FAMILY LAW SECTION
Respectfully submits the following position on:

*

ADM File No. 2013-17

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The Family Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Family Law Section only and is not the position of the State Bar of Michigan.

The State Bar position on this matter to oppose the proposed amendment.

The total membership of the Family Law Section is 2,486.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 21. The number who voted in favor of this position was 15. The number who voted opposed to this position was 0.

SBM State Bar of Michigan | FAMILY LAW SECTION

Report on Public Policy Position

Name of Section:
Family Law Section

Contact person:
Mathew Kobliska, Chair of the Court Rules & Ethics Committee

E-Mail/Phone:
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Proposed Court Rule or Administrative Order Number:
ADM File No. 2013-17: Proposed Amendment of MCR 3.206
The proposed amendments of MCR 3.206 would limit the ability of a court to require one party to pay another party's attorney fees during the proceeding to those cases that involve divorce or separation of married persons.

Date position was adopted:
June 7, 2014

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting

Number of members in the decision-making body:
21

Number who voted in favor and opposed to the position:
15 Voted for position
0 Voted against position
0 Abstained from vote
6 Did not vote

Position:
Oppose

Explanation of the position, including any recommended amendments:
Please see attached letter.

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July 28, 2014

Mr. Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2013-17
Proposed Amendment to MCR 3.206(C)

Dear Mr. Royster:

Thank you for the opportunity for the State Bar of Michigan Family Law Section to comment on ADM File No. 2013-17, the proposed amendment to Michigan Court Rule 3.206(C). The proposed amendment would limit fee allocation to divorce, separate maintenance, and annulment proceedings, and therefore prohibit fee allocation in any situation in which the parties had not been married, including all Family Support Act cases, paternity cases, child custody cases, and parenting time cases. For the reasons stated in this letter[1], in addition to the public policy considerations, the Family Law Section strongly opposes the amendment:

1. Further limitations on access to justice by unmarried parents will have deleterious effects on children in Michigan.

Statistics gathered by the Annie E. Casey Foundation's annual *Kids Count* survey for 2012 show that Michigan is home to a large number of single parent families and that many of these families are poor. The *Kids Count* survey is the premier source for data on child and family well-being in the United States[2]. For example, statistics for Michigan show that[3]:

- 48,377 – or 42% -- of all live births in Michigan were to unwed mothers.
- 763,000 – or 35% -- of kids under 18 lived with a single parent.
- Children growing up in single-parent families

> typically do not have the same economic or human resources available as those growing up in two-parent families. Compared with children in married-couple families, children raised in single-parent households are more likely to drop out of school, to have or cause a teen pregnancy and to experience a divorce in adulthood.

- 176,000 – or 43% -- of single parent families had income below the federal poverty level, which in 2012 was $23,050 annually for a family of four.

- Since 2008, there has been a steady increase in single parent families living in poverty.

- In 2008, female-headed households with young children were ten (10) times more likely to be poor than married couples[4].

In many of these cases, there is a significant disparity in the economic circumstances between the two unmarried parents. When the boots hit the ground on matters involving child custody, parenting time and child support, this means that the parent with superior financial resources is able to have a lawyer (likely a more experienced lawyer), better resources with which to acquire potential evidence and expert witness testimony, and better trial preparation, among many other things that money can provide. Equally important is the realization by moneyed parties that cases may be won according to which party has the most staying power. None of these have anything to do with the best interests of the child or children in any particular case.

The paramount duty of a trial court under the *Child Custody Act* is to ensure the best interest and welfare of the minor child[ren]. See MCL 722.24[5]. In *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004), the Michigan Supreme Court addressed a court's duty under the Act:

> The act makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at MCL 722.23. MCL 722.25(1). It places an affirmative obligation on the circuit court to "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act" whenever the court is required to adjudicate an action "involving dispute of a minor child's custody." MCL 722.24(1). Taken together, these statutory provisions impose on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child.

This obligation applies to all child custody disputes regardless if the parents have been married. The purpose of fee allocation is to somewhat level the playing field so that cases involving the rights of children are decided upon facts, and not one party's ability to outspend the other.

2. MCR 3.206 (& MCR 3.204 prior to 1993) evolved to acknowledge the importance of a more level playing field in matters involving minor children.

The 1963 Michigan General Court Rules were enacted at the time of the Michigan Constitution of 1963. Domestic relations actions were covered by GCR 721-731. GCR 721 defined domestic relations actions:

> Rules 721 to 731 are applicable to all actions for:
>
> (1) Divorce
>
> (2) Separate maintenance
>
> (3) Annulment of marriage
>
> (4) Affirmation of marriage
>
> (5) All proceedings ancillary or subsequent to such action; and
>
> (6) Custody of children.

GCR 726 dealt with *Attorney Fees, Expenses, Temporary Alimony and Child Support*. GCR 726.1 provided:

> (1) In an action for divorce, separate maintenance, annulment, or affirmation of marriage, and in subsequent petitions to modify the judgment, either party may request that the court order the other spouse to pay an attorney the sum specified as necessary to enable that party to carry on or defend the suit.

The provision is limited to marriage situations. Although (1) is gender neutral, provision (3) retains the traditional gender expectation that the husband would be the paying part, reminding us that these court rules were a product of their time:

> (3) The court may order, in the judgment or in a separate order, that whatever sum it finds necessary and reasonable be paid to the wife's attorney, either by the husband or out of the assets of the husband over which the court has jurisdiction.

The notes following GCR 726 indicate that it was amended in 1972, but do not indicate the nature of the amendment.

The General Court Rules of 1963 reflect a different culture of domestic relations. The *Child Custody Act* was not passed until 1970, the *Paternity Act* contained no provision for resolving custody and parenting time issues until 1994, MCL 722.17b, and the *Acknowledgment of Parentage Act* did not take effect until 1996.

The Michigan Court Rules of 1985 replaced the General Court Rules of 1963, effective March 1, 1985. Domestic relations actions were given their own subchapter, 3.200, with MCR 3.201 defining the scope:

> Rule 3.201 *Applicability of Rules*
>
> Subchapter 3.200 applies to actions
>
> > (1) for divorce, separate maintenance, annulment of marriage, affirmation of marriage, and proceedings ancillary or subsequent to those actions,
> >
> > (2) relating to the custody of children, and
> >
> > (3) relating to the support of minor children and spouses.
>
> Unless otherwise specified in this subchapter, the general rules of procedure apply to domestic relations actions.

The editor's comment notes that support actions had been added to the list from GCR 721.

Attorney fees in domestic cases under the 1985 rules were covered by Rule 3.206(A):

> (A) *Attorney fees and expenses*.
>
> > (1) In any domestic relations action, either party may request that the court order **the other spouse** to pay an attorney a specified sum to

> enable that party to prosecute or defend the action.
>
> (2) The moving party must allege facts showing that he or she is unable to bear the expense of the action without this aid. The court may require the disclosure of attorney fees or other expenses already paid.
>
> (3) The court may order that a necessary and reasonable sum be paid to the attorney, either directly by **the other spouse** or from the **spouse's** assets over which the court has jurisdiction. (Emphasis added).

The rule was internally inconsistent, by rendering application of MCR 3.206(A)(1) to "any domestic relations action," which would include all custody and support actions, but strictly interpreted, authorized the court to only order "the other spouse to pay," suggesting a limitation to only situations involving married parents. MCR 3.206(A)(3) repeats the term "spouse."

Between 1985 and 1998, the rules were amended so that the former MCR 3.204 governing pleading was rewritten to become MCR 3.206(A), and the former MCR 3.206(A) governing attorney fees became MCR 3.206(C). The 1993 Staff Comment notes that this change occurred in 1993, and notes that "Subrule (C) governs attorney fees and expenses."

The 1998 Staff Comment indicates that changes were made to MCR 3.206 in October and in December of 1997 to implement statutory changes due to 1996 PA 388, creating the family division of the circuit court. The comment does not detail what those changes were. The 1998 version of the court rule reads:

> (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.
> >
> > (2) A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action and that the other party is able to pay.

This is the first instance in which attorney fees are not limited to a spouse.

The history is unclear as to whether the rule was changed in 1993 when attorney fees were moved from section (A) to (C), or in 1998, when the family law division was created. But in *Featherston v Steinhof*, 226 Mich App 584, 593 (1997) the Court of Appeals affirmed an award of attorney fees in a paternity case, citing MCR 3.602(C)(2):

> Under MCR 3.206(C)(2), plaintiff may recover reasonable fees necessary to defend the domestic relations action if she is unable to bear the expense of the action and defendant is able to pay. *See Thames v. Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991).

In 2002, the Michigan Judges Association proposed an amendment to MCR 3.206(C)[6], which was ultimately adopted by the Court in April of 2003, to make it clarify that trial court judges had authority to make fee allocations in all domestic cases. The reasons given by the MJA included the following[7]:

> (1) to reduce the number of hearings that occur because of a litigant's vindictive or wrongful behavior;
>
> (2) to shift the costs associated with wrongful conduct to the party engaging in the improper behavior;
>
> (3) to remove the ability of a vindictive litigant to apply financial pressure to the opposing party;
>
> (4) to create a financial incentive for attorneys to accept a wronged party as a client, and
>
> (5) to foster respect for court orders.

These reasons are equally applicable today, and in fact, there is considerable data which show that the income gap between unmarried parents, and also the gap between the average unmarried parent and the average divorced parent, is greater today than when it was a decade ago. The history of the rule amendments indicates that at various times it has been considered appropriate to award attorney fees in all domestic relations cases.

3. Fee allocation is inherently procedural and not governed or limited by statute.

The Michigan Court of Appeals case of *Schoensee v Bennett*, 228 Mich App 305 (1998), was a

paternity case in which attorneys' fees were awarded even when no marriage was involved. Although the case was decided in February, 1998, after the effective date of the 1998 amendments deleting the language referring to "spouse," the attorney fees in dispute were awarded in 1995 and 1996. The decision quotes language from the court rule:

> Michigan follows the "American rule" regarding attorney fees. Under this rule, attorney fees are generally not recoverable unless a statute, court rule, or common-law exception provides to the contrary. *Popma v. Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). MCR 3.206(C)(2) permits the court to award attorney fees in a domestic relations action where the party requesting the fees alleges "facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay." MCR 3.201(A)(1) makes this rule applicable to actions for custody of minors under the *Child Custody Act*, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.*

Schoensee considered a direct challenge by the party to the Supreme Court's authority to create a court rule on attorney fees without specific statutory authority:

> Plaintiff contends that MCR 3.201 is insufficient to support an award of attorney fees because there is no statutory authority permitting an award of attorney fees in a custody dispute involving unmarried individuals. Plaintiff maintains that such rule making exceeds the competence of the Supreme Court because it amounts to a substantive rule of law rather than one regulating practice and procedure. However, this Court has rejected a similar argument with regard to the mediation rule requiring payment of attorney fees under certain circumstances. *See Gianetti Bros Constr Co., Inc. v. Pontiac*, 152 Mich App 648, 658; 394 NW2d 59 (1986).

Moreover, pursuant to MCL 722.27(1)(f) [now (e)]; MSA 25.312(7)(1)(f), in a child custody dispute, the court may "[t]ake any other action considered to be necessary in a particular child custody dispute." In addition, MCL 722.26(1); MSA 25.312(6)(1) states: "This act is equitable in nature and shall be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved."

The Michigan Supreme Court has determined that an award of attorney fees may be proper in a child custody case. The Court explained:

> Such authority may be considered as implied from the nature of the proceeding. In any proceeding instituted for the purpose of fixing the custody of a minor child, a proceeding in which the trial court is primarily concerned with the best interests of

> such child, the mother is entitled to be heard. It would scarcely be consistent with ordinary principles of equity and justice to hold that in such a proceeding instituted by a father of the minor child, or children, he alone is concerned. … If under such circumstances a wife is unable because of lack of resources of her own to properly present her claim and to assist the court in the protection of the rights of her minor child, we conclude that the court has the authority, incidental to jurisdiction to hear and determine the matter of custody, to make such an award to cover attorney fees and expenses as may be deemed fair and reasonable under all the circumstances of the case. [*Sovereign v. Sovereign*, 361 Mich 528, 535-536; 106 NW2d 146 (1960).]
>
> We are not persuaded by plaintiff's attempt to distinguish Sovereign on the basis that, unlike the instant case, the parties in *Sovereign* were married. The focus in child custody actions must be on the best interests of the child, regardless of the marital status of the parents. See *id*.
>
> For all the above reasons, we conclude that the trial court did not commit clear legal error when it determined that it had the authority to make an award of attorney fees in this case. Accordingly, reversal is not required.

The *Schoensee* case, as well as the *Sovereign* case cited in *Schoensee*, support the contention that attorneys' fees and court costs allocations between litigants relate to how parties are able to obtain adequate access to the court system, and are therefore procedural, and are not a determination of their ultimate substantive rights and duties.

The *Paternity Act*, MCL 722.714(4), provides a mechanism for the Family Independence Agency to commence an action for support if the parent is receiving public assistance and "without means to employ an attorney," in which case the action shall be pursued by the prosecutor's office. However, the prosecutor is not obligated to represent a party if a custody dispute arises. MCL 722.717(b). A parent may elect not to pursue support for the child out of a well-grounded fear that it may trigger a custody or parenting time dispute and the parent is without the financial means to prosecute or defend the custody or parenting time action.

A previous version of the *Paternity Act* included a provision (MCL 722.717) that authorized a court to include in an order of filiation "expenses . . . in connection with the proceedings." This had been interpreted by several panels to include attorney fees. Indeed, in *Bessmetnaja v. Schwager*, 191 Mich App 151, 158, 477 NW2d 126 (1991), the Court justified its award of attorney fees by stating "if the language in MCL 552.13 is sufficiently specific to authorize an award of attorney fees, then the language in the *Paternity Act* encompasses attorney fees as well." However, the Paternity Act was subsequently amended and the clause "in connection with the proceedings" does not appear in the

present iteration of the act, nor has it for many years. All subsequent cases addressing an award of attorney fees in cases involving non-married parents cite the court rule in its various forms.

Authorization of fees is appropriate under both court rule and statute.

4. The creation of a distinction in MCR 3.206(C) between children of married parents and children of unmarried parents raises Constitutional concerns, implicating Federal and State constitutional equal protection and due process guarantees.

As previously noted, the *Child Custody Act of 1971*, MCL 722.21, *et seq.*, defines its purpose as "an act to declare the inherent rights of minor children; to establish rights and duties to their custody, support, and parenting time in disputed actions; to establish rights and duties to provide support for a child after the child reaches the age of majority under certain circumstances." MCL 722.24(1). If those children happen to be the progeny of parents who were married to each other, then, MCL 552.15 of the *Divorce Act* authorizes the court to "enter orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action," and, under MCL 552.13 of the *Divorce Act*, the court can direct one of those parents to "pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency" in the context of a divorce. But if the parties involved in a custody dispute are unmarried, besides (arguably) the very broad language of MCL 722.27(1)(e) of the *Child Custody Act* permitting the trial court to take any action "necessary," there is nothing specifically authorizing fees for non-married parties. Similarly, the stated purpose of the *Paternity Act* is "to compel and provide support of children born out of wedlock," and the act authorizes a determination of custody and parenting time, yet there is no means within the act to enable a party seek financial contribution from the adverse party in order to fulfill the stated purpose.

The Equal Protection Clauses of the U.S. and Michigan constitutions require that similarly situated people be treated alike, *Rose v. Stokely*, 258 Mich App 283, 295-296; 673 NW2d 413 (2003), and precludes the government from treating persons differently on account of "certain, largely innate characteristics that do not justify disparate treatment." *Crego v. Coleman (Crego IV)*, 430 Mich 248, 258; 615 NW2d 218 (2000). An equal protection challenge requires the court to apply one of three levels of review, depending on the type of classification involved: "strict scrutiny" is applied if a suspect classification – one based on race, national origin, or ethnicity – is involved; if not, then an intermediate level, called "heightened scrutiny" or a "rational basis" test must be met. Under a rational basis test, a law will be upheld as long as the legislation is rationally related to a legitimate government purpose. "To prevail, a challenger must show that the legislation is 'arbitrary and wholly unrelated in a rational way to the objective of the statute.'" *Crego*, at 259, quoting *Smith v. Employment Security Comm.*, 410 Mich 231, 271; 301 NW2d 285 (1981).

Gomez v. Perez, 409 US 535, 93 S.Ct 872, 35 L.Ed.2d 56 (1973), invalidated Texas laws that granted legitimate children an enforceable right to support from fathers, but denied illegitimate children the same right on the grounds that disparate statutory treatment between legitimate and illegitimate children was found unconstitutional, stating:

> [A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.' * * * We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.

The United States Supreme Court has recognized that the intermediate level of scrutiny applies to classifications based on illegitimacy, *Gomez, supra*, and under this review, a challenged statutory classification will be upheld only if it is "substantially related to an important governmental objective." *Crego*, at 260.

Michigan case law has long supported the public policy that the State treats children born out of wedlock as no less deserving of support than those born in wedlock. See *Whybra v. Gustafson*, 365 Mich 396, 112, NW2d 503 (1961).

In *Spada v. Pauley*, 149 Mich App 196, 385 NW2d 746 (1986), the Court of Appeals found that while married, natural parents of minors and mothers of illegitimate minors are statutorily obligated to support their minor children, and the duty of support may be enforced by the minor in circuit court. MCL 722.23; the *Paternity Act*'s failure to provide a child of unmarried parents the right to pursue a child support obligation on his own behalf violated the equal protection clauses of the Michigan and U.S. Constitution. The court noted that the interests of the parties are not necessarily the same as the child's. For instance, the mother may have many reasons not to pursue the father for support, and the state's interest is more narrowly related to ensuring that the child's support is not borne by taxpayers, but by the parents. When children are involved, "the state's interest is that, in so far as is possible, provision shall be made for their support, education, and training, to the end that they may grow up to be worthy and useful citizens. It, therefore, follows that there should be no discrimination in this respect between children born out of wedlock and children legitimately born. The public interest is exactly the same in either case." *Spada, supra*, at 205-206, quoting [*Kaur v. Chawla]* 11 Wash App. 363, n. 1, 522 P2d 1198, quoting *Heney v. Heney*, 24 Wash2d 445, 459, 165 P2d 864, 870-871 (1946).

Additionally, a parent's low income status should not be used to deprive the parent of a fundamental right to raise his or her children or of the right to seek a review of child custody based on the best interests and needs of each child. The potential for creating financial chaos in a family facing a custody challenge from a third party was articulated by Justice Kennedy in his dissenting opinion in *Troxel v. Granville*, 530 US 57, 101 (2000):

> It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. *See, e.g., American Law Institute, Principles of the Law of Family Dissolution 2*, and n.2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection of the parent-child relationship.

Justice Kennedy's reasoning may be similarly applicable to unmarried parents who are unable to afford attorney fees necessary to defend against a custody action or initiate an action to establish or modify custody.

The *Paternity Act*, the *Child Custody Act*[8], and the *Family Support Act* do not authorize fees. These Acts are child-focused, enacted to ensure the support and welfare of children -- marital and non-marital. The proposed amendment to the court rule limits the ability of parents of non-marital children to litigate on behalf of their children. Further, the proposed amendment may raise Constitutional concerns as discussed above.

5. The proposed court rule change to exclude fee allocations in all non-marital domestic cases should not be based on an individual case.

Changes to legislation or court rules should not be based on one case which may have unusual facts. It is often said that bad facts make for bad law. As any practitioner will attest, the majority of fee allocation cases can be measured in hundreds or a few thousand dollars. But these amounts may make a significant difference for a particular litigant. Without the benefit of the current court rule many litigants would lose any meaningful right to counsel, creating a burden on the trial courts, and

reward litigation by bullying. This would be disastrous for the children of unmarried parents in Michigan.

Respectfully submitted on behalf of the Family Law Section:

/s/ James J. Harrington, III
James J. Harrington, III
Chair, Family Law Section

/s/ Mathew Kobliska
Mathew Kobliska
Chair, Court Rules & Ethics Committee
Family Law Section

/s/ Rebecca E. Shiemke
Rebecca E. Shiemke
Chair-Elect, Family Law Section
Work Group Committee Member

/s/ Anne L. Argiroff
Anne L. Argiroff
Co-Chair, Amicus Committee
Work Group Committee Member

/s/ Elizabeth K. Bransdorfer
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/s/ Lori A. Buiteweg
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/s/ Amy M. Spilman
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Work Group Committee Member

/s/ Kent L. Weichmann
Kent L. Weichmann
Recording Secretary & Legislative Chair,
Family Law Section
Work Group Committee Member

1. The Family Law Section wishes to acknowledge to contributions of Anne Argiroff, Rebecca Shiemke, Amy Spilman, and Kent Weichmann in preparation of this position statement.

2. General information about the Annie E. Casey Foundation may be found at http://www.aecf.org/.

3. All Kids Count data for Michigan may be found at http://datacenter.kidscount.org/data#MI/2/0.

4. Michigan Data Book 2008, Michigan League for Human Services, January 13, 2009.

5. MCL 722.24(1) provides: "In all actions involving dispute of a minor child's custody, the court shall declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act."

6. The Michigan Judges Association opposes the current proposed amendment, presumably for the same reasons that it recommended its adoption in 2002.

7. Staff Comment to 2003 Amendment.

8. The authorization of attorney fees under MCL 722.27b(8) is specific to that section on grandparenting time.