

I am writing to offer my comments in reply to those of Mr. Morris dated July 19, 2013.

1. Replace the phrase "in any action or proceeding" with "as provided by law." The law does not currently provide for the appointment of a receiver in "any action or proceeding." For example, a receiver cannot be appointed in a suit whose sole purpose is the appointment of a receiver. *Detroit Fidelity & Surety Co v King*, 264 Mich 91 (1933). This holding, and other decisions and provisions of law which may limit the appointment of receivers, should not be overturned by the adoption of a court rule.

Response: I do not see the phrase "in any action or proceeding" as a change to existing law. MCL 600.2926 already provides in part: "Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending *where appointment is allowed by law.*"

Further, the Court of Appeals has held:

This statute [MCL 600.2926] does not independently grant a circuit court with the authority to appoint receivers but rather confirms that appointment of a receiver is a remedy available to the court in situations where "allowed by law." Although there are several statutes which specifically allow appointment of a receiver, the phrase "allowed by law" is not limited to these statutes, since the Supreme Court has recognized that there are cases where the trial court may appoint a receiver in the absence of a statute pursuant to its inherent equitable authority. See *Michigan Minerals, Inc. v. Williams*, 306 Mich. 515, 525-527, 11 N.W.2d 224 (1943); *Grand Rapids Trust Co. v. Carpenter*, 229 Mich. 491, 201 N.W. 448 (1924).

It thus becomes apparent that, as used in the statute, the phrase "allowed by law" refers to (1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction.

Accordingly, the fact that no specific statute calls for appointment of a receiver in the instant case did not deprive the trial court of the authority to make such an appointment. *Petitpren v. Taylor School Dist.*, 104 Mich.App. 283, 295, 304 N.W.2d 553 (1981).

It is inherent in the language of the proposed Court Rule that the appointment must be *allowed by law*. For example, we have a garnishment statute which authorizes the attachment of a bank account. However, there is nothing in the garnishment statute or rule which indicates that you cannot garnish an exempt IRA account. It would be superfluous for every statute and court to reference every Federal, State, common law and Court Rule exception to the same statute and court rule.

2. Deletion of the sentence which states that a receiver is a fiduciary for the benefit of (only) "all persons appearing in the action or proceeding." My reasons for suggesting this deletion are:

a. The adoption of this court rule would (purportedly) change Michigan law by purporting to

limit a receiver's fiduciary duty. "[A] receiver has the duty of administering the assets of the receivership for the benefit of all of that estate's creditors. 19 Mich Law & Practice, Receivers, § 53, p. 390." *Bogrette v Young*, 132 Mich App 431, 434 (1984); see also *State Treasurer v Abbott*, 468 Mich 143, 152 n.10 (2003). A receiver appointed pursuant to MCL 600.3510 is the trustee of a corporation's assets "for the benefit of its creditors and stockholders."

b. The Supreme Court should not change substantive law by the adoption of a court rule. *McDougall v Schanz*, 461 Mich 15, 27 (1999).

Response: The Receiver's duties are defined by the order of appointment. See MCL 600.2926. It provides, in part: "In all cases in which a receiver is appointed the court shall provide for bond and shall define the receiver's power and duties where they are not otherwise spelled out by law." The *Bogrette* Court was not as expansive as asserted. The Court first looked to the provisions of the order appointing receiver. In deciding that the Receiver had a duty to all creditors, the Court confirmed that the order's provisions directed that result. In describing the order, the Court noted: "The language of the foregoing order appointing a receiver and authorizing claims is broad and unqualified. Consistent with traditional notions of receivership, we interpret this order to permit all creditors of the dissolved corporation to prove their claims against the receivership." *Id* at 434.

Conversely, in *Radulovich v. Findling*, (unpublished) 2003 WL 21029187), the Court of Appeals considered a receivership order wherein the receiver's duties were limited to one creditor.

"By contrast, as the original order appointing Findling makes clear, Findling was authorized to use Maciejewski's assets only to pay a specific debt, namely, the judgment in favor of Migda. Therefore, Findling was acting in accordance with the scope of his receivership by seeking to prevent Radulovich from asserting a claim on Maciejewski's assets. Accordingly, the trial court properly dismissed Radulovich's claims of conversion and breach of fiduciary duty." *Radulovich* at page 7.

A receiver's duty to one or more creditors is defined by the order of appointment. There is no general rule that a receiver is a fiduciary for all creditors.

3. Deletion of the word "Person" from the definition of receivership estate. My reasons for suggesting this deletion are:

a. A receivership estate consists of property, not a "person". The law might in some instances provide for the appointment of a receiver with respect to a legal entity such as a corporation. Provided that the rule is changed as I suggest in item 1 so as to not purport to abrogate the requirement that the appointment of a receiver be provided for by law, the inclusion of the term "entity" would not represent a change in the law. However, the rule should not provide support for the concept that a natural person, as opposed to his or her property, can be the subject of a receivership.

b. The Supreme Court should not change substantive law by the adoption of a court rule.

McDougall v Schanz, 461 Mich 15, 27 (1999).

c. The deletion of the word "person" would not preclude a litigant from arguing for the appointment of a receiver over a natural person on the theory that a person is an "entity", but the court rule should not provide support to the questionable and problematic proposition that a receiver can be appointed with respect to a natural person as distinguished from his or her property.

Response: A Receiver may be appointed over a natural person. "If after a decree is entered [or before] the defendant refuses or neglects to perform the acts found to be reasonably necessary to be done by him, it may be necessary that they may be done by a receiver or other officer of the court." Clark on Receivers 3d., §240, page 350 (1959).

MCL 600.2926 states in part: "Circuit Court judges in the exercise of their equitable powers..." Therefore, the appointment of a receiver by its very nature is not a remedy at law but instead an equitable remedy. It is axiomatic that equity acts through the person and not exclusively in rem as suggested. See *Herpolsheimer v. A. B. Herpolsheimer Realty Co.*, 344 Mich. 657, 75 N.W.2d 333 (Mich. 1956) "A court of chancery has plenary power to affect the title to real estate beyond its jurisdiction by a sale and conveyance thereof by its master or otherwise by its decree in suits to execute trusts, to undo frauds, and to enforce contracts regarding such real estate, whenever it has acquired jurisdiction of the persons of the parties interested therein, for the reason that equity acts through the person." *Id.* at 664.

Equitable remedies include injunctive relief and specific performance. Injunctions may be mandatory (compelling a person to do something) and prohibitory. Specific performance requires a person to perform a contract. The claim that a receivership is only in rem and limited to property is specious.

Equitable remedies necessarily act *in personam*, unlike remedies at law which act *in rem*. All equitable remedies are essentially injunctions. For example, a prohibitory injunction directs a person to not perform a particular action and specific performance directs a person to perform a contract. Because, as per MCL 600.2926, an order appointing receiver is granted by a circuit court judge in exercise of his or her equitable powers, such an order is an injunction directing a person to submit to the authority of the receiver. Therefore, the claim that a receivership is only *in rem* and thus limited to property is incorrect and contradicts the *in personam* nature of equitable remedies.

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