March 29, 2012

Michigan Supreme Court

MSC_clerk@courts.mi.gov.

Re: ADM File No. 2006-04 (Proposed Amendment of Rule MCR 3.204)

I am an attorney with over 20 years of experience in the family law area, with the last 17 years doing child support and paternity cases as an assistant prosecuting attorney under the Title IV-D program. Generally, I support the proposed amendment, as the "supplemental complaint" provisions have been problematic and largely ignored by some practitioners, while others tried to comply.

However, I submit the following comments concerning a portion of the proposed amendment:

> (A) (3) Whenever possible, all actions involving children of the same parents shall be administered together. When the court enters a final order in a new action involving a new child of those parents, the **order shall include comprehensive provisions for custody, parenting time, and support** for both that child **and any children named in previous actions involving the same parents.** The **order must** refer to the other cases and **state that it supersedes the custody, parenting time**, and **support provisions of the orders entered previously in those cases**. In the new action, the court may modify substantive provisions in preexisting orders involving another child or children of the same parents, provided that the modification is supported by evidence presented in the new case and both parents have had an opportunity to be heard concerning the proposed modifications.
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> (My emphasis in bold added.)

1. The bolded provisions are of great concern to me for child support professionals working under the provisions of the IV-D Program (Title IV, Section D, or the Social Security Act) to establish child support orders and paternity. The Federal government reimburses Michigan for 66% of the **eligible** program costs of carrying out the IV-D Program. Custody and parenting time are not considered eligible program costs, so time spent in resolving custody and parenting time disputes cannot be billed to the IV-D Program.

   The Michigan Legislature has made provision in the two acts most used by IV-D workers to establish child support orders (The Paternity Act, MCL 722.711 *et. seq.* and The Family Support Act, MCL 522.451 *et. seq.*), which helps to avoid funding issues. The Paternity Act and the Family Support Act contain similar language:

   The Family Support Act states: "In a dispute regarding custody and parenting time for a child, the prosecuting attorney is not required to represent either party regarding the dispute." MCL 522.452(4).

The Paternity Act states: "In a dispute regarding custody or parenting time, the prosecuting attorney, an attorney appointed by the county, or an attorney appointed by the court under section 4 shall not be required to represent either party regarding that dispute." MCL 722.717b.

It has been significantly more difficult in many cases to carry out the mandates of the Title IV-D program in a timely manner since the Michigan statutes were changed to require child custody and parenting time be addressed in every support order. Currently, "parenting time as the parties agree", or something similar, is often used in the IV-D orders and the parties can file a motion to modify if they want to be more specific down the road. A court rule mandate for "comprehensive parenting time" to be provided in every support order will exacerbate the problem of getting timely final orders. The term "comprehensive parenting time" is not defined. Many times, the parties do not want detailed parenting time orders for various reasons.

The local counties would likely carry the brunt of any Federal funding reductions that resulted from the delay in getting final orders entered due to being required to put "comprehensive provisions for custody and parenting time" in every support order. A reduction in meeting federally required performance factors could result in less Title IV-A (TANF) money for Michigan.

Even ignoring the Federal funding issue, the sheer volume of IV-D cases filed by the respective prosecuting attorney's offices would make it prohibitive for PA offices to be involved in contested custody and parenting time issues in every case, especially with current staffing levels. A paternity or family support case (divorce cases, too), can be subject to dismissal if the case fails to timely progress to a "final" order. However, the PA offices would have to repeatedly file a new action if dismissal occurred and if IV-D services are involved, and the whole scenario could play out all over again. On the other hand, a "final" order for administrative purposes does not preclude the parties from further contested proceedings on child custody, parenting time, or child support, if they so desire, without requiring "comprehensive provisions" is every order involving these issues.

The case flow management standards set out through the Michigan Supreme Court Administrator's Office (SCAO) indicates the Michigan Supreme Court wants faster movement toward final orders, not more delay. While the issues of custody, parenting time, and child support are never really "final" throughout the course of a child's minority, it is still required to have something entered that is considered a "final" order in child support and paternity cases to comply with the SCAO requirements.

According to recent statistics obtained from the Department of Human Services, hospital birthing statistics for Calendar Year 2011 show that 43% of Michigan births were out of wedlock. That means there are a large number of cases involving children that do not involve a typical divorce action. It also means there are many cases where a

stereotypical marriage relationship did not exist, even though the parties may have more than one child together.

Furthermore, Michigan law already requires the court to address custody and parenting time under the Child Custody Act, and when setting a child support order (see e.g. MCL 552.452(4) in the Family Support Act; and MCL 722.717b in the Paternity Act). The proposed subsection (A) (3) of MCR 3.204 just adds confusion to that issue by requiring "comprehensive provisions" for custody and parenting time in every final order for every child of the parents in a new action involving custody, parenting time, or child support, even if fully contested proceedings involving older children of the parties recently took place.

2. A second concern over the proposed language in MCR 3.204 (A)(3) involves the requirement that:

   "…The order **must** refer to the other cases and **state that it supersedes** the custody, parenting time, and support provisions of the orders entered previously in those cases." (My emphasis in bold added.)

   First, there is no state-wide repository where all cases in every court in Michigan that may enter an order affecting custody, parenting time, or child support is required to be listed and tracked. (There is likewise no National repository for such case information and a child of the parties could be covered by an order in another state.) While it may seem to be self-evident that every person will be able and willing to provide the necessary information about other cases in other places at the time a new case is being filed, it just does not always work out that way in my experience.

   Second, there are a number of scenarios that would not fit well with the proposed language. For example, a scenario where an initial order for child one is entered in Otsego County, a second order for child two is entered in Kent County, and a third order for child three is entered in Genesee County.
   The Genesee County order would apparently be required to include comprehensive custody, parenting time, and support provisions for all three children, and must supersede the Otsego and Kent County orders, even if those children do not reside in Genesee County (e.g., a family support action may be filed in the county where either parent resides). This type of scenario is not uncommon in the IV-D world.

   Given the very mobile populations we are dealing with today, this could lead to concerns such as forum shopping, hoping to find a more lenient court or FOC, or one party trying to make it more difficult for another party to participate in court proceedings in another county. Also, if only one child were on a IV-D referral to a PA office to establish a support order, but other children of the parties exist, only the referred child would have data in the Michigan Child Support Enforcement System

(MiCSES) attached to the Court Action Referral (CAR) to be worked. But, under the proposed court rule provisions, a final order on the "referred" child could be held up by the need to establish, or re-hash, custody and parenting time on other child(ren) of the parties. The other children, again, may well be under the jurisdiction of other county courts, or even another state's court.

It would be helpful to have a more complete framework spelled out for what the court rule is trying to accomplish. For example, perhaps the cases should need to be consolidated before one court can start issuing orders that supersede another court's orders. However, one caution there, if cases are transferred and/or consolidated, a dismissal for any reason on the case involving the "newest" child may result in dismissing all the previously ordered child support, if the prior actions are consolidated with the newest action in the newest county.

3. A third concern with the proposed language to MCR 3.204(A)(3), again stems from the large and varied scenarios that come to IV-D attorneys for establishment of paternity and/or support orders. For example, some parents get back together briefly after a period of separation and have a new child. That new child could be 2, 5, even 17 years younger than previous children of these same parents.

   A requirement that custody, parenting time, and support provisions of the previously established orders be superseded by a new order may not be in the best interest of all the children. Much of the history that resulted in the previous provisions covering the older children might be lost if a different judge is now hearing the case and seeing the parties for the first time.

   And, if the payer refuses to cooperate in the new case, if current income information is not available, and the judge in the new case uses potential income much lower than what was used for the payer when the earlier orders were set, the overall support amount could be lower after adding an additional child. It could end up that payers would benefit from not participating and hoping that a lower level of income is used for the calculations to reset the order for all the children. It is not uncommon in the IV-D world for payers to decline to participate in the court process. The proposed amended language to MCR 3.204 that would mandate the support order shall include comprehensive provisions for custody, parenting time, and support in such a scenario is problematic.

4. There are a number of real life scenarios that raise my concern about the proposed language changes to MCR 3.204 (A)(3). Accordingly, please consider my comments:

(1) To clarify whether it is contemplated that an order in a new action in a new county can modify the custody, parenting time, and/or child support provisions of an order from a different jurisdiction without limitation, or, if it is contemplated that only if the previous court dockets are consolidated into the new action that previous orders can be modified;

(2) To consider changing the proposed language to provide that only in situations where previous dockets are consolidated with the new action would the previous orders be modifiable by the new court; and,

(3) To keep only the first and last sentences of (A)(3), and modify the language to state:

"Whenever practical, if a court with jurisdiction over all the parties to an action, including jurisdiction over both parents, determines it would be in the best interests of all the children of the same parents, all actions falling under MCR Subchapter 3.200 (Domestic Relations Actions) involving the children of the same parents shall be administered together. If a new action is filed, the court may modify substantive provisions in preexisting orders involving another child or children of the same parents, provided:

a. That the modification is supported by evidence presented in the new action;

b. That both parents have had an opportunity to be heard in the new action concerning the proposed modifications; and,

c. That in the event another court has issued an order addressing custody, parenting time, or child support of any of the children of the same parents, that the court handling the new action confers with the court which has already issued such an order as part of the determination of whether any such orders previously issued should be modified by the court hearing the new action."

Respectfully submitted by,

Steven M. Willis (P35124)