May 15, 2020

To: Michigan Supreme Court
From: Michigan Coalition of Family Law Appellate Attorneys (MCFLAA)

RE: ADM File No. 2015-21 (MCR 7.202 and 7.204)
ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)
ADM File No. 2019-27 (MCR 7.205)
ADM File No. 2019-29 (MCR 7.212 and 7.312)
ADM File No. 2019-31 (MCR 7.216)

MCFLAA met via video conference on May 4, 2020 to discuss the appellate rule proposals as they relate to family law appeals.

ADM File No. 2015-21 (MCR 7.202 and 7.204)

The definition of a "custody case" in MCR 7.202(5) is expanded to include a delinquency proceeding where there is a dispositional order removing the minor from his/her home. This would give appeals from delinquency dispositions the same heightened priority as other appeals affecting custody or placement of children. We support the change. When delinquency appeals are not given priority, the minor ages out of the system before the appeal can be heard and decided.

Inexplicably, the proposal amends MCR 7.204(A)(1)(b) to eliminate the ability of the trial court to "for good cause" extend the time to file a post-judgment motion for new trial, rehearing, reconsideration, or other relief beyond the initial 21 days and still preserve the right to file a timely appeal from the order deciding that post-judgment motion. No explanation is given for how this change serves the purpose of making uniform the priority given to child custody, child protection, and delinquency appeals. The other proposal affecting MCR 7.204(A)(1) contained in ADM File Nos. 2018-33, 2019-20, and 2019-38 leaves this subsection unchanged. The inconsistency between this proposal and the proposal below needs to be explained and resolved. We believe the trial court is in the best position to determine if there should be a "good cause" extension.

ADM File Nos. 2018-33, 2019-20, and 2019-38 (MCR 7.204, 7.205, and 7.211)

Unlike ADM File No. 2015-21, this proposal leaves unchanged the ability of the trial court to extend the time for filing a post-judgment motion for new trial, reconsideration, etc., while preserving the ability to file a timely claim of

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appeal from the order deciding that motion. This inconsistency should be resolved. We support retaining the trial court's authority to determine if there is good cause to extend the time to file a timely post-judgment motion without losing the right to appeal after than motion is decided.

This proposal amends MCR 7.211(C)(1) to eliminate the requirement that a motion to remand be filed within the time for filing appellant's brief. It also stays further proceedings in the COA upon ***filing*** a motion to remand. The current rule stays COA proceedings only if the motion is granted. We support the change.

ADM File No. 2019-27 (MCR 7.205)

According to the staff comment, the purpose of this proposal is to clarify and simplify rules regarding criminal appellate matters. However, its scope is broader and affects all appeals, including civil and family.

The "Late Appeal" provisions are rewritten, renamed "Delayed Application for Leave to Appeal" and relocated from MCR 7.205(G) to MCR 7.205(A)(4). Proposed MCR 7.205(A)(4)(b) could be interpreted to reduce the time for filing a delayed appeal although there is no indication that was the intent of the drafters. Current MCR 7.205(G)(5) requires that a late application be filed within 21 days after a dismissal order for lack of jurisdiction ***only if*** the 6-month late appeal jurisdiction window has expired. Proposed MCR 7.205(A)(4)(b) could be read to require filing a delayed application with 21 days after a dismissal order for lack of jurisdiction even if the 6-month delayed appeal window ***has not*** expired.

If interpreted to limit the delayed application period to 21 days after dismissal in all cases, even if the 6-month window has not expired, this presents potentially serious problems. If the dismissal order is issued shortly after the claim of appeal is filed, as often happens, the trial court transcripts and other information needed to prepare the delayed application may not yet be available to appellant's counsel. The 21-day period to file a delayed application would also rule out the option of an appeal to the Michigan Supreme Court on the jurisdictional issue and receiving a ruling from that Court before facing the deadline to file a delayed leave application in the Court of Appeals.

To avoid confusion, proposed MCR 7.205(A)(4)(b) could be rewritten to state:

> (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within the later of 6 months from entry of the order appealed, 21 days after entry of the dismissal order, or 21 days after entry of an order denying reconsideration of the dismissal order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

ADM File No. 2019-29 (MCR 7.212 and 7.312)

This proposal changes the appendix rule in the Court of Appeals and Supreme Court. Proposed MCR 7.212(J)(2) governing the form of the appendix requires that each separate document in the appendix "must be preceded by a title page that identifies the appendix number or letter and the title of the document." While this may be useful for an appendix filed on paper, we do not see the need for this provision for an electronically filed appendix.

An electronically filed appendix must be bookmarked. The bookmark is a more efficient way to quickly move to any document in the appendix. Clicking on the bookmark should take you to the first page of that document, not a cover sheet that provides no additional useful information. Adding the cover page will also require more attorney or staff time (many appellate attorneys do not have staff and perform these tasks themselves) without a corresponding benefit to the court or court staff. It would unnecessarily drive up the cost of appeals, particularly for low and middle-income clients. This requirement should be deleted from the proposal.

Proposed MCR 7.212(J)(2)(b)(i) eliminates the page limit per appendix volume. It allows any number of pages in a volume so long as the file size is not too large for electronic filing. This is a welcome change we support.

Proposed MCR 7.212(J)(2)(b)(ii) and (iii) contain what we believe to be functionally redundant bookmark/TOC linking requirements. Subsection (ii) appropriately requires that the appendix be text searchable and that each document in the appendix be bookmarked. Although not part of the rule, we are instructed in the efiling guidelines to file our documents with the initial view including the bookmarks panel. That makes bookmarks the most visible and easiest way for judges, court staff, and opposing counsel to navigate to the various documents in the appendix.

Subsection (iii) is functionally redundant and unnecessary. It adds little to the ability of the reader to navigate through the appendix while driving up the cost of an appeal by requiring counsel to provide links to each document to the appendix table of contents. The TOC is visible from only one point in the appendix. The bookmarks panel is visible at all times, making it the preferred navigation option. We believe subsection (iii) should be eliminated from the proposal.

Proposed MCR 7.212(J)(3)(c) requires relevant pages of the transcript cited in support of the argument be included in the appendix. Submitting entire transcripts is discouraged.

In practice, it is prohibitively expensive for counsel to devote the hours needed to extract from the transcript those pages cited in support of the argument. Submitting the entire transcript is often a necessity for cost reasons.

If a complete transcript is submitted, this proposal requires that an index of the transcript be included. We see relatively few transcripts of trial court proceedings that include an index. Appellate counsel usually received transcripts from reporters via email in PDF format. Using Acrobat or its equivalents, it is not possible to create a printable index for a transcript received as a PDF. Until court reporters are required to include an index with each transcript they file, we oppose this proposal.

The proposal prohibits including in the appendix what are known as mini-scripts containing more than one page of transcript per document page. Court and deposition transcripts ordered by trial counsel during trial court proceedings are often received in mini-script format with up to four transcript pages per document page. Acrobat and equivalent software do not provide an obvious way to convert a mini-script transcript to a full-page transcript. The only option is to contact the reporter and request a full-page transcript. Depending on the length of time trial proceedings were pending, the transcripts may have been prepared a year or two earlier. The additional time and expense involved in tracking down the original reporter and requesting and paying for a full-page transcript adds delay and cost to the appellate process.

We agree that full-page transcripts should be included in the appendix when available. However, we oppose a ban on including mini-script transcripts when that is the only format reasonably available.

ADM File No. 2019-31 (MCR 7.216)

This proposal would add MCR 7.216(C)(3) to the Vexatious Proceedings rule. The current rule focuses on whether "an appeal or any of the proceedings in an appeal" are vexatious. The proposal would allow the court to also designate a party as a "vexatious litigator" and prohibit a party from continuing or instituting appeals without first obtaining leave from the court.

We oppose this proposal. The current rule allow sanctions for vexatious proceedings is sufficient to deter improper filings. A new rule is not needed. Because the proposal focuses on the party rather than the merits of the litigation, it could have an unwanted chilling effect on appeals presenting novel or politically unpopular issues. Keeping the focus on the merits of the litigation rather than the litigator is a better approach.

If it can be demonstrated that the existing rule is inadequate and a new rule addressing parties is needed, the rule must be more narrowly tailored. It should include clearly written standards defining the conduct making a party a vexatious litigator.

Yours truly,

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