

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

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ADM File No. 2016-32

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The Probate & Estate Planning 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 Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

The State Bar's position on this matter is to support the proposed amendments subject to the following amendments:

- (1) MCR 5.801: Delete subsection (A)(1), add reference to MCR 5.101(C) to paragraph (A), revise definition of "final orders" in paragraph (A) to remove reference to MCR 7.202(6)(a) to avoid circularity, and delete "as may be hereafter" in subsection (A)(35);
- (2) MCR 7.202(6)(a): Add subparagraph stating that anything designated as a "final order" in MCR 5.801(A) is a "final order" in a civil case, which would render proposed subparagraphs (a)(vi) and (a)(vii) unnecessary;
- (3) MCR 7.202(6)(a)(vi): Delete as unnecessary, or, alternatively, combine proposed subsection (6)(a) (vi) with existing (6)(i) to avoid duplication.

- (4) MCR 7.202(6)(a)(vii): Delete as unnecessary and confusing, or, alternatively, change “as defined in MCR 5.801(B)” to “as described in MCR 5.801(A);”
- (5) MCR 7.212(A)(1)(a)(i) and 7.212(A)(2)(a)(i): Change proposed language as follows: “adult or minor guardianship or conservatorship case under the Estates and Protected Individuals Act Code, guardianship of the person or estate case under the Mental Health Code, ~~mental illness involuntary mental health treatment~~ cases under the Mental Health Code . . .”
- (6) MCR 7.213(C)(2): Change proposed language as follows: “guardianship cases under the Estates and Protected Individuals Act Code and under the Mental Health Code, conservatorship cases under the Estates and Protected Individuals Code, and ~~mental illness involuntary mental health treatment~~ cases under the Mental Health Code.”

The total membership of the Probate & Estate Planning Section is 3,762.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 19. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Probate & Estate Planning Section

Contact person:

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Proposed Court Rule or Administrative Order Number:

[2016-32 – Proposed Amendments of MCR 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.202, 7.203, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213](#)

The proposed amendments of Rules 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.202, 7.203, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213 of the Michigan Court Rules would require all appeals from probate court to be heard in the Court of Appeals, instead of the bifurcated system that previously required some probate appeals to be heard in the Court of Appeals and some to be heard in the local circuit court. The proposal also would establish priority status for appeals in guardianship and mental illness cases, similar to child custody cases.

Date position was adopted:

January 14, 2017

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:

23

Number who voted in favor and opposed to the position:

19 Voted for position

0 Voted against position

0 Abstained from vote

4 Did not vote (absent)

Position:

Support with Recommended Amendments

Explanation of the position, including any recommended amendments:

1. 5.801(A)(1) We recommend deleting (1) since this identical language is already in the main part of paragraph (A) except for a reference to MCR 5.101(C). We suggest adding to 5.801(A) a reference to MCR 5.101(C) and a deletion of (A)(1) with all subsequent numbers to be modified accordingly. Further, in the body of (A), final orders are described in (A) but the list of items in the “laundry list” that follows contains orders that are not normally a final order; deleting current sub (1) is important to leave all things that describe, or define, a final order in the body of

(A) and all items that are not normally final orders described in the laundry list.

2. 5.801(A)(35) should be changed to take out “as may be hereafter” since this might apply to laws already in existence and the rule should not inadvertently apply to only laws that are hereafter provided by law.

3. 7.202(6)(a)(vi). There are other types of orders that MCR 7.202(6)(a) applies to but are not specifically referenced. Therefore, the reference is not necessary. We recommend deleting this completely.

4. 7.202(6)(a)(vii). First, the reference to MCR 5.801(B) should be changed to MCR 5.801(A). If the Court decides to retain this subparagraph and (vi), above, we believe it is very important to delete everything after “a final order, as defined in MCR 5.801(B)” and change the word, “defined” to “described” and change “(B)” to “(A).” The list in subparagraph (vii) differs from the laundry list of Orders that are final Orders in 5.801(A). Having two laundry lists that vary is very confusing and suggest different substantive rights will exist depending on which rule is referenced.

5. 7.212(A)(1)(a)(i) & (2)(a)(i) and 7.213(C)(2): The use in these subparagraphs of the words “mental illness” cases that are referred to in the Mental Health Code as “involuntary mental health treatment” cases should be changed to match the statutory language.

6. The changes to MCR 7.212 and 7.213 relative to giving certain probate matters priority is a good idea; we support these changes.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2016-32_2016-11-23_FormattedOrder_PropAmendtsToProbateAppealsv2.pdf

Proposed Amendment of
Rule 5.801, 5.802, 7.102, 7.103,
7.108, 7.109, 7.202, 7.203, 7.205,
7.208, 7.209, 7.210, 7.212, and 7.213 of the
Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.202, 7.203, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Rule 5.801 Appeals to ~~Other Courts~~ Court of Appeals

~~(A) Right to Appeal. An interested person aggrieved by an order of the probate court may appeal as provided by this rule.~~

(A) Orders Appealable to Court of Appeals Appeal of Right. Orders appealable of right to the Court of Appeals are defined as and limited to the following Pursuant to MCL 600.308(1), a final order affecting the rights or interests of either a party to a civil action in a probate court under MCR 5.101(C) or an interested person in a proceeding in the probate court is appealable as a matter of right to the Court of Appeals. A probate court order is “final” if it qualifies as a final order under MCR 7.202(6)(a), or if it affects with finality the rights or interests of a party or an interested person in the subject matter, including, but not limited to, the following orders:

(1) a final order affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C);

~~(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a trust created under a will. These are defined as and limited to orders resolving the following matters:~~

| ~~(12a)~~ appointing or removing a ~~personal representative, conservator, trustee, fiduciary or trust protector as referred to defined in MCL 700.7103(n), or denying such an appointment or removal;~~

| ~~(23b)~~ admitting or denying to probate of a will, codicil, or other testamentary instrument;

| ~~(34e)~~ determining the validity of a governing instrument as defined in MCL 700.1104(m);

| ~~(45d)~~ interpreting or construing a governing instrument as defined in MCL 700.1104(m);

| ~~(56e)~~ approving or denying a settlement relating to a governing instrument as defined in MCL 700.1104(m);

| ~~(67f)~~ reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;

| ~~(78g)~~ granting or denying a petition to consolidate or divide trusts;

| ~~(89h)~~ discharging or denying the discharge of a surety on a bond from further liability;

| ~~(94i)~~ allowing, disallowing, or denying a claim;

| ~~(104j)~~ assigning, selling, leasing, or encumbering any of the assets of an estate or trust;

| ~~(112k)~~ authorizing or denying the continuation of a business;

| ~~(123l)~~ determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;

- | (134m) authorizing or denying rights of election;
- | (145n) determining heirs, devisees, or beneficiaries;
- | (156o) determining title to or rights or interests in property;
- | (167p) authorizing or denying partition of property;
- | (178q) authorizing or denying specific performance;
- | (189r) ascertaining survivorship of parties;
- | (1920s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;
- | (201t) granting or denying a petition to determine *cy pres*;
- | (212u) directing or denying the making or repayment of distributions;
- | (223v) determining or denying a constructive trust;
- | (234w) determining or denying an oral contract relating to a will;
- | (245x) allowing or disallowing an account, fees, or administration expenses;
- | (256y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);
- | (267z) determining or directing payment or apportionment of taxes;
- | (278aa) distributing proceeds recovered for wrongful death under MCL 600.2922;
- | (289bb) assigning residue;
- | (2930ee) granting or denying a petition for instructions;
- | (301dd) authorizing disclaimers;
- | (312ee) allowing or disallowing a trustee to change the principal place of a trust's administration;

| (323) affecting the rights and interests of an adult or a minor in a guardianship proceeding under the Estates and Protected Individuals Code;

| (334) affecting the rights or interests of a person under the Mental Health Code;

| (3453) other appeals as may be hereafter provided by statute law.

(C) ~~Final Orders Appealable to Circuit Court. All final orders not enumerated in subrule (B) are appealable of right to the circuit court. These include, but are not limited to:~~

(1) ~~a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding;~~

(2) ~~a final order affecting the rights or interests of a person under the Mental Health Code, except for a final order affecting the rights and interests of a person in the estate of an individual with developmental disabilities.~~

(BD) ~~Appeal by Leave Interlocutory Orders. Any judgment or order of the probate court which is not a final judgment or final order appealable of right interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the circuit court of Appeals and only by leave of that court. The circuit court shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.~~

(E) ~~Transfer of Appeals from Court of Appeals to Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the Court of Appeals, the Court of Appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court.~~

(F) ~~Appeals to Court of Appeals on Certification by Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the Court of Appeals if the probate court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of~~

~~opinion and that an appeal directly to the Court of Appeals may materially advance the ultimate termination of the litigation. An appeal to the Court of Appeals under this subrule is by leave only under the provisions of MCR 7.205. In lieu of granting leave to appeal, the Court of Appeals may remand the appeal to the circuit court for consideration as on leave granted.~~

Rule 5.802 Appellate Procedure; Stays Pending Appeal

(A)-(B) [Unchanged.]

(C) Stays Pending Appeals. An order removing or appointing a fiduciary; appointing a special personal representative or a special fiduciary; granting a new trial or rehearing; granting an allowance to the spouse or children of a decedent; granting permission to sue on a fiduciary's bond; or suspending a fiduciary and appointing a special fiduciary, is not stayed pending appeal unless ordered by the court on motion for good cause.

Rule 7.102 Definitions

For purposes of this subchapter:

(1)-(8) [Unchanged.]

(9) "trial court" means the district, ~~probate~~, or municipal court from which the "appeal" is taken.

Rule 7.103 Appellate Jurisdiction of the Circuit Court

(A) Appeal of Right. The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) [Unchanged.]

~~(2) a final order of a probate court under MCR 5.801(C);~~

~~(23)~~ a final order or decision of an agency governed by the Administrative Procedures Act, MCL 24.201 *et seq.*; and

~~(34)~~ a final order or decision of an agency from which an appeal of right to the circuit court is provided by law.

(B) [Unchanged.]

Rule 7.108 Stay of Proceedings; Bond; Review

(A)-(D) [Unchanged.]

~~(E) Probate Actions.~~

- ~~(1) The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.~~
- ~~(2) A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).~~

Rule 7.109 Record on Appeal

(A) [Unchanged.]

(B) Transcript.

- (1) *Appellant's Duties; Orders; Stipulations.*
 - (a) [Unchanged.]
 - ~~(b) In an appeal from probate court, only that portion of the transcript concerning the order appealed need be filed. The appellee may file additional portions of the transcript.~~
 - (c)-(e) [Relettered (b)-(d) but otherwise unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

Rule 7.202 Definitions

For purposes of this subchapter:

- (1)-(5) [Unchanged.]
- (6) "final judgment" or "final order" means:
 - (a) In a civil case,

(i)-(v) [Unchanged.]

~~(vi) — the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after a reversal of an earlier final judgment or order commenced in the probate court under MCR 5.101(C);~~

~~(vii) — a final order, as defined in MCR 5.801(B), affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, an inter vivos trust or a trust created under a will, a guardianship proceeding of an adult or minor under the Estates and Protected Individuals Code, or a mental health proceeding under the Mental Health Code.~~

(b) [Unchanged.]

Rule 7.203 Jurisdiction of the Court of Appeals

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, probate court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court

(a)-(b) [Unchanged.]

(2) [Unchanged.]

(B) Appeal by Leave. The court may grant leave to appeal from:

(1) a judgment or order of the circuit court ~~and~~, probate court, or court of claims that is not a final judgment appealable of right;

(2)-(5) [Unchanged.]

(C)-(G) [Unchanged.]

Rule 7.205 Application for Leave to Appeal

(A) [Unchanged.]

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1)-(4) [Unchanged.]

~~(5) if the appeal is from a probate court order, 5 copies of the probate court's certification of the issue, as required by law;~~

~~(56)~~ proof that a copy of the filed documents was served on all other parties; and

~~(67)~~ the entry fee.

(C)-(H) [Unchanged.]

Rule 7.208 Authority of Court or Tribunal Appealed From

(A)-(C) [Unchanged.]

(D) Probate Actions. The probate court retains continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.

(D)-(I) [Relettered (E)-(J) but otherwise unchanged.]

Rule 7.209 Bond; Stay of Proceedings

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614 or MCL 600.867, or except as otherwise provided under this rule, an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a cause in which a party has appealed a trial court's denial of the party's claim of governmental immunity.

(2)-(3) [Unchanged.]

- (B) Responsibility for Setting Amount of Bond in Trial Court.
- (1) Civil Actions and Probate Proceedings. Unless determined by law, or as otherwise provided by this rule, the dollar amount of a stay or appeal bond in a civil action or probate proceeding must be set by the trial court in an amount adequate to protect the opposite party.

(2) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Conditions of Stay Bond.

- (1) Civil Actions and Probate Proceedings. In a bond filed for stay pending appeal in a civil action or probate proceeding, the appellant shall promise in writing:

(a)-(e) [Unchanged.]

(2) [Unchanged.]

(G) Sureties and Filing of Bond; Service of Bond; Objections; Stay Orders. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court that entered the order or judgment to be stayed.

- (1) Civil Actions and Probate Proceedings.

(a)-(g) [Unchanged.]

(2) [Unchanged.]

(H)-(I) [Unchanged.]

Rule 7.210 Record on Appeal

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

- (1) Appeal From Court. In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. In an appeal from probate court ~~in an estate or trust proceeding~~, only the order appealed from

and those petitions, opinions, and other documents pertaining to it need be included.

(2)-(4) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) [Unchanged.]

(b) In an appeal from probate court ~~in an estate or trust proceeding~~, only that portion of the transcript concerning the order appealed from need be filed. The appellee may file additional portions of the transcript.

(c)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

Rule 7.212 Briefs

(A) Time for Filing and Service.

(1) *Appellant's Brief.*

(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 28 days after the claim of appeal is filed, the order granting leave is certified, the transcript is filed with the trial court, or a settled statement of facts and certifying order is filed with the trial court or tribunal, whichever is later, in a child custody case, adult or minor guardianship case under the Estates and Protected Individuals Act or under the Mental Health Code, involuntary mental health treatment ~~mental illness~~ cases under the Mental Health Code, or an interlocutory criminal appeal. This time may be extended only by the Court of Appeals on motion; or

(ii)-(iii) [Unchanged.]

(b) [Unchanged.]

(2) *Appellee's Brief.*

(a) Filing. The appellee shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 21 days after the appellant's brief is served on the appellee, in an interlocutory criminal appeal, adult or minor guardianship case under the Estates and Protected Individuals Act or under the Mental Health Code, ~~involuntary mental health treatment~~ ~~mental illness~~ cases under the Mental Health Code, or a child custody case. This time may be extended only by the Court of Appeals on motion;

(ii) [Unchanged.]

(3)-(5) [Unchanged.]

(B)-(I) [Unchanged.]

Rule 7.213 Calendar Cases

(A)-(B) [Unchanged.]

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:

(1) [Unchanged.]

(2) child custody cases, guardianship cases under the Estates and Protected Individuals Act and under the Mental Health Code, and ~~involuntary mental health treatment~~ ~~mental illness~~ cases under the Mental Health Code.

(3)-(7) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The proposed amendments of Rules 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.202, 7.203, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213 of the Michigan Court Rules would require all appeals from probate court to be heard in the Court of Appeals, instead of the bifurcated system that previously required some probate appeals to be heard in the Court of Appeals and some to be heard in the local circuit court. The proposal also would establish priority status for appeals in guardianship and mental illness cases, similar to child custody cases.

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.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-32. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).