FAMILY LAW SECTION
Respectfully submits the following position on:

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MCR 2.302

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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.

To date, the State Bar does not have a position on this matter.

The total membership of the Family Law Section is 2,481.

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 to this position was 21. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:
Family Law Section

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

E-Mail:
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Proposed Court Rule or Administrative Order Number:
MCR 2.302

Date position was adopted:
May 5, 2012

Process used to take the ideological position:
The proposed revisions were first approved by the Family Law Section Court Rules & Ethics committee, and then submitted to the full council. The proposal was adopted by the full council by vote at its regular scheduled meeting.

Number of members in the decision-making body:
21

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

Position:
Support and Amend

Explanation of the position, including any recommended amendments:
The filing of motions post-judgment is a regular occurrence in our practices. The absence of a Michigan Court Rule addressing post-judgment discovery is a problem which can be solved with some ease, in our collective opinion. The Courts are uneven in their approach to this issue. The Court Rules Committee felt that normalization and predictability relative to the permissibility of discovery ought to be codified in a court rule.

An article identifying the nature of the problem entitled "Post-Judgment Discovery Issues" was authored by practitioner Amy M. Spilman, and published in the October issue of Laches.

We recommended that MCR 2.302 be amended to include (4) as follows:

(A) Availability of Discovery.

(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.

(4) For purposes of this subchapter, the "commencement of an action" includes the filing of postjudgment motions brought in "Domestic Relations Actions," as defined by subchapter 3..200 of these rules.

Post-Judgment Discovery Issues

by Amy M. Spilman

Consider this scenario: the judgment of divorce has been final for several years when a support dispute emerges. Opposing counsel issues a records subpoena to your client's employer, perhaps, or to his bank requesting production of records, but has yet to file a motion with the court. Is this permissible? What if a motion to modify support has been filed, and counsel issues a subpoena prior to the hearing – does your answer change? The proper application of the court rules governing discovery in post-judgment domestic relations cases is far from clear and leads to disparate approaches from courts and counselors, including the abusive or harassing use of attorneys' power to issue subpoenas without prior court approval. The glaring absence of court rules specifically tailored to the unique needs of family law must be remedied to bring much-needed uniformity to post-judgment discovery practices.

Domestic relations actions are governed generally by subchapter 3.200 of the Michigan Court Rules. MCR 3.201(A) – **Applicability of Rules** – specifically provides that the subchapter applies not only to "actions" within the domestic relations rubric – divorce, separate maintenance, annulment, the affirmation of marriage, paternity, family support, custody of minors – but also "to proceedings that are ancillary or subsequent to those actions which relate to custody of and visitation with minors or the support of minors and spouses or former spouses." Yet, although subchapter 3.200 clearly anticipates numerous reasons for the court's post-judgment involvement in a domestic relations matter, no specific court rule addresses post-judgment discovery motions in a domestic relations context. MCR 3.213 – **Postjudgment Motions and Enforcement** – merely provides that "post-judgment motions in domestic relations actions are governed by MCR 2.119" and, as a 'catch-all' provision, MCR 3.201(C) refers the practitioner back to the general rules of civil procedure by providing that "except as otherwise provided in this subchapter, practice and procedure in domestic relations actions is governed by other applicable provisions of the Michigan Court Rules." Subchapter 2.600, addressing post-judgment proceedings more broadly, relates mostly to actions seeking to modify, clarify or obtain relief from judgments and contains no reference whatsoever to discovery issues.

Thus, the family law attorney must refer to subchapter 2.300 for the rules directly addressing discovery. The few court rules that contemplate a need for post-judgment discovery clearly do not apply to the unique circumstances that domestic relations cases entail. The only court rule addressing post-judgment discovery by name at all is MCR 2.303(B) – **Depositions Before Action or Pending Appeal** – which allows a post-judgment deposition if an appeal has been taken or before the appeal period expires, for the limited purpose of perpetuating testimony and only upon leave of the court. So the practitioner is left with the general discovery rules of MCR 2.302(A)(1) – **Availability of Discovery** – which provides that "after commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules," and MCR 2.302(B)(1) – **Scope of Discovery** – which states that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." (Emphasis supplied.) Both court rules evidence Michigan's "strong historical commitment to a far-reaching, open and effective discovery practice. In light of that commitment, [the Supreme Court] has repeatedly emphasized that discovery rules are to be liberally construed ... to further the ends of justice."[1] Yet, at the same time "a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests."[2] By limiting discovery to pending actions, the court rules help put the discovery request in appropriate, relevant context to the issues raised therein.

The operative word/phrase in both MCR 2.302(A)(1) and MCR 2.302(B)(1) is "action" or "pending action." General civil litigation has clear start and end points; as MCR 2.101(A) provides, an "action" is commenced by filing a complaint with the court, and it terminates with the entry of a judgment. Both court rules use the term of art, "action," and even MCR 3.201(A) appears to distinguish

between "actions" such as divorce and paternity cases versus subsequent or ancillary "proceedings"; however, the Court of Appeals rejected this potential bright-line division between "actions" and "proceedings" as essentially a distinction without a difference. In *In Re Brown*[3] an attorney was sanctioned by the trial court for conducting a deposition as part of his investigation of a wrongful death action on behalf of his client, who was duly appointed the personal representative of the estate upon the filing of a petition, which initiated the probate "proceeding." The deponent's attorney sought the sanction on the basis that the "proceeding" did not constitute a contested case or civil action within the meaning of MCR 2.302 to authorize the use of discovery.

The Court of Appeals, however, reversed, finding that while the probate court rules are specialized rules recognizing a specific type of action, a probate "proceeding" is an "action" sufficient to authorize the application of the general discovery rules contained in chapter 2, particularly since MCR 5.001(A) provides that "procedures in the probate court are governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter." This reasoning is directly applicable in the domestic relations context. As in probate court, the post-judgment "proceedings" of MCR 3.201(A) merely refer to the accepted forms of action that are the routine practice to raise post-judgment issues in domestic relations matters. Similarly, MCR 3.201(C) mirrors the language of MCR 5.001(A), subjecting domestic relations matters to the general court rules applicable to all civil actions.

Few rules address post-judgment discovery because there simply is no need for it. Indeed, MCR 2.602(A)(3) – **Entry of Judgments or Orders** – requires that "each judgment must state, immediately preceding the judge's signature, whether it resolves the last pending claim and closes the case." However, domestic relations cases are unique from other civil matters in that litigation may continue for years after the entry of a judgment. Perhaps, then, the proper focus is on the definition of "pending." Since the court has continuing jurisdiction to address custody, support and parenting time issues, or enforcement disputes for years after the entry of the judgment, is the case always a "pending" action? Once a judgment of divorce or order of filiation is entered, what issues remain "pending," and thus relevant, and subject to discovery?

It hardly seems questionable that a domestic relations case, which is clearly subject to post-judgment litigation, remains "pending" in some amorphous way.[4] The Court of Appeals touched on this issue in *Olepa v. Olepa*.[5] The paternal grandfather sought visitation under the former Grandparent Visitation Act after the child's parents divorced. In construing whether a child custody dispute was "pending before the court" to confer standing on the grandfather, the *Olepa* court, at 696, stated that "the special nature of divorce cases should be kept in mind. A circuit court retains some control even after a divorce judgment is entered. The trial judge who presides over a divorce action retains continuing authority to oversee the parties' compliance with the terms of the divorce judgment and to modify a previously issued judgment." The court ultimately held that the Legislature could not have intended to limit a grandparent's right to petition for visitation to the discrete period of time before a judgment of divorce was entered, and specifically overruled a previous case, *Attard v. Adamczyk*,[6] which could have been read to hold that a child custody dispute was no longer pending once a divorce judgment was entered.

But at the same time, bearing in mind the balance between expansive discovery and the right to be free from abusive and harassing discovery, the "suspended pendency" of domestic relations cases should not give a party *carte blanche* to engage in unrestricted discovery without there being some discernible connection to a pending dispute raised by a post-judgment motion. "Michigan's commitment to open and far-reaching discovery does not encompass 'fishing expedition[s].'"[7] Further, to hold otherwise would make it impossible to determine whether the discovery request was truly relevant to the subject matter. As the court stated in *Hamed v. Wayne County*,[8] "the purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy."

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Local practice interpreting the availability of post-judgment discovery varies widely among jurisdictions and judges. I personally have encountered judges with perspectives on both sides of the spectrum: one judge refused to quash a post-judgment records subpoena not related to a motion or specific pending controversy (under the theory that a divorce case is always pending), while a judge in a neighboring county did quash a subpoena that preceded the filing of a specific post-judgment motion (under the theory that no disputed issue was actively pending before the court). One approach would be to require the filing of a motion to authorize discovery either contemporaneously with or after the filing of the post-judgment motion. This has some appeal, as it would put the burden on the proponent to establish the parameters of the discovery, rather than require the opponent to file a motion to quash or seek a protective order. However, unless this request is merely a formality to start the discovery process, one can anticipate that this could potentially lead to inequitable results if the court denied a discovery request where there are barriers to obtaining information.

The State Bar of Michigan Family Law Section has noted the inadequacy of the current court rules and the disparate interpretations among the bench and bar, and advocates an approach that recognizes the problem is not *whether* discovery should be permitted, but rather the *timing* of when it is appropriate. The Rules Committee has undertaken, at the time of this writing, the task of proposing an amendment of MCR 2.302 (A) – **Availability of Discovery** – to the Michigan Supreme Court, which is (amended portion noted in bold type):

(A) Availability of Discovery.

(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.

(4) For purposes of this subchapter, the "commencement of an action" includes the filing of postjudgment motions brought in "Domestic Relations Actions," as defined by subchapter 3.200 of these rules.[9]

This amendment expands the definition of "action" to clarify that post-judgment discovery must be preceded by the filing of a post-judgment motion, thus resolving any apparent conflicts between MCR 3.201(A) and MCR 2.302, and establishing a clear demarcation of when discovery is appropriate, which should bring uniformity to our post-judgment practice. It is a clear and simple change that addresses the problems highlighted above and is worthy of the support of the family bar.

Amy M. Spilman is a member of Alexander, Eisenberg & Spilman, PLLC, in Birmingham, specializing her practice in family law litigation and appeals as well as probate matters. She obtained a Bachelor of Arts degree from the University of Michigan and her Juris Doctor from the University of Michigan Law School.

Footnotes

1 *Domako v. Rowe*, 438 Mich 347, 359; 475 NW2d 30 (1991).
2 *Bloomfield Charter Twp. v. Oakland Co. Clerk*, 253 Mich App 1, 35-36; 645 NW2d 610 (2002).
3 *In Re Brown*, 229 Mich App 496, 582 NW2d 530 (1998).
4 See *Talbot v. Talbot*, 99 Mich App 246, 253; 297 NW2d 896 (1980), which held that the entry of a judgment of divorce does not terminate the suit and therefore new process is not required to acquire personal jurisdiction in connection with post-judgment proceedings to modify custody and support. "If the court had in personam jurisdiction when it granted the divorce decree this authorizes revision, amendment or alteration of the custody and support provisions without new process issuing."
5 *Olepa v. Olepa*, 151 Mich App 690, 391 NW2d 446 (1986).
6 *Attard v. Adamczyk*, 141 Mich App 246, 367 NW2d 75 (1985).
7 *In re Estate of Hammond*, 215 Mich App 379, 386-387, 547 NW2d 36 (1996).
8 *Hamed v. Wayne County*, 271 Mich.App. 106, 109; 719 N.W.2d 612 (2006).
9 Courtesy of Carol Breitmeyer, State Bar of Michigan Family Law Section, Rules Committee.