the patient-parent's operation of a motor vehicle while using his or her medicine as an unreasonable danger to a minor. When making or defending this argument, be aware that the Michigan Supreme Court in *People v Koon* held that the Michigan Vehicle Code's zero-tolerance provision, which prohibits driving with any indication of marijuana in one's system, is superseded by the MMA.[28] To be guilty of a moving violation, the patient

must be shown to be actually under the influence of marijuana. Thus, a parent who drives with marijuana in his or her system, but who cannot be shown to be "under the influence," is protected by the MMA.

These are but some of the issues that may arise when litigating whether a patient or caregiver's conduct poses an unreasonable danger to a minor child in a custody or parenting time case. Given the dearth of case law on the subject and the slow evolution, it appears that the waging of battles is occurring primarily at the trial court level. Creative advocacy will be an essential skill.

Additional Food for Thought

Prohibition on use and court-monitoring of medical marijuana levels

In a 2015 custody matter, a Lapeer Circuit Court judge prohibited a compliant, registered patient from using medical marijuana, ordered random drug screens, and ordered that if the father failed a screen, his parenting time would become supervised. An application for leave to appeal this ruling is pending before the Michigan Court of Appeals.[29] Stay tuned.

Does a court have the right to monitor a parent's medical marijuana use? In a neglect/abuse matter, a Hillsdale County probate court addressed the prohibition on a father on using medical marijuana. After reviewing the positive tests out of a sample of the father's last 25 tests, the trial court set a "therapeutic level" for the father of 50 ng/ml.

Rulings such as this invoke a "J.D. vs. M.D." battle, calling into question how a court is qualified to set therapeutic limits, particularly when there is no scientific basis on which to determine how much marijuana a particular patient requires. That said, this particular ruling seems to be a fairly reasoned approach because the court in essence took the patient's word—as shown by the patient's own testing—as to how much marijuana the patient used to be effective. However, if testing above that limit caused the court to take adverse action regarding the father's parenting time, one may convincingly argue a violation of the MMA.

Either way, this is uncharted territory and is untested at the appellate level.

Housing

Michigan Attorney General Bill Schuette has opined that nothing in the MMA requires landlords to permit the cultivation or use of medical marijuana.[30] In other words, medical marijuana users and caregivers are potentially at risk of losing housing if and when a landlord institutes a prohibition against medical marijuana.

Gun possession

In this hunting-oriented state, it is important to know that the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives has declared that licensed medical marijuana users in any state cannot legally own or possess a firearm.[31] Nor can a gun establishment sell guns or ammunition to any person who the establishment discovers holds a medical marijuana permit.

Treating children with medical marijuana

You may be surprised to learn that at least forty-four children—the youngest is seven years old—are qualified Michigan medical marijuana patients.[32] Should parents disagree on using medical marijuana for treatment of their child, an interesting, and likely expensive, legal dispute may arise.

Changes of domicile

If a parent, or even a child, suffers from a condition for which medical marijuana has been found to be effective, but that is not one of Michigan's approved "debilitating medical conditions," that parent may wish to relocate to a state in which marijuana is legal. The potential for a change-of-domicile case premised on this set of facts is not out of the realm of possibilities. A savvy litigator might point to the patent the United States government holds on cannabinoids, in which it proclaims the many varied health and medical benefits of cannabinoids.[33]

Final Thoughts

The explosion of the production, use, and availability of medical marijuana has certainly brought the beliefs and attitudes about use of marijuana with or without state permission to the forefront. But out of this new territory has arisen many new questions and challenges for family law courts in cases where one parent's allegation of substance use is solely related to medical marijuana. As it stands, practitioners in Michigan have the unique opportunity to help shape the law when it comes to medical marijuana in custody and parenting time cases.

About the Author

Natalie Alane *concentrates her practice on family law, collaborative practice, and appellate law and is a trained mediator. Before co-founding Alane & Chartier, P.L.C., she served as a senior staff attorney to Michigan Supreme Court Justice Michael F. Cavanagh and Michigan Court of Appeals Judge Stephen L. Borrello and worked as a prehearing attorney in the Michigan Court of Appeals Research Division. Ms. Alane has taught Scholarly Writing, Moot Court, and Advanced Legal Writing at Western Michigan University School of Law. She is a former President of the Collaborative Practice Institute of Michigan and is a member*

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Endnotes

1 MCL 333.26421-26430.

2 The legislation spells marijuana with an "h" instead of a "j." The more familiar spelling using a "j" is employed here except in a direct quote.

3 MCL 333.26424(c).

4 The MMA is complex in and of itself, to say nothing of the myriad cases interpreting it. Thus, consulting with a criminal defense attorney who deals regularly with medical marijuana cases is extremely prudent.

5 MCL 333.2624(a).

6 MCL 333.26423(b).

7 http://tinyurl.com/h9r7yyn

8 MCL 722.23(g).

9 MCL 333.26423(h).

10 MCL 333.26426(d).

11 MCL 333.26424(4)(b).

12 MCL 333.26423(a)(3).

13 MCL 333.26424(c).

14 The Michigan Court of Appeals has cited this passage in three parental termination cases. But because other issues in those cases were outcome-determinative, the passage was afforded only a cursory analysis. See *In re Huffman*, unpublished per curiam opinion of the Michigan Court of Appeals, issued December 8, 2015 (Docket No. 326538); *In re Beeler*, unpublished per curiam opinion of the Michigan Court of Appeals, issued January 20, 2015 (Docket No. 321648); and *In re Fay*, unpublished per curiam opinion of the Michigan Court of Appeals, issued November 26, 2013 (Docket No. 314262).

15 MRS 22 § 2423-E(3).

16 See, e.g., *In re Alexis E*, 171 Cal App 4th 438; 90 Cal Rptr 3d 44 (2009).

17 Cf. *Jordan v Coon*, unpublished per curiam opinion of the Michigan Court of Appeals, issued July 31, 1998 (Docket No. 203346) (declining to find that the mother's exposure of the children to her secondhand cigarette smoke required the weighing of the "satisfactory home environment" best interest factor against her).

18 See Armentano, Not All Smoke Is Created Equal, http://blog.norml.org/2016/01/07/all-smoke-is-not-created-equal/.

19 HB 4209 was passed by the House of Representatives on October 7, 2015, and is currently pending in the Senate.

20 See, e.g., *In re Marriage of Wieldraayer*, unpublished opinion of the Washington Court of Appeals, issued December 22, 2008 (Docket No. 59429-0-I).

21 See *id.*

22 *In re Alexis E*, 171 Cal App 4th 438; 90 Cal Rptr 3d 44 (2009).

23 "*Children taken from mom in pot raid inflame Butte county ballot debate*," Sacramento Bee, May 30, 2012.

24 For a compilation of scientific studies, see http://kellymom.com/bf/can-i-breastfeed/lifestyle/marijuana/.

25 See 21 USC 812(c), 823(f), and 844(a).

26 See, e.g., The Morning Sun, "*Police raid medical marijuana growing operation*," September 15, 2011; Opposing Views, "*Feds raid medical marijuana facilities in Spokane, Washington*," April 29, 2011; Cannabis Fantastic, "*Washington vet shoved to the ground in swat raid over two small plants*," October 28, 2010; "*Feature: Can Medical Marijuana Cost You Your Kid? In California, It Can*," November 2, 2007.

27 H.R. 83 § 538.

28 *People v Koon*, 494 Mich 1, 7-8; 832 NW2d 724 (2013).

29 *Stefani v Stefani*, Michigan Court of Appeals Docket No. 330715.

30 Michigan Attorney General Opinion No. 7261.

31 See Detroit Free Press, "*Have a license for medical pot? You can't have a gun, U.S. says*," October 1, 2011; September 21, 2011 memo from the United States Department of Justice, ATF division.

32 "*Michigan OKs Medical Marijuana for 44 Children*," WLNS.com, May 28, 2012.

33 Patent No. US6630507B1, issued on October 7, 2003. The patent abstract indicates that cannabinoids are "useful in the treatment of and prophylaxis of [a] wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases" and that "cannabinoids are found to have particular application as neuroprotectants, for example in limiting neurological damage following ischemic insults, such as stroke and trauma, or in the treatment of neurodegenerative diseases, such as Alzheimer's disease, Parkinson's disease and HIV dementia."

Making The Uniform Child Abduction Prevention Act (UCAPA) Work To Protect Children

By Jeanne M. Hannah
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"An ounce of prevention is worth a pound of cure." —Benjamin Franklin

The Uniform Child Abduction Prevention Act (UCAPA), enacted in Michigan as Public Act 460 of 2014,[1] was signed into law by the governor on January 11, 2015 and given immediate effect. UCAPA is an important law that addresses the growing problem of interstate and international child abduction by parents. UCAPA defines "abduction" as "the wrongful removal or wrongful retention of a child."[2]

Stranger abductions are rare, but are the most publicized. Parental abduction is far more commonplace and may occur at a time when the parents separate or begin divorce proceedings. Parental abduction may also occur in times of marital discord or if there is domestic violence or domestic abuse. Sometimes, a parent abducts or retains the child seeking an advantage in anticipated or pending child-custody proceedings. Sometimes a parent may refuse to return a child at the end of his or her parenting time after a custody order has been entered or may flee with the child to prevent parenting time by the other parent. Parental child abductions may be within the same city, state, country, or may be international. Whether the parents are married to each other or are unmarried, children are often caught in the middle of adult disputes. UCAPA was enacted to help prevent parental abductions. Parental abduction is not criminalized by UCAPA unless an abduction is in violation of a UCAPA order, thus it is not necessary to prove intent in order to obtain a prevention order under UCAPA.

Many societal factors compound the risk of parental abduction: tumultuous financial times, an imploding job market in the U.S., abandonment of the tender-years doctrine and other gender based rules, increasing joint custody awards, increasing mobility, and increasing numbers of unmarried parents, parents in an arranged marriage and parents having ties to another country. Outcomes of child custody decisions are less predictable because of these factors.

The children most at risk (least likely to be recovered) are those born to a parent or parents who are citizens of a country that is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention").[3] The Convention is now in force between the United States and seventy-two other Nation-States.[4] The UCAPA helps family lawyers and family courts assess the risks of parental abduction and fashion appropriate orders to prevent wrongful removal of a child and the unnecessary consequences of a wrongful removal. Where, as is often the case, a child is at risk for abduction to a non-Hague country, Michigan lawyers and courts may use UCAPA to protect children from disruption of the status quo and from being victims of a parent's efforts at self-help.

The federal Parental Kidnapping Prevention Act (PKPA)[5] enacted in 1980 and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[6] prioritize a child's home state and also provide parents and courts with enforcement powers, providing more efficient and rapid means of recovery of abducted children. The UCAPA incorporates the definition of home state found in the UCCJEA and the PKPA.[7] The Hague Convention gives priority to a court located in a child's "habitual residence" to make child custody decisions.[8] These laws are civil and procedural in nature. No best interest analysis is provided when deciding whether a removal or retention was wrongful.

Primary purposes of these laws are to preserve the status quo regarding a child's custody so that a court in a jurisdiction having the closest connection with the child can make an initial custody determination. As stated by the 6th Circuit in a Hague proceeding:

> "Every family dispute has its own unique set of facts, and the case before us certainly is no different. However, there is a central core of matters at which The Hague Convention was aimed: situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country, or country of preferred residence. That is exactly what happened here."[9]

Fourteen states and the District of Columbia have enacted the UCAPA at the time of this writing.[10] The UCAPA does not supersede any law; rather, it supplements other laws.

Thus, UCAPA is intended to be used hand-in-glove with the PKPA, the UCCJEA, and the Hague Convention to provide additional methods and resources to address potential, threatened and actual family child abductions.

Section 6 of the UCAPA specifies the pleading requirements for a verified petition.[11] The petitioner must specify the risk factors for abduction, including the relevant factors described in Section 7[12] and also the same matters that are required in the UCCJEA's Section 209.[13] UCAPA identifies a credible risk of abduction as threatened mistreatment or abuse for emergency jurisdiction purposes. Section 7 sets forth a long list of possible risk factors for abduction.[14] A prudent lawyer will plead the risk factors applicable to the particular case at bar, and will support the petition with a sworn affidavit of the petitioner setting forth facts and evidence that would enable the trial court to make findings of fact regarding the credible risk(s) that support issuance of an abduction prevention order.

Because some of the risk factors set forth in Michigan's UCAPA are actions that a person fleeing from domestic violence might do—such as to quit a job, terminate a lease, or close a bank account—it is important to note that Section 7 also provides that the risk factors apply "[e]xcept for planning activities related to providing for the safety of a party or the child while avoiding or attempting to avoid domestic violence."[15] If the court finds, during a hearing on a petition under this act, that the respondent's conduct was intended to avoid domestic violence or imminent harm to the child or the respondent, the court shall not issue an abduction prevention order."[16]

Note that it is not enough for the petitioner to allege that the other parent is a citizen of a country that is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. See, e.g., *Mohsen v Mohsen*, 5 So3d 218 (La App, 2008). In that case, the Court held

> Nonetheless, we find it necessary to vacate the portion of the judgment that ordered the surrender of the child's passport in light of the trial court's reliance solely on Nicaragua's nonparticipation in the Hague Convention in its determination of the existence of a credible risk of abduction. Clearly, a country's nonparticipation in the Hague Convention is only one factor to be considered by a court in determining whether a credible risk of abduction exists. See LSA-R.S. 13:1857(A)(8)(a).[17]

The *Mohsen* Court remanded for the trial court to make findings of fact on all of the risk factors contained within UCAPA.

Preserving the status quo regarding a child's custody and deterring a parent from crossing county lines, or, alternatively, crossing interstate or international boundaries in search of a more sympathetic court (or a court less convenient for the left behind parent) is a primary purpose of UCAPA. In addition, as with the UCCJEA and the Hague Convention, an additional purpose is to preserve jurisdiction in that place which has the closest connection with the family and child. As stated by the 6th Circuit in a Hague proceeding:

> Every family dispute has its own unique set of facts, and the case before us certainly is no different. However, there is a central core of matters at which The Hague Convention was aimed: situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country, or country of preferred residence. That is exactly what happened here.[18]

"Abduction" is defined in UCAPA in the same way it is used in the Hague Convention on the Civil Aspects of International Child Abduction; that is, as "the wrongful removal or wrongful retention of a child."[19]

There is little case law interpreting UCAPA since only fourteen states have enacted this uniform law. However, a Michigan court interpreting and applying UCAPA may rely upon caselaw from other jurisdictions that have enacted UCAPA.[20] "The conduct made actionable by the Convention and by UCAPA–the wrongful removal or retention of children–is wrongful not in a criminal sense but in a civil sense."[21] Thus,

Fast Facts

- The Uniform Child Abduction Prevention Act (UCAPA) is a new law intended to deter parental abduction. It became effective on January 11, 2015.
- UCAPA defines "abduction" as the wrongful removal or wrongful retention of a child.
- UCAPA can be used to deter intrastate, interstate and international parental abductions.
- The children most at risk (least likely to be recovered) are those born to a parent or parents who are citizens of a country that is not a signatory to the Hague Convention on the Civil Aspects of Child Abduction.
- UCAPA works hand-in-glove with the UCCJEA and the Hague Convention.
- If a Michigan court finds a credible threat of abduction, the court is authorized by UCAPA to issue a prevention order and to take temporary emergency jurisdiction under section 204 of the UCCJEA.

under the Hague Convention, and by analogy under UCAPA, to show that a removal or retention is wrongful, the petitioner must show that he or she was exercising rights of custody or would have been exercised rights of custody, but for the actions of the taking parent who is alleged to have wrongfully removed or retained the children.[22]

"Generally speaking, 'wrongful removal' refers to the act of removing the child without the consent of the person who was actually exercising custody of the child. ' Wrongful retention' refers to the act of keeping the child without the consent of the person who was actually exercising custody. A typical example of this conduct is a refusal by a noncustodial parent to return a child at the end of an authorized parenting time."[23] A "wrongful removal or retention" of a child occurs within the meaning of the Convention, and by analogy under UCAPA, when an action is taken by one parent in contravention to the rights of a person or institution under the law of the State of the child's habitual residence.[24]

The Convention's true nature is revealed most clearly in these situations: It is neither concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. There is no "best interest of the child analysis" at all in UCAPA, in the UCCJEA or in the Convention. These laws are procedural in nature, and the object of them is to ensure that the court making a custody determination has the closest relationship to the child and to the family. The intent is to prevent a custody decision to be influenced by a change of circumstances brought about through unilateral action by one of the parties.[25]

In a situation where a parent and child may have fled to another city or county or where the child is residing in a state but the statutory time period for filing of a divorce cannot be met, a married petitioner may file a petition in a county and state where the child is present under section 204 of the UCCJEA requesting temporary emergency jurisdiction and under UCAPA for an abduction prevention order. The court may take temporary emergency jurisdiction under section 204 of the UCCJEA if the court finds a credible risk of abduction.[26]

UCAPA allows a trial court that finds a credible risk of abduction to enter an order providing many safeguards against abduction, including, but not limited to: imposition of travel restrictions; prohibitions against the removal of the child from the State, the United States, or another geographic area without the court's permission or that of the petitioner; prohibitions against removing the child from school or a child-care facility or from approaching the child at any location other than a site designated for supervised parenting time; a requirement for registration of the child-custody order in another state; a requirement that a parent surrender the child's passport or restrictions on obtaining a new or replacement passport or visa; a requirement for a mirror-image order from the relevant foreign country; – a requirement that the respondent post a bond or other security to serve as a financial deterrent to abduction.

It is of utmost importance, to ensure that UCAPA orders are given full faith and credit in every state of the union, and that it is clear upon the face of the order that the trial court complied with the Act and provided due process to both parties. Thus, Section 8 of UCAPA provides that if the court enters an order, the court must state on the face of the order the basis for the court's exercise of jurisdiction; the manner in which notice and opportunity to be heard were given to those entitled to notice of the proceeding; a detailed description of custody and visitation rights and residential arrangements; a provision that a violation of the order may subject the party in violation to civil and criminal penalties; and identification of the child's home state or country of habitual residence at the time of the issuance of the order.[27] The order must also state the findings of fact regarding "credible risk of abduction" upon which the trial court based its prevention order and, if the basis for the restriction is fear of abduction or concealment, consider alternatives offered by law.[28]

Conclusion

In an abduction case, time is of the essence. It is critical that the action taken is effective. No parent should attempt to "take the law into his/her own hands" by snatching a child away from the other parent. The Uniform Child Abduction Prevention Act is an important act to protect children from becoming enmeshed in an already tense situation—one that threatens to cause irreparable and incomprehensible harm to the family and the parties' children.

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About the Author

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Endnotes

1 MCL 722.1521, *et seq*.

2 MCL 722.1522(a).

3 *https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.*

4 *https://travel.state.gov/content/childabduction/en/country/hague-party-countries.html.*

5 The Parental Kidnapping Prevention Act (PKPA; (Pub.L. 96–611, 94 Stat. 3573, enacted December 28, 1980; 28 U.S.C. § 1738A).

6 MCL 722.1101 et seq. All states except Massachusetts have enacted the UCCJEA.

7 MCL 722.5722(h): "Home state" means that term as defined in section 102 of the uniform Child-Custody Jurisdiction and Enforcement Act, 2001 PA 195, MCL 722.1102. MCL 722.1102(g) defines home state: "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period.

8 The Convention, at Article 3.

9 *Friedrich v. Friedrich,* 983 F.2d 1396, 1402 (6th Cir. 1993).

10 *http://www.uniformlaws.org/Act.aspx?title=Child%20Abduction%20Prevention*. Note that some states enacted the uniform law with changes.

11 MCL 722.1526.

12 MCL 722.1527.

13 MCL 722.1209.

14 MCL 722.1527.

15 MCL 722.1527(c).

16 MCL 722.1527(2).

17 *Mohsen v Mohsen,* 5 So.3d 218, 224 (La. App 2008).

18 *Friedrich v Friedrich,* 983 F.2d 1396, 1402 (6th Cir. 1993).

19 MCL 722.1522(a).

20 MCL 722.1531.

21 *Legal Analysis of the Hague Convention*, 51 Fed.Reg. 10494, 10505 (1986).

22 Hague Convention, Article 3.

23 *Legal Analysis of the Hague Convention*, 51 Fed.Reg. 10494, 10503 (1986).

24 Hague Convention, Article 3.

25 Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session ("Explanatory Report"), ¶ 71, at 447-48.

26 MCL 722.1525.

27 MCL 722.1528(1).

28 *Davis v Ewalefo*, 131. Nev. Adv. Op. 45 (July 02, 2015).

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Litigating a ROPA Action

By James P. Ryan and Kate Weaver

Introduction

Establishment of Paternity

The Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq.*, seeks to comprehensively address the problem of misidentified fathers. Actions may be filed under ROPA to determine who is–or who is not–the father of a child. The Act separately addresses four "legal father" situations (acknowledged, affiliated, genetic or presumed), and sets forth the circumstances under which those men, plus mothers and alleged fathers, may file an action to have their designation as father either revoked or declared. Before ROPA, many biological fathers had no way to challenge another man's legal paternity.

ROPA supplements and works with the Acknowledgment of Parentage Act (APA), MCL 722.1001 *et seq*., under which unmarried parents can establish a man as a child's "natural" father by signing an Acknowledgment of Parentage (AOP). ROPA also works with the Paternity Act, MCL 722.711 - .730, under which a man or a mother (or the state, if the mother receives state assistance) can file an action to determine a man's paternity of a "child born out of wedlock." MCL 722.711(a).

ROPA replaces the former practice where couples going through a divorce could prove that the husband is not the father of a child born during a marriage (or from a pregnancy that began or ended during a marriage), and then enter a "*Serafin* Order," under its namesake decision *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977). Paternity could be established by the mother and another man signing an AOP, or by either of them filing a paternity action.

Neither the APA nor the Paternity Act considers equitable factors to make determinations about fatherhood. In general, the same is true of ROPA: the best interest factors come into play when deciding between competing parental interests, not when deciding who the parents are.

ROPA Procedures

This article assumes that you have studied and are familiar with ROPA, and that you have an action planned or pending.[1] This article is limited to discussing issues that you and your client will face in evidentiary hearings or at trial. Some issues are preliminary, like proving a party's standing, or the sufficiency of the pleadings. Other issues involve entitlement to relief—what needs to be shown and what is the burden of proof.

Some predicate issues will be clear and relatively easy to prove. Examples include the birth of the child, the identity of the current legal father, what type of father (acknowledged, affiliated, genetic or presumed) he is, that the alleged father had sex with the mother, or that the current legal father did not, and that the proper pleadings (complaint, or a motion in an existing action, including a motion to intervene by, or for joinder of, an alleged father) were filed in a timely manner.

Actions to Revoke an AOP

Sufficiency of Accompanying Affidavits

ROPA requires each person filing a claim for revocation of a Michigan AOP (and those who request an extension of time to file) to file an affidavit stating facts that constitute one of five grounds: mistake of fact, newly discovered evidence that by due diligence could not have been found before the Acknowledgment was signed, fraud, misrepresentation or misconduct, or duress in signing the Acknowledgment.[2] The affidavit is the principal fact-based pleading concerning the threshold requirements for filing the action, and it must be properly drafted, executed, and based on personal knowledge of provable facts so that it will not fall to a motion to strike.

The court has an obligation to review the affidavit for sufficiency, whether or not an opposing affidavit has been filed, in actions to revoke an AOP before it orders the parties to participate in and pay for blood, tissue typing or DNA identification profiling, and in late-filed cases before allowing the action to proceed. MCL 722.1437(3), MCL 722.1443(13). The issue can be raised by the court on its own, or it can be brought up by motion. The hearing on the motion could become a contest between competing affidavits (and, perhaps, depositions and oral testimony). The Michigan Supreme Court concluded in *In re Moiles* that consideration of ROPA's best interest factors, MCL 722.1437(4), is inappropriate where the supporting affidavit fails to meet the threshold requirement of sufficiency under MCL 722.1437. *In re Moiles*, 495 Mich 944, 945; 843 NW2d 220 (2014).

The word "sufficient" is not defined in ROPA. Dictionary definitions of "sufficient" are: adequate, enough, as much as may be necessary, equal or fit for the end proposed, and that which may be necessary to accomplish an object. Thus, the court's review is not to determine the truth of the allegations made in the affidavit, but only whether the affidavit sufficiently states facts that constitute one of the five grounds required for filing the action. The issue at this stage of the action is similar to determining whether a party's pleadings have stated a cause of action. But if the truth of the allegations in the affidavit are properly contested, a hearing must be held which could result in dismissal of the action before the court orders the parties to undergo paternity testing.

Mistake of Fact

The first of the five grounds, mistake of fact, is the easiest to prove, and the most successful ground in appellate opinions. A definition of mistake of fact can be found in *Bay County Prosecutor v Nugent*, 276 Mich App 183; 740 NW2d 678 (2007), where a DNA test taken in a criminal action against the mother showed that the acknowledged father was not the biological father. The DNA results were a sufficient showing of a mistake of fact by the acknowledged father, who signed the AOP wrongly believing that he was the biological father. *Helton v Beaman*, 304 Mich App 97; 850 NW2d 515 (2014), involved a supporting affidavit alleging mistake of fact based upon DNA results. The Court of Appeals issued three opinions, all of which found the allegation of mistake of fact sufficient to proceed (the three opinions diverge greatly from there). See also *Rogers v Wcisel*, __ Mich App __ ; __ NW2d __ (2015), which thoroughly discusses mistake of fact and reiterates that it requires both a belief by the man that he is the father and DNA evidence that he is not.

Newly Discovered Evidence

The authors are unaware of a ROPA decision that relies upon newly discovered evidence. If this ground is alleged, be prepared to also explain why the evidence could not have been discovered earlier. If the new evidence is a private DNA test, it is better to simply allege that the man signed the AOP under a mistake of fact, as discussed above.

Fraud

When making allegations of fraud or mistake, MCR 2.112(B) requires that "the circumstances constituting fraud or mistake must be stated with particularity." Fraud claims have not fared well in ROPA actions.

In re Moiles, 303 Mich App 59; 840 NW2d 790 (2013), rev'd and remanded, 495 Mich 944 (2014), discusses fraud and misrepresentation at length. The Michigan Supreme Court agreed with the dissent and held that because a man can validly sign an AOP if he believes himself to be the "natural" father, neither fraud nor misrepresentation is shown by the signing. It would have been better in *Moiles* to simply allege mistake of fact, as discussed above.

Misrepresentation

Kiesling v Johnston, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2015 (Docket No. 326294), is a ROPA action to revoke an AOP that was filed late because the mother fraudulently represented that she had taken the proper steps to remove the acknowledged father as the child's father, and he did not discover her deceit until after the 3-year statutory time had passed. MCL 722.1443(12)(d). In addition, her fraudulent representations induced him to sign the AOP and it was not until he received the DNA tests that he learned of the deception. The Court concluded that her false or misleading assertion constituted a "misrepresentation," and agreed with the definition used in *In Re Moiles*: "[t]he act of making a false or misleading assertion about something, usu. with the intent to deceive."

Misconduct and Duress in Signing

Ketchmark v Hayman, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015, (Docket No. 321201), is a very long decision involving a multi-count complaint that included ROPA and Paternity Act allegations. Most of the trial court's decisions were made under the Paternity Act. The factual situation discussed at length by the Court includes "misconduct" and "duress in signing the acknowledgment" (he feared both exposure as a "womanizer" and plaintiff's "potential wrath"). See *Black's Law Dictionary* (7th ed), p. 1013 (defining misconduct, in part, as "unlawful or improper behavior").

Action to Set Aside Affiliated Father's Paternity

"Failure to Participate"

A prior Michigan order of paternity can only be revoked if the affiliated father's "paternity was determined based on the affiliated father's failure to participate in the court proceedings." MCL 722.1439. "Failure to participate" is not defined in the Act. The statutory provision could be interpreted as requiring the satisfaction of one or both of the following threshold issues: Did the affiliated father participate in the court proceedings? Did his failure to participate form the basis for the determination of his paternity? It is not simply whether a default judgment was entered, as many situations can lead to entry of a default judgment of paternity, including as a sanction. And a party in default may "participate" in an action in many ways, such as attending Friend of the Court interviews and investigations (including supplying evidence, and filing objections to recommendations), and in judicial and referee

hearings. See, e.g., *Green v Green*, unpublished opinion per curiam of the Court of Appeals, issued October 24, 2006 (Docket No. 261537).

If an affiliated father submitted to paternity testing and he was not excluded as the father, then he would not satisfy either threshold: he participated, and it was his participation–not his failure to participate–that formed the basis for the paternity determination. No one would be entitled to relief under ROPA.

In a normal default situation it is fairly clear that the affiliated father's failure to participate formed the basis for the finding of paternity. See MCL 722.717(1)(c). But if a default judgment is entered due to refusal to participate in genetic paternity testing, MCL 722.716(1)(a), the "failure to participate" in the testing in those situations formed the basis for the determination of the affiliated father's paternity, and an action under ROPA to set aside the order of filiation could be filed. This "second bite at the apple" seems counter-intuitive.

Actions to Remove Presumed Father

"Mutually and openly acknowledged a biological relationship"

In some actions filed by a mother or an alleged father seeking to revoke a presumed father's paternity, one of the statutory factors that must be shown is that all three adults "at some time mutually and openly acknowledged a biological relationship between the alleged father and the child." ROPA does not state when the mutual acknowledgment must take place, or for how long, but this threshold issue must be met before the court can order genetic testing.

In *Parks v Parks*, 304 Mich App 232; 850 NW2d 595 (2014), the Court relied upon dictionary definitions of "acknowledge" and "mutual," and upheld the trial court's dismissal of the mother's post-judgment motion without holding an evidentiary hearing, finding that her motion was bereft of clear allegations concerning the presumed father's actions with no disputed facts before the court that required a hearing.

"Did not know or have reason to know that the mother was married"

Although ROPA cracked open the door to allow alleged fathers to file actions against married couples, most of those actions require the alleged father to prove that he "did not know or have reason to know that the mother was married," before the court can order genetic testing. This has been a very difficult thing for the men to prove. See *Grimes v Van Hook-Williams*, 302 Mich App 521; 839 NW2d 237 (2013), and *Sprenger v Bickle*, 307 Mich App 411; 861 NW2d 52 (2014) for two examples. Notice that the mother's husband is a necessary party in these actions. *Graham v Foster*, 311 Mich App 139; __ NW2d __ (2015).

Burdens of Proof

Who is the father?

The person who files the ROPA action always has the burden of persuasion throughout the proceedings. If that person satisfies the predicate issues described above, he or she next faces the burden of proving by clear and convincing evidence that the current "legal" father is <u>not</u> the father of the child. This burden is listed in ROPA for acknowledged (MCL 722.1437(5)) and genetic fathers (MCL 722.1438(3)). For presumed fathers, the standard comes from *Serafin, supra*, at 636: "The child is also guarded by the still viable and strong, though rebuttable, presumption of legitimacy. *Maxwell v Maxwell*, 15 Mich App 607, 617; 167 NW2d 114 (1969). We hold that, in order to rebut the presumption, clear and convincing evidence must be given." ROPA does not provide a standard concerning affiliated fathers, but the authors contend that it should be the same burden as the others.

Also notice that ROPA provides that if the alleged father pursues an order of filiation under the Act (instead of filing a later paternity action), he must prove by clear and convincing evidence that he <u>*is*</u> the father, and the paternity testing results are not binding on the court. MCL 722.1445. If the request for a determination of the alleged father's paternity is made by the mother or the state, the court can do so upon a preponderance of the evidence.

In cases where the court allows late filing, MCL 722.1443(13) imposes upon the late-filing party a burden of proving, by clear and convincing evidence, that granting relief under the Act "will not be against the best interests of the child considering the equities of the case."

Clear and Convincing

Hunter v Hunter, 484 Mich 247, 265; 771 NW2d 694 (2009), defined clear and convincing evidence as follows:

> The clear and convincing evidence standard is "the most demanding standard applied in civil cases . . . ." This showing must "'produce[] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue,'" (citing *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995)).

DNA and Other Evidence

DNA testing results will be the primary evidence about the above fatherhood issues, but the results of DNA tests "are not binding on a court in making a determination under this act." MCL 722.1443(5). Other evidence can certainly be used

to show that the current legal father is *not* the child's father, or that the alleged father is the father. Testimony concerning nonaccess, or access outside the expected date of conception, resemblance of the child to another man, and other facts can be used. But proper DNA test results appear to be enough, unless the court does not find them sufficiently clear and convincing, such as when the results themselves may be inaccurate, or the results show that two different men may be the father, or that neither of two men is the father.

Should Legal Father be Removed?

Equitable Considerations

After the standing and other threshold issues have been satisfied, and the biological father has been identified, ROPA allows the court to consider the equities of the case, even if it has determined that the current legal father is not the actual father of the child. The court may refuse to "remove" a father if it "finds evidence" that doing so "would not be in the best interests of the child." ROPA actions become much like custody actions at this stage. MCL 722.1443(4) lists the following factors to consider:

(a) Whether the presumed father is estopped from denying parentage because of his conduct.

(b) The length of time the presumed father was on notice that he might not be the child's father.

(c) The facts surrounding the presumed father's discovery that he might not be the child's father.

(d) The nature of the relationship between the child and the presumed or alleged father.

(e) The age of the child.

(f) The harm that may result to the child.

(g) Other factors that may affect the equities arising from the disruption of the father-child relationship.

(h) Any other factor that the court determines appropriate to consider.

The factors are poorly written and do not mention mothers or affiliated fathers. A presumed or affiliated father who wants to maintain his status is properly protected if he can provide reasons for him to continue on as the father. If the court does *not* find evidence that it would *not* be in the best interests of the child, it *should grant* the requested relief and revoke the AOP, vacate the order of filiation, or enter a *Serafin*-like order. The court is to state its reasons for *refusing* to enter an order on the record.

Case Discussions

Each case will have its own set of facts. Many ROPA actions do not get to the "best interest" stage of the proceedings, and of those that do, few of the appellate opinions discuss the best interest factors. The court is not expressly required to use the clear and convincing evidence standard when considering the factors, but the issue is far from clear. If your case involves a hearing on the factors, review *Phillips v Phillips*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2014 (Docket No. 315429), *Ketchmark v Hayman*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015 (Docket No. 321201), and *Demski v Petlick*, 309 Mich App 404, ___ NW2d ___ (2015).

Final Thoughts

Revoke Parentage

If the court grants a request for revocation, the former legal father's parent-child relationship, and all rights and obligations derived from it, including custody and parenting time rights, along with his child support obligations, will come to an end and be terminated as of the date the motion was filed. The order does not relieve a man from a support obligation for the child or the child's mother that was incurred before the action was filed, nor does it prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment. MCL 722.1443(3). The court's order may also provide for amendment of the child's birth certificate.

If the court revokes a legal father's status, the child will be left without a father, and it will be up to others (i.e., the mother, an alleged father, or the state) to sign an AOP or to file an action to determine the child's parentage.

Determine Paternity

If the court grants the request to remove the legal father, it can then determine paternity and enter an order of filiation under the provisions of the Paternity Act. If the request for a determination of the alleged father's paternity is made by the mother or the state, the court can do so upon a preponderance of the evidence. To do so, however, the alleged father must be a party to the action so that the court has personal jurisdiction over him. Note that determining a new father, and entering new custody and support orders, in an existing action creates a bureaucratic mess.

Related Issues

Lastly, if a "new" father is established, the action may transition into contested custody and parenting time issues, and counsel should be prepared to provide evidence under the factors listed in those statutes: MCL 722.23 and MCL 722.27a(6). Child support will have to be determined, necessitating evidence about the parties' incomes.

About the Authors

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Endnotes

1 If you are new to ROPA, see the authors' 57-page *Revocation of Paternity Act Update* materials in the 2014 ICLE *Family Law Institute* binder.

2 In actions involving a genetic father, the affidavit must show one of the following: (a) The genetic tests that established the man as a child's father were inaccurate; (b) The man's genetic material was not available to the child's mother; (c) A man who has DNA identical to the genetic father is the child's father. MCL 722.1438(2). This article does not discuss genetic father actions.

Best Practices: How to Stipulate to Exhibits

By Elizabeth K. Bransdorfer
Mika Meyers PLC

The goal of stipulating to exhibits is to create efficiencies during a hearing or trial by avoiding the need to call witnesses to testify to authenticity and foundation, arguing hearsay objections (where an exceptions should permit admission), establish uncontroverted facts and summarize information in written form to help the judge, arbitrator or referee understand and recall relevant facts and chronology more easily. By being direct and fair to the opposing side as well as prepared and deliberate in trial preparation, you can maximize the likelihood of achieving these goals without feeling compelled to agree to the admission of evidence that should be excluded in order to secure admission of documents you need to most persuasively prove your case.

Working with Your Client

An essential first step to admission of exhibits, whether by stipulation or through a witness, is to have documents and things that are, in fact, authentic and unadulterated documents that are relevant to the subject matter involved in the case. Your client is an important source of relevant evidence. However, many clients do not appreciate the need to provide their original documents, and complete copies of records, without their handwritten analysis or highlighting. It is helpful to receive input from a client on what part of a long document is especially important, or makes the point they are concerned about. Yet, it is also much more difficult to secure stipulation to or admission of a document that has been annotated or is incomplete.

Part of the initial conversation about the procedural options for the case should include mention that hearings and trials occur if the parties cannot settle. This discussion should also include a clear directive to preserve originals of financial records, medical records, school reports and records and other potential exhibits, and to annotate, edit or otherwise communicate with counsel only by writing on copies. Similarly, forwarding emails the client receives from the opposing party should be done without comment on at least one version, with privileged attorney-client communication in a separate message so counsel can save and print a clean copy of the message that might possibly be used as an exhibit.

Often, clients believe that they are helping by creating documents using Excel or Quicken that should replace documents from an original, neutral source. These documents can be exceedingly helpful in analyzing the case and negotiating settlement, but cannot replace the original underlying documentation in highly contested cases. As will be discussed under the "Working with the Court Rules" section below, the admissibility of summaries depends on access to the underlying documents. If your client understands the reason you are insisting on also having those source documents, it will be much easier to secure their cooperation throughout the long, stressful process of case preparation.

The ongoing need for updated exhibits, such as monthly statements from accounts, should also be made clear early in the case. It is impossible to know what timeframes will end up being most important. Having a comprehensive set of statements makes it much easier to secure agreement to admissibility than if some statements are available and some are not. Clients should be educated so that they can be as helpful as possible in the preparation of their cases.

Each individual case will be different in terms of the amount of input that the client will have (or should have) in the actual decision about what exhibits to stipulate to. Clients should not be allowed to force counsel to refuse to stipulate to the admission of evidence that is clearly admissible or that will be admitted despite efforts to exclude it, just as client should not be allowed to force their attorney to be unreasonable in any other aspect of litigation procedure. Where there are judgment calls, especially where the opposing party will stipulate to the admission of something important to your case that you are concerned wouldn't otherwise come in in exchange for something important to their case that you think you may be able to keep out, you may want to discuss the pros and cons of the agreement with your client if they are going to be able to be helpful and insightful in the decision-making. Ultimately, lawyering is your job, but the case is about their life, so I tend to err on the side of including the client in difficult and/or close decisions.

Working with Opposing Counsel

Approach opposing counsel to learn their willingness to stipulate to the admission of exhibits as early in the process as possible, and respond positively if opposing counsel approaches you. Whenever opposing counsel is willing to discuss being cooperative, try to understand what categories of documents you can probably agree to, even if it isn't going to be all of the documents you would like to include. School records and financial records that come from neutral, non-party sources are often easy to stipulate to admit. Documents created by reputable on-line sources, such as valuations from kbb.com or nada.com for vehicles, are also generally deemed reliable. Written reports from actual witnesses who will also testify, such as read estate appraisers and business valuation experts, are often admitted by stipulation; while letters or reports from persons (often counselors and teachers) who are not unwilling to testify in person are more controversial, yet can provide important information and be a greater savings of cost and trial time fighting with reluctant witnesses.

If you get or give a positive response to initial overtures, keep in periodic contact to be sure cooperation is still likely. Even if the initial response wasn't encouraging, don't give up. Unless the opposing party is deliberately trying to force your client to incur excessive amounts of attorney fees in an effort to force settlement, and is able to out-spend dramatically him or herself, then opposing counsel will end up being in the same position you are and see the benefits of stipulating to exhibits rather than enduring a long, protracted trial and risk the ire of the Court.

Notify opposing counsel or the unrepresented opposing party well in advance of the trial or exhibit disclosure/exchange deadline that you really to want to try to stipulate to as many exhibits as possible. Schedule a preliminary meeting to discuss stipulation in person, with as many of the proposed exhibits available at that meeting as possible. The likelihood of miscommunication (if you are simply describing what each of you are willing to stipulate to) is just too great, and the fallout from seeming to backtrack from perceived agreements can be unpleasant and damaging to your reputation. If actual exhibits are not yet available, bring the best you have. This is common where values change constantly, such as mortgage balances or investment account values, and the stipulation for trial exhibits will be to a document not yet in existence. Plan a second and third meeting, at pre-determined intervals, to add or remove agreed exhibits as the issues for trial change, based on mediation settlements, custody investigation reports or other occurrences.

Be open-minded about classes of exhibits to stipulate to, consider whether to agree to some without an agreement as to all. Allow time for a series of meetings, building on prior agreements or tentative agreements to increase the number of documents in the stipulation.

Be fair in your negotiations. Don't condition your agreement to the other side's bank or school records on their agreement to your client's internet research on psychological disorders or handwritten journal entries.

Deciding what exhibits are necessary and important to your case, or how to get them admitted if opposing counsel will not stipulate, are beyond the scope of this article. It is critically important to the process that those decisions are made and strategies are determined in a timely manner, so don't neglect the basics of trial preparation as if the stipulation option did not exist.

After agreeing what exhibits will be stipulated to (or as soon as it is clear that more than a few exhibits will be the subject of admission by stipulation) discuss how to present the stipulated exhibits to the Court. In the section below are suggestions for working with the Court to determine what the judge in your case wants and expects. If the Court is open to various options, typically useful options include a single Joint Exhibit 1 in a three-ring binder, with an index and documents separated by individually lettered or numbered tabs to be introduced before testimony starts. This which works especially well where you have an agreed spreadsheet with back-up documents. Another option is individually numbered or lettered Plaintiff's and Defendant's Exhibits to be introduced during witness testimony. For some cases, what works best is a combination of these approaches. Be sure to assign responsibility for making enough copies of any joint exhibits, marking the stipulated exhibits and bringing them to the hearing. Each attorney should have one complete set of the stipulated exhibits well in advance of trial so that there are no last minute surprises. This does not always happen though, with additional exhibits, or last minute corrections to exhibits, occurring the morning of trial, or between trial days. With a good working relationship between counsel, a lot is possible.

Working with the Court

The first, last and cardinal rule is to read all pretrial orders and notices carefully. You can also check for local rules or practices on the court's website as well as in published sources, and ask about the judge's expectations for trial exhibits at any in-person pretrial or settlement conference. More and more courts and arbitrators are including provisions concerning mandatory exchange of exhibits, not just lists of generally categories of exhibits, in their pretrial orders under MCR 2.401(B)(2)[1]. The orders or notices may say that exhibits not timely listed or exchanged will not be allowed, perhaps with some exception for newly discovered information or other extraordinary circumstances.

Some courts are also including requirements that objections to exchanged exhibits be specifically stated in writing and exchanged within a set time limit. While it is tempt-

ing to assume that opposing counsel's failure to submit timely written objections is the same as a stipulation to admission, that assumption is not necessarily a safe one to rely on. If no express consequences for failure to object are stated, the judge may or may not determine that objections not made in compliance with the order are waived, or that the exhibits not objected to will be admitted without a foundation witness. Therefore, be sure to ask specific questions of the court or arbitrator at a pretrial hearing or discuss with opposing counsel to learn their perception, so that you are not caught without necessary foundation witnesses or arguments for admission despite the hearsay or other rules of evidence.

Be sure to check with the court, or at least the clerk or reporter, to be sure that the method of submitting the stipulated exhibits is acceptable. While I have not had a judge reject a proposed joint exhibit binder that contains a substantial number of separately numbered or lettered exhibits, it is possible that this approach would not be welcome in some jurisdictions–or that a different method of presentation is preferred and should be used. Individual judges probably have individual preferences about how the "judge's copy" of exhibits should be bound or presented. I could not imagine a judge not wanting a separate "judge's copy" of all stipulated exhibits, but did have the experience where the judge wanted the original marked exhibit as soon as it was admitted, and we had to provide the witness with a copy when needed to refer to during testimony after identification and admission of the exhibit, so it is better to be prepared by asking the court its preferences.

Courts use different lettering and numbering systems for exhibits, with numbers for Plaintiff's exhibits, and letters for Defendant's exhibits the most common. Some courts prefer numbers for all, with a designation of the offering party preceding the number. In those cases there may be both a "Plaintiff's Exhibit 1" and a "Defendant's Exhibit 1" or the exhibits may be numbered consecutively. Another common area where courts have different preferences is whether all exhibits are expected to be marked prior to the start of testimony. If so, then the exhibits may not be used or introduced in number order; exhibit 6 may follow exhibit 2 and come before exhibit 3, if the examination of the witness does not proceed exactly as contemplated at the time the exhibits were put in order and marked. Where the court has a preference for numbering exhibits in the order they are actually used, then the stipulated exhibits generally cannot be pre-marked and submitted. The only stupid question can be the one you neglected to ask when it comes to meeting your trial judge's expectations. Successful trial preparation and planning must accommodate your court's preferences and expectations to maximize the persuasive effect of the exhibits that have been stipulated for admission, and to maximize your confidence in the courtroom and your client's confidence in you as they watch you navigate the trial using the stipulated exhibits.

Working with the Court Rules and Michigan Rules of Evidence

As you and opposing counsel reach agreements that documents and things will be admissible, document your agreements and comply with MCR 2.507(G)[2] to be sure the agreement is binding. Agreements not placed on the record in open court, or in a signed writing, are not binding and you could be caught holding the bag if opposing counsel will not honor a prior agreement (which, fortunately, is a very rare occurrence) or if the opposing party changes lawyers, or the lawyer has forgotten the agreement or did not understand it the same way you did, which are more common problems.

You will negotiate a better stipulation if you are realistic about what you (and the other side) can get in without the stipulation. Therefore, review the most relevant of the Rules of Evidence. These include the hearsay rules, MRE 801- 806, and the authentication rules, MRE 901-903. Also relevant are contents of writings rules of MRE 1001-1007. The hearsay rule, MCR 802[3], is the most common reason that documents are excluded from evidence. The exceptions in MRE 803,[4] 803A[5] and 804[6] are critically important to determine again, with your specific case in mind. Pay particular attention to MRE 803(24) and MRE 804 (7), which are "catch-all" exceptions MRE 803,[7] 803A[8] and 804[9] are critically important to determine again, with your specific case in mind. Pay particular attention to MRE 803(24) and MRE 804 (7), which are "catch-all" exceptions MRE 803,[10] 803A[11] and 804[12] are critically important to determine again, with your specific case in mind. Pay particular attention to MRE 803(24) and MRE 804 (7), which are "catch-all" exceptions with specific notice requirements. Often the invocation of these rules will be sufficient to secure your or opposing counsel's stipulation to the admission of documents, as you or they may conclude that there is no reasonable chance of excluding the evidence and do not want to spend the time, energy or reputational cost to be seen as unreasonably obstructionist.

Don't forget about Rule 902[13], concerning self-authenticating documents, and the option to acquire acknowledgments pursuant to MRE 902(8) or authenticated documents pursuant to MRE 902(11), when possible. Ask for an affidavit of authentication when you subpoena documents from a non-party such as a bank or an investment company. Most are happy to comply as they know if means their representatives are less likely to be subpoenaed to testify in person at the trial or hearing.

MRE 1001 – 1007 specifically address the contents of writings. Particularly important rules are MRE 1003[14] allowing copies as well as originals and MRE 1006[15] allowing summaries so long as the underlying documents are made available prior to court. If the document will come in if these requirements are met, it makes sense to stipulate and avoid unnecessary dispute and argument to distract the court or arbitrator from the real issues they will need to decide.

Use requests for admissions to secure admissibility or shift the cost of securing witnesses to authenticate documents or to testify to matters that are contained in documents if it seems that the other side is reluctant to agree to their admission without such witnesses. MCR 2.312[16] allows for requests to admit to the foundation and authenticity of documents, and/or that the document meets the requirements of one or more of the exceptions to the hearsay rule that would otherwise exclude it. Be sure to cover all three of these possible objections to admission, as well as relevance if that is potentially disputed. If you are required to prove the genuineness of a document, or other matter which was the subject of a request to admit which was denied, you are entitled to costs under MCR 2.313(C).[17] Rather than requiring the motions and sanctions called for under these rules, the use of the Request to Admit is generally sufficient to secure opposing counsel's agreement to a more reasonable approach to the process of stipulating to exhibits. If admissions are not forthcoming early in the case, it can be helpful to remind the other side that they can avoid the possible sanctions by voluntarily amending their responses to admissions as the case gets closer to trial.

Conclusion

Armed with a solid understanding of your case, the documents and things that you have as potential exhibits, insight into what the Court wants and expects from you and working knowledge of the Court Rules and Rules of Evidence, it is virtually always worth another attempt to work with opposing counsel to try to stipulate to the admission of exhibits, so long as sufficient time remains before trial or hearing. Armed with the necessary information, you can be both open-minded and confident about what exhibits to stipulate to, considering the benefits of agreeing to some without an agreement as to all. Cooperation can be the most powerful tool in your arsenal Not all aspects of litigation have to be highly adversarial. This is one prime example of when cooperation will allow you to effectively and efficiently advance your client's interests, increasing your likelihood of proving your case persuasively at trial in a reasonable amount of time and with a minimum of distraction from the narrative you need to present.

About the Author

Elizabeth K. Bransdorfer *is a member of Mika Meyers, PLC, where she has practiced for over 30 years. Liz is the Recording Secretary and Co-chair of the Mid-Summer Conference for the Family Law Section of the State Bar of Michigan and is actively engaged in family law litigation, advocating for her clients to help achieve their goals through the courts. In addition to representing clients as an advocate, Liz is a trained collaborative lawyer, neutral arbitrator and mediator. Liz also represents the 17th Circuit (Kent County) on the State Bar of Michigan Representative Assembly and is a member of the Family Law Advisory Board of the Institute of Continuing Legal Education. She has served as Treasurer of the Grand Rapids Bar Association and Chair of the Gerald R. Ford Chapter of the American Inns of Court, and President of the Women Lawyers Association of Michigan (WLAM) and the National Association of Women Lawyers. Liz was the 2009 recipient of the Michael S. Barnes Award in recognition of her exemplary contributions toward the provision of free legal assistance to the poor and the elderly in Western Michigan and the 2015 WLAM Western Region Outstanding Member Award. She is a Michigan Super Lawyer for family law and is also listed in Best Lawyers of America for collaborative law: family law.*

Endnotes

1 (2) Scheduling Order.

(2)(a) At an early scheduling conference under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events the court deems appropriate, including

(i) the initiation or completion of an ADR process,

(ii) the amendment of pleadings, adding of parties, or filing of motions,

(iii) the completion of discovery,

(iv) the exchange of witness lists under subrule (I), and

(v) the scheduling of a pretrial conference, a settlement conference, or trial. More than one such order may be entered in a case.

(b) The scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.

(c) The scheduling order also may include provisions concerning discovery of electronically stored information, any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production, preserving discoverable information, and the form in which electronically stored information shall be produced.

(d) Whenever reasonably practical, the scheduling of events under this subrule shall be made after meaningful consultation with all counsel of record.

(i) If a scheduling order is entered under this subrule in a manner that does not permit meaningful advance consultation with counsel, within 14 days after entry of the order, a party may file and serve a written request for amendment of the order detailing the reasons why the order should be amended.

(ii) Upon receiving such a written request, the court shall reconsider the order in light of the objections raised by the parties. Whether the reconsideration occurs at a con-

ference or in some other manner, the court must either enter a new scheduling order or notify the parties in writing that the court declines to amend the order. The court must schedule a conference, enter the new order, or send the written notice, within 14 days after receiving the request.

(iii) The submission of a request pursuant to this subrule, or the failure to submit such a request, does not preclude a party from filing a motion to modify a scheduling order.

2 (G) Agreements to be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

3 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=13*

4 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=14*

5 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=17*

6 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=17*

7 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=14*

8 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=17*

9 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=17*

10 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=14*

11 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=17*

12 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan Rules of Evidence.pdf#page=17*

13 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Evidence.pdf#page=21&zoom=auto,256,536*

14 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Evidence.pdf#page=23&zoom=auto,450,342*

15 *http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Evidence.pdf#page=24&zoom=auto,216,576*

16 Rule 2.312 Request for Admission

(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. Copies of the documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested must be stated separately.

(B) Answer; Objection.

(1) Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter. Unless the court orders a shorter time a defendant may serve an answer or objection within 42 days after being served with the summons and complaint.

(2) The answer must specifically deny the matter or state in detail the reasons why the answering party cannot truthfully admit or deny it. A denial must fairly meet the substance of the request, and when good faith requires that a party qualify an answer or deny only part of the matter of which an admission is requested, the party must specify the parts that are admitted and denied.

(3) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable is insufficient to enable the party to admit or deny. (4) If an objection is made, the reasons must be stated. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. The party may, subject to the provisions of MCR 2.313(C), deny the matter or state reasons why he or she cannot admit or deny it.

(C) Motion Regarding Answer or Objection. The party who has requested the admission may move to determine the sufficiency of the answer or objection. The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of the rule, it may order either that the matter is admitted, or that an amended answer be served. The court may, in lieu of one of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time before trial. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

(D) Effect of Admission.

(1) A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission. The court may condition amendment or withdrawal of the admission on terms that are just.

(2) An admission made by a party under this rule is for the purpose of the pending action only and is not an admission for another purpose, nor may it be used against the party in another proceeding.

(E) Public Records.

(1) A party intending to use as evidence (a) a record that a public official is required by federal, state, or municipal authority to receive for filing or recording or is given custody of by law, or (b) a memorial of a public official, may prepare a copy, synopsis, or abstract of the record, insofar as it is to be used, and serve it on the adverse party sufficiently in advance of trial to allow the adverse party a reasonable opportunity to determine its accuracy.

(2) The copy, synopsis, or abstract is then admissible in evidence as admitted facts in the action, if otherwise admissible, except insofar as its inaccuracy is pointed out by the adverse party in an affidavit filed and served within a reasonable time before trial.

(F) Filing With Court. Requests and responses under this rule must be filed with the court either before service or within a reasonable time thereafter.

17 (C) Expenses on Failure to Admit.

If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that

(1) the request was held objectionable pursuant to MCR 2.312,

(2) the admission sought was of no substantial importance,

(3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

(4) there was other good reason for the failure to admit.

Preserving Issues For Appeal: An Overview

By Anne L. Argiroff

The Michigan Court of Appeals serves essentially as a court of review, principally charged with the responsibility of correcting errors and generally does not address unpreserved issues.[1] *Burns v City of Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). An issue that is not raised before the trial court is not preserved for appeal. *46th Circuit Trial Court v Crawford County*, 261 Mich. App. 477, 504; 682 N.W.2d 519 (2004). "The purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Generally, to preserve an issue for appellate review, it must be raised in the trial court.

As with most rules, there are exceptions. Unpreserved claims will be reviewed for plain error affecting substantial rights. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 381; 808 NW2d 511 (2011); *Kline v. Kline*, 92 Mich App 62, 73-74, 284 NW2d 488 (1979) (deciding to address issues of property distribution because the errors were fundamental or apparent). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). The plain error rule extends to claims of unpreserved, constitutional error. *Carines*, 460 Mich at 763-765. The Michigan Supreme Court in *Carines* reasoned that the policy underlying the issue forfeiture rule provides no basis for distinguishing constitutional from nonconstitutional error. In both instances, requiring a contemporaneous objection provides the trial court "an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights." *Id* at 764-765.

When a trial court does not make a decision on an issue, the Court of Appeals will generally address the issue if the appellant raised the issue below. See e.g. *Heltzel v Heltzel*, 248 Mich App 1, 15, 638 NW2d 123 (2001) ("[a]lthough the trial court did not address the constitutional issue, we nonetheless consider defendant's argument because it was raised below and involves a significant constitutional issue for which all necessary facts are before this Court"). And, the subject matter jurisdiction of the trial court may be raised at any time in any court. *Bowie v Arder* and *Duong v Hong*, 441 Mich 23, 56, 490 NW2d 386 (1992).

Necessity of Preserving the Record

MCR 7.210(A) provides that appeals to the Court of Appeals are heard on the original record and that the record consists of original papers filed in the lower court or a certified copy, the transcript of any testimony or other proceedings and the exhibits introduced. Appellate review is generally limited to the record developed in the trial court and the Court of Appeals cannot consider references to facts outside the record. *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989); *Trail Clinic, PC v Bloch*, 114 Mich App 700, 708, 709; 319 NW2d 638 (1983), *lv den* 417 Mich 959 (1983). The Court of Appeals, however, has the authority to expand the record on appeal "in its discretion, and on the "terms it deems just" under MCR 7.216(A)(4) (including amendments, corrections or additions to the transcript or record).

There are numerous examples of unpreserved claims on appeal–both procedural and substantive. *Kosch v Kosch*, 233 Mich App 346, 353-354, 592 NW2d 434 (1999) (claim that trial court abused its discretion in failing to provide "good fortune trust" for the children was not preserved for appeal because claim never raised before the trial court). The failure to raise a fact or issue, or a stipulation regarding an issue or facts at the trial court level, amounts to a waiver of the issue or fact on appeal. See e.g. *Curylo v Curylo*, 104 Mich App 340, 346, 304 NW2d 575 (1981) (party not permitted to claim error in a 14-month delay between trial and rendering of decision, where the party had some part in causing the delay and, at the very least, did not oppose the delay).

Consent Orders and Judgments

Consent orders and judgments are not appealable, except under certain circumstances dependant upon the specific facts. An agreement to settle a lawsuit, including a suit for divorce, is a contract, and general contract principles usually

apply. *Scholnick's Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 109, 343 NW2d 249 (1983); *Kline v Kline*, supra, 92 Mich App at 71. Absent a showing of fraud, duress, or similar factors, it is usually appropriate for a court to enforce the terms of the parties' agreement. See e.g. *Holmes v Holmes*, 281 Mich App 575, 760 NW2d 300 (2008). Of course, family law presents unique considerations (for example, concerning prenuptial agreements) which are not the subject of this article, however, for general purposes, consent judgments and orders are not appealable.

In defining what is a consent or stipulation, the Michigan Supreme Court has addressed orders or judgments signed by both parties as to "form and content." The Court recognized that, although previous caselaw held that approving an order as to "form and content" could be viewed as waiver of the ability to challenge the order, the "better rule," which the Court adopted, cautions against finding waiver simply where an order was approved as to form and content. *Ahrenberg Mech Contracting, Inc v Howlett*, 451 Mich 74, 77; 545 NW2d 4 (1996). Rather than amounting to a waiver, the Court explained that an attorney's approval of an order as to "form and substance" or "form and content" should be, under certain circumstances, viewed " . . . only as recognition that the proposed decree was legally formulated, and contained in substance the decision as orally announced by the court." *Id.* at 77 (citation and quotation marks omitted). In *Ahrenberg*, there was no evidence of negotiations indicating that the parties were looking to compromise or otherwise surrender rights. *Id.* at 78. In addition, the fact that the defendant vigorously challenged the trial court's ruling—both before and after entry of the order—demonstrated that the approval of the order as to "form and content" was not a waiver, but rather an acknowledgment that the prepared order contained the substance of the trial court's decision. *Id.* at 78. See also *Sulaica v Rometty*, 308 Mich App 568, 587-589, 866 NW2d 838 (2014) (signing order as to form and content did not bar review; the record supported appellant challenging the order). The best practice, however, is to sign contested orders as to "form" only to avoid any potential argument concerning consent.

Preservation of Specific Issues

Attorneys should be cognizant of the criteria for various types of motions and proceedings. For example, a motion for summary disposition under MCR 2.116 may be based on a variety of grounds, each of which has specific timing and other requirements. A summary disposition motion filed under MCR 2.116(C)(10) may be filed at any time (unless there is a scheduling order), but must be supported by an affidavit. MCR 2.116(C)(10); (D)(4); & (G)(3)(b). Compliance with a specific court rule affects preservation of the issue for appeal.

Further, in terms of evidentiary hearings, a party who has the burden of requesting a hearing (depending upon the particular circumstances) must request the hearing in order to preserve the issue for appeal. See *Mitchell v Mitchell*, 198 Mich App 393, 399, 499 NW2d 396 (1993) (a trial court is obligated to hold an evidentiary hearing *if* requested); *Kernen v Homestead Development Co*, 252 Mich App 689, 692, 653 NW2d 634 (2002) (plaintiff's failure to timely request an evidentiary hearing constituted a forfeiture of the issue"). MCR 3.210(C)(8) sets out particular requirements for determining whether there should be an evidentiary hearing with regard to a post-judgment motion to change custody, including an offer of proof setting out contested facts.[2] A party may raise on appeal the issue of a trial court denying or refusing to hold an evidentiary hearing. See e.g. *Mann v Mann*, 190 Mich App 526, 476 NW2d 439 (1991) (an evidentiary hearing and evidence is required for orders changing and affecting custody–even temporary ones; compliance with Child Custody Act is mandatory); *Hisaw v Hayes*, 133 Mich App 639, 350 NW2d 302 (1984) ("[d]ue process requires that a litigant be afforded a fair trial of the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence).

Again, it is important to preserve any issue that may be challenged and every factual claim that may be contested. Try to be as inclusive as possible in all motions, briefs and attachments, introduce exhibits at hearings and trial, clearly object to evidentiary rulings on the record and state the basis for the objection, and be as clear as possible on the record when presenting a client's position, including legal authority. It may be helpful to contact an appellate attorney when preparing for an evidentiary hearing or trial in order to address any potential preservation issues and to identify issues for a possible appeal.

Use of Reconsideration Motions and Motions for New Trial and Relief from Judgment in Domestic Relations Cases

A motion for rehearing or reconsideration of a decision on a motion may provide a vehicle for presenting additional arguments and facts not raised previously. MCR 2.119(F)(3) states:

> 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.

Under this court rule, "a trial court has unrestricted discretion to review its previous decision." *Prentis Family Foundation,*

Inc v Karmanos Cancer Institute, 266 Mich App 39, 52-53; 698 NW2d 900 (2005). The rule does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes. *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006); *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014).

> If a court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing. [*Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986).]

Although reconsideration motions are more often denied for failure to raise new issues or present "palpable error," these reasons should not be used as an absolute bar to consideration and trial court discretion. The broader construction of the rule is consistent with the reasons behind preservation requirements–allowing the trial court to prevent error efficiently. Trial court discretion plays a pivotal role in family law cases – from property division to custody. For example, in determining custody, a trial court has a fundamental responsibility to ensure the best interest and welfare of a child. *Harvey v Harvey*, 470 Mich 186, 189; 680 NW2d 835 (2004). It is appropriate to attempt a discretionary reconsideration motion to ensure that custody decisions are in the best interest of children. And although there is not uniform treatment, the Court of Appeals has relied on information presented in reconsideration and post-judgment motions in its opinions. See e.g. *Hanaway v Hanaway*, 208 Mich App 278, 295-296, 527 NW2d (1995), *lv den* 451 Mich 874 (1996) (reliance on evidence related to alimony first proffered in post-judgment motion).

MCR 2.611 (New Trials; Amendment of Judgment) and MCR 2.612 (Relief from Judgment or Order) are post-*judgment* motions for relief (MCR 2.612 also includes orders).[3] Each rule contains various grounds with specific timing and other requirements. These motions may also be possible vehicles for raising additional argument or expanding on existing argument. See *Hanaway, supra*. There are a significant number of decisions addressing the various grounds–including restrictions. Both rules, however, authorize discretionary relief. It is this element of discretion that is so important throughout family law in both statute and case law–with an emphasis on equity and ensuring the best interest and welfare of children.

Bifurcation and Preservation

Domestic relations judgments often involve issues of bifurcation and the determination whether there is a final judgment subject to an appeal of right. A final order is defined in MCR 7.202(6) as:

> (6) final judgment or final order means:
>
> (a) in a civil case,
>
> (i) the *first* judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties .... (Emphasis added).

Michigan has long disapproved of bifurcated judgments (judgments that do not dispose of all claims and liabilities of a party under MCR 7.203(6)(a)(i)). Divorce judgments may often reserve or refer certain issues—such as child support or personal property distribution—for a later determination or to arbitration. This results in an incomplete judgment under the court rule. A bifurcated judgment is a non-final judgment under MCR 7.202(6). See *McCormick v McCormick*, 221 Mich App 672, 680, 562 NW2d 504 (1997); *Engemann v Engemann*, 53 Mich App 588, 219 NW2d 777 (1974) ("Where a trial court has jurisdiction to grant a divorce . . . it is mandatory that the court dispose of the related matters of alimony, support and property"). In such situations, a party's options are to file a less "desirable discretionary application for leave to appeal pending a final judgment or order addressing all claims, rights and liabilities, or wait until a final order complying with MCR 7.202(6)(a)(i) is issued.

In *Yeo v Yeo*, 214 Mich App 598, 543 NW2d 62 (1995), the trial court erred in granting a divorce judgment while reserving property division to a later date. The *Yeo* decision specifically concerns property provisions, relying on MCR 3.211(B)(3). The court rule provides for the mandatory contents of a judgment of divorce (specifically including property rights), ensuring that "divorce cases are not tried piecemeal subjecting the parties to a multiplicity of orders that could be appealed." *Id* at 601. See also *Kennedy v Kennedy*, 358 Mich 542, 544, 100 NW2d 481 (1960) (noting that the appellate courts try to avoid hearing appeals piecemeal); *Bonner v Bonner*, unpublished, Mich Ct App, issued September 22, 2009 (Docket Nos. 288733, 291202) (referral of personal property to arbitration created a non-final judgment).[4]

Parties need to be cognizant of what orders are final in terms of preserving an appeal of right and need to be prepared to file a second claim of appeal if necessary from any subsequent trial court order that completes the judgment and creates the actual final order.

Strategy Decisions and Conclusion

Trial attorneys are constantly faced with tactical decisions. For example, making an objection to a ruling for preservation purposes may create difficulties for a client. It is important to balance forgoing the objection–or the preservation of an

issue in some other way–with the risk of waiving the issue on appeal. In some circumstances, the decision may be an appropriate one. But, such decisions should be made with the full knowledge and involvement of the client.

This article is not an exhaustive review, but is intended to raise awareness of potential preservation issues.[5] Such awareness will help position a case for a possible appeal (or protect your client if the other party appeals), and, more importantly, may result in a favorable trial court decision or settlement.

About the Author

Anne L. Argiroff *has an active Michigan appellate practice concentrating in family law, with recent published cases in 2013 (Burnett v Burnett), 2014 (Sulaica v Rometty), and 2015 (Eickelberg v Eickelberg). She has authored amicus briefs in the Michigan Supreme Court and Court of Appeals and in the United States Supreme Court. A Top Lawyer (dbusiness) in 2011 and 2012 and Super Lawyer in 2014 and 2015, she speaks on and has published numerous articles on a variety of domestic relations topics. Ms. Argiroff is a member of the State Bar of Michigan and State Bar Family Law Section. She served on the Family Law Section Council for multiple terms and is currently Co-Chair of the Section's Amicus Committee.*

Endnotes

1 The Court of Appeals has jurisdiction over appeals of right, appeals by leave, extraordinary writs, original actions and enforcement actions, and other appeals and proceedings established by law. See MCR 7.203 (A)-(D).

2 MCR 3.210(C)(8) provides:

> In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

3 MCR 2.119(F)(2) provides no response to the motion may be filed, and there is no oral argument, unless the trial court otherwise directs.

4 In *Bonner*, the judgment of divorce resolved the parties' real property disputes, equally divided their bank and retirement accounts, and liquidated their securities. However, pursuant to the parties' stipulation, the trial court reserved the distribution of all personal property, including but not limited to, motor vehicles, collections, and furniture and furnishings" to be arbitrated. By incorporating the impending, but incomplete, personal property arbitration into the judgment of divorce, the trial court failed to make a determination of the personal property rights of the parties. Contrary to the purpose of MCR 3.211(B)(3), the piecemeal judgment of divorce and arbitration award subjected the parties to a multiplicity of orders that could be appealed under *Yeo, supra* at 601. Consequently, the judgment of divorce violated MCR 3.211(B)(3) and would not be appealable by right.

5 For a more in-depth discussion of preservation issues, see *Navigating Michigan's Murky Preservation Doctrine* by Gaëtan GervilleRéache, Mich Bar Journal, January 2016, p. 30.

Compassion Fatigue, A Common Problem Among Family Law Attorneys

By John R. Urso

When each of us graduated from law school, passed the bar, and secured our license to practice law, I think it fair to say that none of us viewed our new professional status as "care-giver." That was a calling for EMTs, medical and mental health professionals, and social workers who face, in their respective jobs, handling severe trauma and crisis management. Yet, when we reflect upon our domestic relations/family law practice, I believe most of us would acknowledge that we are exposed, on a daily basis, to situations where our clients have suffered physical or emotional trauma, are in crisis management mode, and/or are in pain. As their attorneys, we are expected to give care.

The emotional cost to attorneys who are constantly exposed to the trauma their clients are experiencing, can lead to emotional impairment in each of us.

During our years in law school, we learned the law; we learned how to apply the law; and, lastly, we learned how to argue the law. What we did not learn was how to manage clients who are in the midst of experiencing significant trauma as their marriage is ending, or their parenting time is being challenged, or they have been charged with neglect or abuse of their children. For most of us, we see people who are emotionally hurt. So how do we, as counselors, professionals trained in the law, manage the trauma that we are exposed to on a daily basis without letting our emotions spill into our personal lives? According to statistics, not very well.

The Centers for Disease Control and Prevention reports the latest available data on suicide deaths by profession. Lawyers ranked fourth when the proportion of suicides in that profession is compared to suicides in all other occupations in the study population (adjusted for age). They come right behind dentists, pharmacists and physicians.[1]

Lawyers are also prone to depression, which the American Psychological Association, among others, identified as the most likely trigger for suicide. Lawyers are 3.6 times more likely to suffer from depression than non-lawyers.[2]

"There are a lot of high stress professions," said Yvette Hourigan, who runs the Kentucky Lawyer Assistance Program. "Being a physician has stress. However, when the surgeon goes into the surgical suite to perform his surgery, they don't send another physician in to try to kill the patient. You know, they're all on the same team trying to do one job. In the legal profession, adversity is the nature of our game."

Consider our priorities: we all have a practice to run that will generate sufficient income to cover the overhead costs of the office and allow each of us to take home a modest draw for ourselves and our families. As a result, we become the victims of what has been labeled by Charles R. Figley as compassion fatigue. Mr. Figley in his article "Compassion Fatigue as Secondary Traumatic Stress Disorder" defines this condition as "secondary trauma or traumatic stress which results from helping or wanting to help a traumatized or suffering person."[3] For attorneys and counselors practicing in the domestic relations arena, secondary trauma affects many of us. It disrupts our emotional health and well-being, resulting from the cumulative effect of multiple exposures to clients who have suffered trauma in their lives.

Compassion fatigue is not unique to the practicing family law attorney. Judges are also at a particularly high risk especially those judges who preside over dependency, neglect and abuse cases. Certainly judges who sit on the Family Law bench are often asked to choose among a set of circumstances that they can only hope are in the best interest of the child.

Why are we as legal professionals so vulnerable? The simple answer may very well be that our clients' traumas (the pain of divorce, child custody and parenting time issues, and the break-up of the traditional family) become our issues. We absorb the above on a day-to-day basis and we take it home with us. Many of us are not equipped to leave those client issues at the office, resulting in having boundaries with our family which keep us from reconnecting with our loved ones. In law school, we are trained to know the law and how to apply it to a set of circumstances. We are not trained as psychotherapists are trained to understand transference and counter-transference reactions with our clients.

The legal profession is a magnet for workaholics who fall into a pattern where stress leads to depression, which can then trigger substance abuse or marital problems. Often, disciplinary cases ensue.

A lawyer has conflict. We've got our clients, we've got other lawyers, we've got the opposition lawyers, we've got insurance companies, judges, jurors, and we've got the bar association. Clients will often take the most minor little thing and turn it into a problem for a lawyer.

Dan Lukasik founded Lawyers With Depression after he started descending into a paralyzing depression. "The stigma is huge with mental illness and depression in this country. . . . You're supposed to be a problem solver; you're supposed to be a superman or superwoman. You're not supposed to have problems," he said.[4]

We, as family law attorneys, begin to feel stress and depression because we are supposed to bring about change for the better for our clients and, when that doesn't happen, we feel helpless. Studies have shown that this feeling of helplessness is a precursor to depression. Dr. Robert Sapolsky, an expert in stress-related illness opines that: *"Helplessness is a pillar of depressive disorder. It becomes a major issue for lawyers because we aren't supposed to experience periods of helplessness. We often think of ourselves as invulnerable super-heroes who are the helpers and not the ones in need of help. Accordingly, lawyers often don't get help for their depression and feel ashamed if they do."*[5]

As a family law attorney and long standing member of the bar, my life was personally touched by suicide. On March 23, 2013, my eldest son, Kevin, ended his life at the age of 41. In an effort to honor my son and raise public awareness about suicide, its causes and prevention, Kevin's Song was born–a non-profit, 501(c)(3) organization aimed at reducing deaths from this silent epidemic.

Kevin's Song is sponsoring The Silent Epidemic: A Conference on Suicide, that will provide attendees with the latest information and research about suicide from leading experts; effective ways of intervention and suicide prevention including the Zero Suicide national initiative; and will also provide a message of hope for loss and attempt survivors.

Kevin's Song has assembled a panel of distinguished, national experts in the areas of research and prevention to address attendees from Southeastern Michigan and across the State. This conference will bring these renowned individuals to Michigan providing local mental health professionals and the residents an opportunity to learn about the latest research on suicide and to share programs aimed at reducing suicide and saving lives.

Among the offerings will be a panel presentation about the impact of suicide on professionals. The panel, comprised of Tish Vincent of the State Bar of Michigan, Yvette Hourigan of the Kentucky Bar Association and a number of mental health professionals, will focus on the emotional stressors that professionals face in their respective careers and how left untreated, these individuals are at risk of becoming depressed and, at times, suicidal.

Suicide is a problem with no perfect answers. The panel has the goal of reducing the stigma of secondary trauma while educating about best practices in responding to professionals who face emotional trauma in their respective careers. The panel will draw on the work presented throughout the conference as a starting point for exploration of the unique stressors these professionals face.

For more information about "The Silent Epidemic: A Conference on Suicide", which will be held on April 7, 8 and 9, 2016 at The Inn at St. John's in Plymouth, MI, go to *www.kevinssong.org*.

About the Author

John R. Urso *is an attorney in private practice in the Metropolitan Detroit area with a concentration in Domestic Relations. He served as Director of the University of Detroit Urban Law Clinic and was an associate professor of law at the University of Detroit Law School for ten years. During his law school career he served as Municipal Judge in Grosse Pointe Park.*

Endnotes

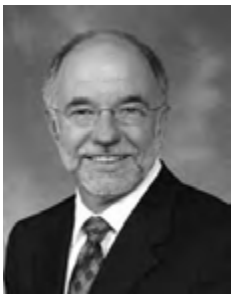
1 *http://www.abajournal.com/news/article/state_bars_battle_lawyer_depression_legal_profession_ranks_fourth_in_suicid*

2 *Id.*

3 Figley, Charles R., "Compassion Fatigue," Brunner Rutledge (2002) p 195.

4 CNN.com/2014/01/19 Why are Lawyers Killing Themselves?

5 Lawyers with Depression (1998).



Legislative Update

By William Kandler, Lobbyist
Kandler Reed Khoury and Muchmore

It is the time of year, again, when the primary focus of the legislature is the development and enactment of the state budget for the next fiscal year. Governor Snyder presented his Fiscal Year 2017 budget proposal to a joint meeting of the House and Senate Appropriations Committees on February 10. The two chambers of the legislature will now each sift through the mountains of data and attempt to pass a comprehensive set of appropriations that will set the fiscal, and policy, course for the State of Michigan for the next fiscal year, which begins on October 1, 2016. Since being elected, Governor Snyder has pushed to accelerate the appropriations process with a target date of May 30, for completion. This is in contrast to the traditional June 30, self-imposed deadline the legislature had worked to meet before the Snyder years.

The Governor's proposed budget totals $54.9 billion, an increase of 0.8 percent or $438 million over last year, and includes $10.2 billion in general fund dollars. The general fund is up 1.5 percent from last year which translates to $145 million. In reality, the General fund dollars are the only funds for which the legislature has full authority to allocate through the annual appropriations process. The remainder of the almost $55 billion is committed by constitution, state statute or by Federal law.

The Governor's proposed spending plan includes all of the typical items regarding the operation of state Government. In addition, he has included proposed spending to implement his plans to build employment skills among the Michigan work force, "rescue" Detroit Public Schools, and address the Flint water crisis. Among all of the other, much larger budget items, these last two are getting the most attention in the media. It will be interesting to see how these two very controversial topics play out over the next several months.

Of course, even during this time when state spending is the number one focus, we continue to press for action on items of priority for the Family Law Council and to keep a vigilant eye on items of serious concern to the Council. We are still working with House Judiciary Committee Chair, Klint Kesto to secure a hearing date for SB 351, the "anti-trolling" bill. The Chair has not committed to holding a hearing on this legislation. However, it appears that he is getting close to scheduling a hearing on SB 458 which would address the problem created by the decision of the Supreme Court in the case of "In re AJR."

The item that is creating the biggest buzz among family practitioners is the anticipated introduction of the "Shared Parenting Act." This bill, which is expected to be introduced soon by Representative Jim Runestad, is intended to "reform the state's child custody laws to encourage greater involvement by both biological parents in the lives of their children in times of divorce. The legislation provides a legal presumption of joint custody and substantially equal parenting time where "two fit parents are willing and able to provide care for the minor children while providing critical judicial discretion" according to documents provided by Rep. Runestad's office. Rep. Runestad has been very forthcoming in providing advance information about this proposed legislation even though he is aware that the Council is likely to be opposed to it. The Council's legislative committee will begin an examination of the bill as soon as it is introduced.

Legislation that the Family Law Section is Following:

HJR L	SAME-SEX MARRIAGE (Moss) Repeals constitutional prohibition of same-sex marriage and civil unions. Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support
SJR I	SAME-SEX MARRIAGE (Warren) Repeals constitutional prohibition of same-sex marriage and civil unions. Repeals section 25 of article I of the state constitution of 1963 to allow the recognition of marriage or similar unions of two people Bill Text Introduced (3/24/2015; To Judiciary) Position: Support

HB 4023	CHILD CARE (Kosowski) Limits hours children can be left in child care. Am. 1973 PA 116 (CL 722.111 to 722.128) by adding Sec. 1b. Bill Text Introduced (1/15/2015; To Families, Children and Seniors) Position: Oppose
HB 4024	NEWBORN LEAVE TIME (Kosowski) Creates Birth of Adoption Leave Act to give new parents certain time off work. Bill Text Introduced (1/15/2015) Position: No Position
HB 4028	RESPONSIBLE FATHERS (Kosowski) Creates Responsible Father Registry to provide putative fathers with notice of certain proceedings. Am. Sec. 2805, 1978 PA 368 (CL 333.2805) as amended by 1996 PA 307; adds Secs. 2893, 2893a, 2893b, 2893c, 2893d and 2893e. Bill Text Introduced (1/15/2015; To Families, Children and Seniors) Position: Support
HB 4071 (PA 50)	CHILD CUSTODY (Barrett) Modifies requirement to file motion for change of custody or parenting time order when parent is called to active military duty. Amends 1970 PA 91 by amending section 7a (MCL 722.27a), as amended by 2012 PA 600. Bill Text Signed by the Governor (6/10/2015; Signed: June 8, 2015; Effective: September 7, 2015) Position: Support
HB 4132	FAMILY LAW (Geiss) Provides for right to first refusal of child care for children during other parent's normal parenting time. Amends 1970 PA 91 (MCL 722.21 to 722.31) by adding section 7c. Bill Text Introduced (2/3/2015; To Families, Children and Seniors) Position: Oppose
HB 4133	SECOND PARENT ADOPTION (Irwin) Provides for second parent adoption. Amends 1939 PA 288 by amending sections 24, 41 and 51 of chapter X (MCL 710.24, 710.41 and 710.51), section 24 as amended by 2012 PA 614, section 41 as amended by 1994 PA 222 and section 51 as amended by 1996 PA 409. Bill Text Introduced (2/3/2015; To Families, Children and Seniors) Position: Support
HB 4141	FAMILY LAW (Runestad) Mandate joint custody in every custody dispute between parents except in certain circumstances. Amends 1970 PA 91 by amending sections 5 and 6a (MCL 722.25 and 722.26a), section 5 as amended by 1993 PA 259 and section 6a as added by 1980 PA 434. Bill Text Introduced (2/5/2015; To Families, Children and Seniors) Position: Oppose
HB 4170	VETERAN COMPENSATION (Franz) Excludes veteran disability compensation from marital estate. Amends 1846 RS 84 by amending section 18 (MCL 552.18), as amended by 1991 PA 86. Bill Text Committee Hearing in House (10/13/2015) Position: Oppose
HB 4188 (PA 53)	RELIGIOUS CONVICTIONS (LaFontaine) Allows objection to placements by child placing agency based on religious or moral convictions. Amends 1973 PA 116 (MCL 722.111 to 722.128) by adding sections 14e and 14f. Bill Text Signed by the Governor (6/11/2015, Presented 6/10/2015; Signed: June 11, 2015; Effective: September 9, 2015; earlier Presented) Position: Oppose
HB 4189 (PA 54)	RELIGIOUS CONVICTIONS (Santana) Allows objection to placements by child placing agency based on religious or moral convictions. Amends 1999 PA 288 (MCL 710.21 to 712B.41) by adding section 23g to chapter X. Bill Text Signed by the Governor (6/11/2015, Presented 6/10/2015; Signed: June 11, 2015; Effective: September 9, 2015; earlier Presented) Position: Oppose
HB 4190 (PA 55)	RELIGIOUS CONVICTIONS (Leutheuser) Allows licensure of child placing agency that objects to placements on religious or moral grounds. Amends 1939 PA 280 (MCL 400.1 to 400.119b) by adding section 5a. Bill Text Signed by the Governor (6/11/2015, Presented 6/10/2015; Signed: June 11, 2015; Effective: September 9, 2015; earlier Presented) Position: Oppose
HB 4223	ADOPTION LEAVE (Kosowski) Requires businesses with 50 or more employees to offer adoption leave. Bill Text Introduced (2/19/2015; To Commerce and Trade) Position: No Position

HB 4374	SAME-SEX MARRIAGE (Irwin) Removes prohibition on same-sex marriage. Amends 1846 RS 83 by amending sections 2, 3 and 9 (MCL 551.2,551.3 and 551.9), sections 2 and 3 as amended by 1996 PA 324 and to repeal acts and parts of acts.Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support
HB 4375	SAME-SEX MARRIAGE (Zemke) Removes prohibition of same-sex marriage from foreign marriage act. Amends 1939 PA 168 by amending section 1 (MCL 551.271), as amended by 1996 PA 334 and to repeal acts and parts of acts. Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support
HB 4376	SAME-SEX MARRIAGE (Wittenberg) Allows issuance of marriage license to same-sex couples without publicity. Amends 1897 PA 180 by amending section 1 (MCL 551.201) as amended by 1983 PA 199. Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support
HB 4411	DOMESTIC VIOLENCE VICTIMS (Singh) Prohibits housing discrimination for domestic violence victims. Amends 1976 PA 453 by amending the title and section 502 (MCL 37.2502), the title as amended by 1992 PA 258 and section 502 as amended by 1992 PA 124. Bill Text Introduced (3/26/2015; To Judiciary) Position: Support
HB 4412	DOMESTIC VIOLENCE VICTIMS (Irwin) Creates exception from disqualification from receiving benefits when leaving employment for domestic violence victim. Amends 1936 (Ex Sess) PA 1 by amending sections 17 and 29 (MCL 427.17 and 421.29), section 17 as amended by 2011 PA 269 and section 29 as amended by 2013 PA 146 and by adding section 29a. Bill Text Introduced (3/26/2015; To Commerce and Trade) Position: Support
HB 4413	DOMESTIC VIOLENCE VICTIMS (Hovey-Wright) Creates address confidentiality program for victims of domestic violence crimes. Bill Text Referred in House (11/10/2015; To Criminal Justice) Position: Support
HB 4414	SICK LEAVE (Brinks) Expands criteria use of sick leave. Bill Text Introduced (3/26/2015; To Commerce and Trade) Position: Support
HB 4476	DOMESTIC RELATIONS (Santana) Limits mediation in certain domestic relations actions. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 1035. Bill Text Committee Hearing in Senate (2/2/2016) Position: Support
HB 4477	APPEALS (Kesto) Provides for alternative service of papers if party is protected by protected order. Amends 1961 PA 236 by amending sections 227 and 316 (MCL 600.227 and 600.316). Bill Text Committee Hearing in Senate (2/2/2016) Position: Oppose
HB 4478	PERSONAL PROTECTION ORDERS (Kosowski) Includes harming animals owned by the petitioner in acts that may be enjoined. Amends 1961 PA 236 by amending section 2950 (MCL 600.2950), as amended by 2001 PA 200. Bill Text Committee Hearing in Senate (2/2/2016) Position: Support
HB 4479	PREGNANT WOMEN (Price) Increases penalties for assault of a pregnant woman. Amends 1931 PA 328 by amending section 81 (MCL 750.81), as amended by 2012 PA 366. Bill Text Committee Hearing in Senate (2/2/2016) Position: No Position
HB 4480	DOMESTIC VIOLENCE (Heise) Modifies factors determining best interest of child in cases of domestic violence. Amends 1970 PA 91 by amending section 3 (MCL 722.23), as amended by 1993 PA 259. Bill Text Committee Hearing in Senate (2/2/2016) Position: Support

HB 4481	DOMESTIC VIOLENCE (Lyons) Prohibits custody or parenting time for certain parents of a child conceived through sexual assault or sexual abuse. Amends 1970 PA 91 by amending sections 5 and 7a (MCL 722.25 and 722.27a), section 5 as amended by 1993 PA 259 and section 7a as amended by 2012 PA 600. Bill Text Committee Hearing in Senate (2/2/2016) Position: Oppose
HB 4482 (PA 51)	CUSTODY (Kesto) Modifies requirement to file motion for change of custody or parenting time order when parent is called to active military duty. Amends 1970 PA 91 by amending section 2 (MCL 722.22), as amended by 2005 PA 327. Bill Text Signed by the Governor (6/10/2015; Signed: June 8, 2015; Effective: September 7, 2015) Position: Support
HB 4563 (PA 248)	DOMESTIC VIOLENCE (Leutheuser) Authorizes contracting for services to assist victims of domestic violence. Amends 1846 RS 16 by amending section 110c (MCL 41.110c), as added by 1989 PA 77. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: March 21, 2016) Position: TBD
HB 4622	HUMAN TRAFFICKING (Hovey-Wright) Provides for personal protection orders for victims of human trafficking. Amends 1961 PA 236 by amending section 2950a (MCL 600.2950a), as amended by 2010 PA 19. Bill Text Introduced (5/19/2015; To Judiciary) Position: Support
HB 4658 (PA 257)	CIVIL PROCEDURE (McCready) Allows collection of court-ordered financial obligations from judgements against the state. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 6096. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: March 22, 2016) Position: TBD
HB 4731	MARRIAGE AND DIVORCE (Courser) Eliminate requirement for issuance of marriage license. Amends 1987 PA 180 by amending the title and sections 1, 2, 3 and 4 (MCL 551.201, 551.202, 551.203 and 551.204), the title and sections 1 and 2 as amended by 1983 PA 199 and by adding section 1a. Bill Text Introduced (6/17/2015; To Government Operations) Position: TBD
HB 4732	MARRIAGE AND DIVORCE (Courser) Eliminates requirement of marriage license and allows only clergy to solemnize marriage. Amends 1846 RS 83 by amending sections 2, 7 and 16 (MLC 551.2, 551.7 and 551.16), section 2 as amended by 1996 PA 324, section 7 as amended by 2014 PA 278 and section 16 as amended by 2006 PA 419. Bill Text Introduced (6/17/2015; To Government Operations) Position: TBD
HB 4733	MARRIAGE AND DIVORCE (Courser) Eliminate government facilitated marriage licenses, restores common law marriage and only allows clergy to solemnize marriages. Amends 1887 PA 128 by amending the title and sections 1, 2, 3, 4, 5, 6 and 8 (MCL 551.101, 551.102, 551.103, 551.104, 551.106 and 551.108) the title as amended by 1998 PA 333 and sections 2 and 3 as amended by 2006 PA 578 and by adding section 1a and to repeal acts and parts of acts. Bill Text Introduced (6/17/2015; To Government Operations) Position: TBD
HB 4742 (PA 255)	FAMILY LAW (Kosowski) Repeals uniform interstate family support act and recreates. Repeals 1996 PA 310 (MCL 552.1101 to 552.1901). Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016) Position: TBD
HB 4743	FAMILY LAW (Kosowski) Updates reference to the uniform interstate family support act. Amends 1971 PA 174 by amending section 3 (MCL 400.233), as amended by 2014 PA 381. Bill Text Reported in Senate (12/2/2015; By Families, Seniors and Human Services) Position: TBD
HB 4744 (PA 256)	FAMILY LAW (Kesto) Updates references to uniform interstate family support act. Amends 1982 PA 295 by amending section 2 (MCL 552.602), as amended by 2014 PA 373. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016) Position: TBD

HB 4745	FAMILY LAW (Heise) Updates reference to the uniform interstate family support act. Amends 1982 PA 294 by amending section 2 (MCL 552.502), as amended by 2009 PA 233. Bill Text Reported in Senate (12/2/2015; By Families, Seniors and Human Services) Position: TBD
HB 4840	ADOPTION LICENSEES (Wittenberg) Requires adoption licensees to provide services to all applicants. Amends 1939 PA 288 by amending section 23g of chapter X (CL 710.23g) as added by 2015 PA 54. Bill Text Introduced (8/20/2015; To Families, Children and Seniors)
HB 4841	ADOPTION LICENSEES (Hoadley) Requires adoption licensees to provide services to all applicants. Amends 1973 PA 116 by amending sections 14e and 14f (CL 722.124e and 722.124f) as added by 2015 PA 53. Bill Text Introduced (8/20/2015; To Families, Children and Seniors)
HB 4842	ADOPTION/FOSTER CARE LICENSEES (Tinsley-Talabi) Requires adoption and foster care licensees to provide service to all applicants. Amends 1939 PA 280 by amending section 5a (CL 400.5a) as added by 2015 PA 55. Bill Text Introduced (8/20/2015; To Families, Children and Seniors)
HB 4845	CHILD RESIDENCE (Runestad) Reduces distance parents can move under custody orders; changes how distance is measured. Amends 1970 PA 91 by amending section 11 (CL 722.31) as added by 2000 PA 422. Bill Text Introduced (8/20/2015; To Judiciary)
HB 4855	FAMILY LAW (Glenn) Provides immunity for religious officials' refusal to solemnize a marriage based on violation of conscience or religious beliefs under certain circumstances. Amends 1846 RS 83 (MCL 551.1 to 551.18) by adding section 8.Bill Text Introduced (9/9/2015; To Government Operations)
HB 4858	FAMILY LAW (Gamrat) Provides for immunity for religious official refusing to solemnize a marriage based on conscience or religious beliefs under certain circumstances. Amends 1846 RS 83 (MCL 551.1 to 551.18) by adding section 8. Bill Text Introduced (9/9/2015; To Government Operations)
HB 4911	PATERNITY (Crawford) Allows option to disclose identity of paternity in a private adoption. Amends 1939 PA 288 by amending sections 36 and 56 of chapter X (MCL 710.36 and 710.56), section 36 as amended by 1996 PA 409 and section 56 as amended by 2014 PA 118. Bill Text Reported in House (2/23/2016; With substitute H-1; By Judiciary)
HB 5028 (PA 230)	COURT ACCESS (Kesto) Allows electronic access to courts. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding chapter 19A. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: January 1, 2016)
HB 5029 (PA 231)	COURT ACCESS (Heise) Allows electronic access to courts. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding sections 1986 and 1987. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: January 1, 2016)
HB 5030 (PA 232)	COURT ACCESS (Price) Allows electronic access to courts. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding chapter 1989. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: January 1, 2016)
SB 9 (PA 52)	PARENTING TIME (Jones) Modify requirement to file motion for change of custody or parenting time order when parent is called to active military duty. A bill to amend 1970 PA 91 by amending section 7 (MCL 722.27), as amended by 2005 PA 328. Bill Text Signed by the Governor (6/10/2015; Signed: June 8, 2015; Effective: September 7, 2015)
SB 227	SAME-SEX MARRIAGE (Hertel) Removes prohibition on same-sex marriage from family law. Amends 1846 RS 83 by amending sections 2, 3, and 9 (MCL 551.2, 551.3, and 551.9), sections 2 and 3 as amended by 1996 PA 324; and to repeal acts and parts of acts. Bill Text Introduced (3/24/2015; To Judiciary) Position: Support
SB 228	MARRIAGE LICENSES (Knezek) Allows issuance of marriage license to same-sex couple without publicity. Amends 1897 PA 180 by amending section 1 (MCL 551.201), as amended by 1983 PA 199. Bill Text Introduced (3/24/2015; To Judiciary) Position: Support
SB 229	SAME-SEX MARRIAGE (Smith) Removes prohibition on same-sex marriage from foreign marriage act. Amends 1939 PA 168 by amending section 1 (MCL 551.271), as amended by 1996 PA 334; and to repeal acts and parts of acts. Bill Text Introduced (3/24/2015; To Judiciary) Position: Support

SB 252	UNEMPLOYMENT BENEFITS (Hertel) Creates exception from disqualification from receiving benefits when leaving employment for domestic violence victim. Amends 1936 (Ex Sess) PA 1 by amending sections 17 and 29 (MCL 421.17 and 421.29), section 17 as amended by 2011 PA 269 and section 29 as amended by 2013 PA 146, and by adding section 29a. Bill Text Introduced (4/14/2015; To Commerce) Position : Support
SB 253	MEDIATION (Bieda) Limits mediation in certain domestic relations actions. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 1035. Bill Text Introduced (4/14/2015; To Judiciary) Position: No Position
SB 254	PROTECTIVE ORDERS (Bieda) Provides for alternate service of papers if party is protected by a protective order. Amends 1961 PA 236 by amending sections 227 and 316 (MCL 600.227 and 600.316). Bill Text Introduced (4/14/2015; To Judiciary) Position: Oppose
SB 255	DOMESTIC VIOLENCE VICTIMS (Warren) Prohibits housing discrimination for domestic violence victims. Amends 1976 PA 453 by amending the title and section 502 (MCL 37.2502), the title as amended by 1992 PA 258 and section 502 as amended by 1992 PA 124. Bill Text Committee Hearing in Senate (5/26/2015) Position: Support
SB 256	SICK LEAVE (Ananich) Expands criteria for use of sick leave. Requires employers to permit use of sick leave to address issues arising from sexual assault, domestic violence, or stalking. Bill Text Introduced (4/14/2015; To Commerce) Position: Support
SB 257	DOMESTIC VIOLENCE VICTIMS (Emmons) Creates address confidentiality program for victims of domestic violence crime. Creates the address confidentiality program; provides certain protections for victims of domestic abuse, sexual assault, stalking, or human trafficking; and prescribes duties and responsibilities of certain state departments and agencies. Bill Text Introduced (4/14/2015; To Judiciary) Position: Support
SB 258	CHILD'S BEST INTEREST (Warren) Modifies factors determining best interest of child in cases of domestic violence. Amends 1970 PA 91 by amending section 3 (MCL 722.23), as amended by 1993 PA 259. Bill Text Introduced (4/14/2015; To Families, Seniors and Human Services)
SB 351	DIVORCE (Jones) Prohibits contacting a party to a divorce action for a certain time period. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 914. Bill Text Received in House (6/11/2015; To Judiciary) Position: Support
SB 458	PARENTAL RIGHTS (Schuitmaker) Clarify grounds for termination of parental rights under certain circumstances. Amends 1939 PA 288 by amending section 51 of chapter X (MCL 710.51), as amended by 1996 PA 409. Bill Text Received in House (10/1/2015; To Judiciary) Passed in Senate (10/1/2015; 34-1)
SB 517	UNIFORM INTERSTATE FAMILY SUPPORT ACT (MacGregor) Repeals and recreates uniform interstate family support act (UIFSA). Makes uniform the laws relating to support enforcement; and repeals acts and parts of acts. Bill Text Received in House (12/1/2015; To Judiciary)
SB 518 (PA 253)	FRIEND OF THE COURT (MacGregor) Updates friend of the court reference to the uniform interstate family support act. Amends 1982 PA 294 by amending section 2 (MCL 552.502), as amended by 2009 PA 233. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016)
SB 519 (PA 254)	CHILD SUPPORT (Emmons) Updates child support reference to the uniform interstate family support act. Amends 1971 PA 174 by amending section 3 (MCL 400.233), as amended by 2014 PA 381. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016)
SB 520	PARENTING TIME (Emmons) Updates parenting time reference to the uniform interstate family support act. Amends 1982 PA 295 by amending section 2 (MCL 552.602), as amended by 2014 PA 373. Bill Text Received in House (12/1/2015; To Judiciary)

SB 558	DOWER RIGHTS (Jones) Repeals dower rights. Amends 1846 RS 66 (MCL 558.1 to 558.29) by adding section 30; and to repeal acts and parts of acts. Bill Text Passed in Senate (11/5/2015; 34-4)
SB 559	DOWER RIGHTS (Jones) Eliminates requirement that judgment of divorce contain provisions regarding wife's dower rights. Amends 1909 PA 259 by amending section 1 (MCL 552.101) as amended by 2006 PA 288. Bill Text Received in House (11/5/2015; To Judiciary) Passed in Senate (11/5/2015; 34-4)
SB 560	WILLS AND ESTATES (Jones) Revises reference to dower in estates and protected individuals code to reflect abolition of dower. Amends 1998 PA 386 by amending sections 1303, 2202, 2205, and 3807 (MCL 700.1303, 700.2202, 700.2205, and 700.3807), sections 1303, 2202, and 2205 as amended by 2000 PA 54 and section 3807 as amended by 2000 PA 177. Bill Text Received in House (11/5/2015; To Judiciary) Passed in Senate (11/5/2015; 34-4)
SB 629	PARENTAL RIGHTS (Jones) Expands termination of parental rights to a child to include forcible rape where child results. Amends 1939 PA 288 by amending section 19b of chapter XIIA (MCL 712A.19b), as amended by 2012 PA 386. Bill Text Received in House (12/16/2015; To Judiciary)
SB 646	SECOND PARENT ADOPTION (Warren) Provides for second parent adoption. Amends 1939 PA 288 by amending sections 24, 41, and 51 of chapter X (MCL 710.24, 710.41, and 710.51), section 24 as amended by 2014 PA 531, section 41 as amended by 1994 PA 222, and section 51 as amended by 1996 PA 409. Bill Text Introduced (12/9/2015; To Families, Seniors and Human Services)
SB 811	SURROGATE PARENTING ACT (Warren) Repeals surrogate parenting act and establishes the gestational surrogate parentage act. Establishes gestational surrogate parentage contracts; allows gestational surrogate parentage contracts for compensation; provides for a child conceived, gestated, and born according to a gestational surrogate parentage contract; provides penalties and remedies; and repeals acts and parts of acts. Bill Text Introduced (2/23/2016; To Families, Seniors and Human Services)
HR 149	DOMESTIC VIOLENCE AWARENESS (Cox) A resolution to declare October 2015 as Domestic Violence Awareness Month in the state of Michigan. Bill Text Passed in House (9/24/2015; Voice vote, With substitute H-1)

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