Order

Michigan Supreme Court
Lansing, Michigan

May 24, 2023

Elizabeth T. Clement,
Chief Justice

ADM File No. 2021-21

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

Amendment of Rule 3.613 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.613 of the Michigan Court Rules is adopted, effective July 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 3.613 Change of Name

(A) A petition to change a name must be made on a form approved by the State Court Administrative Office.

(B~~A~~) Published Notice~~;~~ Contents. Unless otherwise provided in this rule, the court must order publication of the notice of the proceeding to change a name in a newspaper in the county where the action is pending. A published notice of a proceeding to change a name must~~shall~~ include the name of the petitioner; the current name of the subject of the petition; the proposed name; and the time, date, and place of the hearing. Proof of service must be made as provided by MCR 2.106(G)(1).

(C) No Publication of Notice; Confidential Record. Upon receiving a petition establishing good cause, the court must order that no publication of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause includes but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger or increase the likelihood of such danger, such as evidence that the petitioner or another individual has been the victim of stalking, domestic violence, human trafficking, harassment, or an assaultive crime, or evidence that publication or the availability of a record of the proceeding could place the petitioner or another individual at risk of unlawful retaliation or discrimination.

(1) Evidence supporting good cause must include the petitioner's or the endangered individual's sworn statement stating the reason supporting good

cause, including but not limited to fear of physical danger, if the record is published or otherwise available. The court must not require proof of an arrest or prosecution to reach a finding of good cause.

(2) The court must issue an ex parte order granting or denying a petition requesting nonpublication and confidential record under this subrule.

(3) If a petition requesting nonpublication under this subrule is granted, the court must:

(a) issue a written order;

(b) notify the petitioner of its decision and the time, date, and place of the hearing on the requested name change under subrule (A); and

(c) if a minor is the subject of the petition, direct the petitioner to notify the noncustodial parent as provided in subrule (E), except that if the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, notice to the noncustodial parent that is not directed solely to that parent, such as by publication under subrule (E)(2)(a), must not include the current or proposed name of the minor.

(4) If a petition requesting nonpublication under this subrule is denied, the court must issue a written order that states the reasons for denying relief and advises the petitioner of the right to

(a) request a hearing regarding the denial,

(b) file a notice of dismissal, or

(c) proceed with a hearing on the name change petition by submitting a publication of notice of hearing for name change form with the court within 14 days of entry of the order denying the petition requesting nonpublication. If the petitioner submits such form, in accordance with subrule (B) the court must set a time, date, and place of a hearing and order publication.

(5) If the petitioner does not request a hearing under subrule (4)(a) within 14 days of entry of the order, the order is final.

(6) If the petitioner does not request a hearing under subrule (4)(a) or file a notice of dismissal under subrule (4)(b) within 14 days of entry of the order denying

the petition requesting nonpublication, the court may set a time, date, and place of a hearing on the petition for a name change and order publication of notice as provided in subrule (B), and if applicable, subrule (E).

(7) A hearing under subrule (4)(a) must be held on the record.

(8) The petitioner must attend the hearing under subrule (4)(a). If the petitioner fails to attend the hearing, the court must adjourn and reschedule. If the petitioner fails to attend the rescheduled hearing, the court may adjourn and reschedule, dismiss the petition for name change, or notify the petitioner that it will publish notice of the name change proceeding if the petitioner does not file a notice of dismissal within 14 days from the date of the rescheduled hearing.

(9) Following the hearing under subrule (4)(a), the court must provide the reasons for granting or denying a petition requesting nonpublication on the record and enter an appropriate order.

(10) If a petition requesting nonpublication under this subrule is denied, and the petitioner or the court proceed with setting a time, date, and place of a hearing on the petition for a name change as provided in subrules (4)(c) or (6), the court must order that the record is no longer confidential.

(B) [Relettered (D) but otherwise unchanged.]

(E~~C~~) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name must~~shall~~ be made in the following manner:~~.~~

(1) Address Known. If the noncustodial parent's address or whereabouts is known, that parent must~~shall~~ be served with a copy of the petition and a notice of hearing at least 14 days before the hearing in a manner prescribed by MCR 2.107(C).

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent must~~shall~~ be served with a notice of hearing by one of the following methods:

(a) by publishing in a newspaper and filing a proof of service as provided by MCR 2.106~~(F) and~~ (G)(1). Unless otherwise provided in this rule, t~~T~~he notice must be published one time at least 14 days before the date of the hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the

noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (~~A~~B). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.

(b) upon the petitioner's request, and in the court's discretion, the court may order service by any manner reasonably calculated to give the noncustodial parent actual notice of the proceedings and an opportunity to be heard. The petitioner must specify the proposed method of service and explain how it is reasonably calculated. The request and order under this subrule must be made on a form approved by the State Court Administrative Office. Proof of service must be made as provided by MCR 2.104(A)(2) or (3).

(D)-(E) [Relettered (F)-(G) but otherwise unchanged.]

Staff Comment (ADM File No. 2021-21): The amendment of MCR 3.613 clarifies the process courts must use after receiving a petition requesting nonpublication and confidentiality of a name change proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*). I applaud the Court's decision to adopt these changes, which provide a straightforward, accessible name-change process for overwhelmingly unrepresented petitioners as well as for the courts handling the process. These improvements have been thoughtfully considered by the Court[1] to improve clarity while accommodating stakeholder concerns and remaining well within our rulemaking authority.

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[1] The Court published an initial draft of the amendment for comment on April 13, 2022, held a public hearing on September 21, 2022, directed staff to work with stakeholders and commenters to improve the amendment, voted to adopt an amended version, and is now publishing with an effective date of July 1, 2023, to allow courts, partners, and staff to complete internal processes.

I disagree with the dissenting justices that several changes are substantive rather than procedural in nature and are therefore outside the Court's rulemaking authority. Instead, these changes are consistent with the statutory language and fill in the gaps where guidance is lacking. First, although the court rule says that the court "must" order nonpublication on a showing of good cause, MCR 3.613(C), and the statute uses "may," MCL 711.3(1), the use of "may" does not always signal discretion resting exclusively with the court. For example, in *James Twp v Rice*, 509 Mich 363, 372-376 (2022), we held that language in the Right to Farm Act, MCL 286.471 *et seq*., stating that a prevailing farm or farm operation "may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred" did not give courts discretion to refuse to award costs altogether, but instead entitled the prevailing party to recover costs with courts merely maintaining discretion as to whether the expenditures were "reasonably incurred."

Like all statutory language, the word "may" is properly understood only when read in context with the statute and the statutory scheme. *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 307 (2020). The use of "may" versus "must" is not the sole determinant of whether a statute is mandatory or permissive and can be overcome by the Legislature's intent. See *Kment v Detroit*, 109 Mich App 48, 61-62 (1981); see also 7 Sutherland, Statutes and Statutory Construction (7th ed), § 25:3 ("[N]o formalistic rule of grammar or word form should stand in the way of carrying out legislative intent."). "As a general rule, the word 'may' will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in such a sense." *Mill Creek Coalition v South Branch of Mill Creek Intercounty Drain Dist*, 210 Mich App 559, 565 (1995).

Here, the word "may" must be considered in the context of the placement and purposes of the twin statutory provisions. MCL 711.1 explains the name-change process and requirements and that publication is the default; MCL 711.3 explains that the publication requirement may be waived for good cause. It makes little sense to read MCL 711.3 as allowing a court to refuse to order nonpublication despite its determination that good cause had been shown. Under the dissent's approach, a court would have the discretion to refuse to order nonpublication even if that court concluded that publication "could place the petitioner or another individual in physical danger[.]" MCL 711.3(1). Such a decision would be contrary to the statute's purpose and would smack of arbitrary application of the law outside the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006).

I further disagree that this amendment expands the definition of "good cause" beyond that contained in MCL 711.3. The statute uses broad "includes, but is not limited to" language as to what evidence can establish good cause for nonpublication. MCL 711.3(1). The rule now provides an illustrative list of reasons that, if supported by credible evidence, give rise to a finding of good cause, including statutory language on fear of

physical danger as well as fear of additional crimes, discriminatory conduct, or retaliatory conduct against which our laws offer protection. Again, the circuit court must still assess and weigh the evidence to determine whether it credibly establishes good cause. MCL 711.3(1). The rule does not divest courts of discretion to deny a request for nonpublication.

Much of the disagreement appears to stem from differing viewpoints on the level of guidance that we should be providing to the circuit courts. But it is well within this Court's authority to clarify the rules of practice and procedure, and we should take the opportunity to do so, especially when stakeholders tell us that the existing rules and statutes are confusing and inconsistently applied by courts. It makes perfect sense in this context to allow largely unrepresented petitioners an additional chance to attend a hearing on a request for nonpublication, with courts retaining discretion to dismiss or publish the petition after the second missed hearing. See MCR 3.613(C)(8). Similarly, it is logical to require courts to issue an appropriate order following a hearing on the denial of an ex parte order for nonpublication, MCR 3.613(9), just as the rules require in the personal-protection-order context, see MCR 3.705(B)(6) ("At the conclusion of the hearing the court must state the reasons for granting or denying a personal protection order on the record and enter an appropriate order."). These amendments, to be paired with user-friendly SCAO forms, provide maximum flexibility to courts while balancing the ability of largely pro se petitioners seeking name changes to access justice.

WELCH, J., joins the statement of CAVANAGH, J.

ZAHRA, J. (*dissenting*).

Although I agree with some of the changes aimed at making MCR 3.613 more consistent with the statutory requirements in MCL 711.3 regarding petitions not to publish notice of a name-change proceeding, I dissent from several aspects of this Court's order that go well beyond implementation of the statute. In short, several of this Court's changes to MCR 3.613—which were not included in this Court's April 13, 2022 order publishing for public comment the proposed revisions to MCR 3.613—impermissibly modify the substantive law pertaining to the discretion circuit courts have in deciding petitions requesting nonpublication of a name-change proceeding. Thus, these proposed amendments to our court rule fall outside the bounds of this Court's rulemaking authority.

The Michigan Constitution provides this Court with rulemaking authority pertaining to the practice and procedure of our courts.[2] In accordance with separation-of-powers principles, this Court's rulemaking authority is exclusive and "extends only to rules of practice and procedure, as 'this Court is not authorized to enact court rules that establish,

[2] See Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.").

abrogate, or modify the substantive law.' "[3] "Therefore, if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration[,] the court rule should yield."[4]

MCL 711.1 sets out the requirements and procedure for a petition seeking a name change. MCL 711.3 discusses publication of a name-change proceeding and provides, in relevant part:

> (1) In a proceeding under [MCL 711.1], the court may order for good cause that no publication of the proceeding take place and that the record of the proceeding be confidential. Good cause under this section includes, but is not limited to, evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking[5] or an assaultive crime.
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> (2) Evidence under subsection (1) of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available. If evidence is offered of stalking or an assaultive crime, the court shall not require proof of an arrest or prosecution for that crime to reach a finding of good cause under subsection (1).

As a matter of public policy, then, the Legislature intended for circuit courts to decide whether a petitioner has established good cause to waive publication of a name-change proceeding and whether to grant a request for nonpublication. Although new Subrules (C) and (C)(1), as published for comment, modeled the language set forth in MCL 711.3(1) and (2),[6] the changes this Court now enacts conflict with the Legislature's policy determinations.

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[3] *People v Watkins*, 491 Mich 450, 472-473 (2012), quoting *McDougall v Schanz*, 461 Mich 15, 27 (1999).

[4] *McDougall*, 461 Mich at 30-31 (quotation marks, citation, and brackets omitted).

[5] MCL 711.3(5) provides that "stalking" is defined according to MCL 750.411h and MCL 750.411i, which define the term as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d); MCL 759.411i(1)(e).

[6] Proposed MCR 3.613(C), as published for comment, stated in part:

First, MCL 711.3(1) states that "the court *may* order for good cause that no publication of the [name-change] proceeding take place and that the record of the proceeding be confidential."[7] The plain language of the statute vests discretion in the circuit court to decline to require publication of notice of a name-change proceeding on a showing of good cause. This Court, however, has effectively rewritten the statute to strip circuit courts of that discretion by changing "may" to "must" in MCR 3.613(C), thereby *requiring* a court to order nonpublication of a name-change proceeding upon receiving a petition establishing good cause.[8] In other words, while MCL 711.3(1) clearly leaves discretion for the circuit court to deny a petition requesting nonpublication even if good cause is shown, this Court now removes that discretion altogether.

Second, this Court expands the statutory definition of "good cause" beyond what MCL 711.3(1) provides. MCL 711.3(1) defines "good cause" to include evidence involving possible physical danger, such as stalking or an assaultive crime. Thus, the Legislature not only chose to partially define the standard for nonpublication under its definition of "good cause," it also intended for the circuit courts to have the discretion to determine what else may constitute "good cause." Rather than effectuating that intent, this Court now creates a laundry list of circumstances that would definitively constitute "good cause" that, in conjunction with the prior change, automatically require the circuit court to grant the petition requesting nonpublication if good cause is established. Simply put, further defining "good cause" in MCR 3.613(C) goes beyond implementing MCL 711.3(1)

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> (1) Evidence of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available.

[7] Emphasis added.

[8] See *James Twp v Rice*, 509 Mich 363, 372 (2022) ("[T]he term 'may' is ordinarily considered to be permissive."). Justice CAVANAGH states that "the use of 'may' does not always signal discretion resting exclusively with the court," citing *Rice* in support. Unlike MCL 711.3(1), the plain language of the statute in *Rice* gave the prevailing farm or farm operation the discretion to recover attorney fees, not the court. *Id*. at 372 ("MCL 286.473b does not say that the court 'may award' costs, expenses, and fees but that the prevailing farm or farm operation 'may recover' them.").

under this Court's rulemaking authority and, instead, constitutes an impermissible substantive amendment to the statute.[9]

Third, this Court's changes to MCR 3.613(C)(8)[10] now mandate that circuit courts adjourn and reschedule a hearing regarding a denial of a petition requesting nonpublication if the petitioner fails to appear. Why is this Court meddling in the procedure and process of the circuit courts? There is no logical reason to *require* the circuit court to reschedule a hearing for which the petitioner—who requested the hearing in the first place—failed to appear. Once the petitioner fails to appear, the circuit court should have the discretion to reschedule it or proceed with publication unless the petitioner opts to dismiss the petition for a name change altogether.[11] New Subrule (C)(8) not only eliminates the discretion our circuit courts have in resolving with finality a petition requesting nonpublication, it also encroaches on the circuit courts' inherent authority to control their own dockets and "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[12]

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[9] Justice CAVANAGH relies on the statute's use of the "includes, but is not limited to" phrase to support the Court's extension of the definition of "good cause." I agree that the phrase contemplates circumstances constituting "good cause" for nonpublication beyond those that place the petitioner in physical danger. But the Legislature left it for the circuit courts to determine what those circumstances may be, not for this Court to prescribe those circumstances under the guise of our rulemaking authority.

[10] Proposed MCR 3.613(C)(8), as published for comment, stated: "The petitioner must attend the hearing under subrule (4). If the petitioner fails to attend the hearing, the court may adjourn and reschedule or dismiss the petition for a name change."

[11] Justice CAVANAGH believes it "makes perfect sense in this context to allow largely unrepresented petitioners an additional chance to attend a hearing on a request for nonpublication, with courts retaining discretion to dismiss or publish the petition after the second missed hearing." Although courts may generally afford pro se litigants some leniency in pursuing their claims, such as drafting pleadings, see *Haines v Kerner*, 404 US 519, 520 (1972) (noting allegations in a pro se complaint are held "to less stringent standards than formal pleadings drafted by lawyers"), I see no reason why that leniency, which is not without its limits, should allow a party to miss a hearing that the party requested.

[12] *Maldonado v Ford Motor Co*, 476 Mich 372, 376 (2006), citing *Chambers v NASCO, Inc*, 501 US 32, 43 (1991).

Finally, new MCR 3.613(C)(9) requires the court to "enter an appropriate order" after the conclusion of a hearing under Subrule (C)(4) regarding the denial of a petition requesting nonpublication. However, Subrule (C)(4) already requires the court to issue a written order stating the reasons for denying the petition requesting nonpublication, so it is unclear what this second "appropriate order" is supposed to be. Is this Court requiring the court to reaffirm its previous order if it continues to deny relief? Additionally, are requests for a hearing regarding the denial under Subrule (C)(4)(a) more appropriately categorized as motions for reconsideration, in which case the petitioner would need to show palpable error under MCR 2.119(F)(3)? The confusion Subrule (C)(9) is likely to cause further underscores the problems with these rule changes and the haste with which this Court adopts them.

In sum, although some of these changes may be well-intentioned, it is not our role to utilize our rulemaking authority to modify the policy choices of the Legislature, no matter how well-intentioned our actions may be.[13] Because the aforementioned changes have no basis in the statute they are intended to implement and, instead, modify the substance of that statute, these changes go beyond our rulemaking authority. Accordingly, I dissent from this Court's order.

VIVIANO, J., joins the statement of ZAHRA, J.

[13] See *People v Schaefer*, 473 Mich 418, 432 (2005) ("A court is not free to cast aside a specific policy choice adopted on behalf of the people of the state by their elected representatives in the Legislature simply because the court would prefer a different policy choice. To do so would be to empower the least politically accountable branch of government with unbridled policymaking power. Such a model of government was not envisioned by the people of Michigan in ratifying our Constitution, and modifying our structure of government by judicial fiat will not be endorsed by this Court.").