

March 29, 2012

Corbin A. Davis
Clerk, Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

Re: ADM File No 2010-32

Dear Mr. Davis:

As a member of the committee charged with drafting the proposed changes to MCR 3.210, I wish to respectfully modify the proposed language in subsection (5)(c) and (5)(d). Specifically, I would recommend deleting the words “not otherwise admissible” from both subsections.

I believe that the words “not otherwise admissible” may mislead the Justices into thinking that trial judges will consider unreliable evidence when determining whether to enter a default judgment in cases where the default is not set aside. To the contrary, the committee carefully considered the realities of domestic relations cases and that most default judgments are entered without dispute. In those cases where the Court must take testimony before entering a contested default judgment, the committee believed that the rule should set reasonable parameters concerning the type of evidence that can be considered. By permitting litigants who have properly entered defaults against the opposing party to provide the court with school records, CPS reports from the Department of Human Services, police reports, and other relevant and material evidence at the hearing on entry of the default judgment, trial judges who routinely receive these same materials in post-adjudicative child protective proceedings will be able to consider this evidence without requiring the testimony of records custodians, CPS workers or police. In fact, subsections (5)(c) and (5)(d) were intended to be the real “teeth” that give the proposed default rule some meaning and impact. Accordingly, I make the recommendation to delete the words “not otherwise admissible” so that the proverbial baby is not thrown out with the bathwater in the event that those words create concern.

Clearly, the current default rule contained in MCR 2.603 does not work for domestic relations cases. Other than a challenge to jurisdiction, what is the “meritorious defense” that an affiant can set forth to set aside a default or default judgment in a divorce case? See MCR 2.603(D)(1). Despite a default, trial judges must still make findings of fact and conclusions of

law regarding custody, child support, property division, spousal support and other critical factors, consistent with *Koy v Koy*, 274 Mich App 653, 659-661 (2007). The new proposed rule clarifies how judges may conduct those hearings.

Critically, ADM File No. 2010-32 also requires that a copy of the proposed default judgment be served on the defaulted party at least 14 days before the hearing to enter the default judgment. See proposed MCR 3.210(4)(a). The current rules contained in MCR 2.603 do not provide this safeguard to the defaulted party. The proposed rule also eliminates the archaic practice of withdrawing an answer so a consent judgment may be entered. See proposed MCR 3.210(E).

Judges in the Family Division of Circuit Court from across the state were involved in drafting this proposal along with lawyers, referees and Friend of the Court representatives. The proposed rule changes were vetted through the Family Law Section of the State Bar of Michigan in addition to the Michigan Judges' Association. At every turn, there was consensus: the current default and default judgment rules are unworkable in domestic relations cases. We believe that the proposals to modify MCR 3.210 are well-reasoned and will provide much needed guidance to the bench and bar. I appreciate the Justices' careful consideration of ADM Rule No. 2010-32 with the amendments proposed herein.

Sincerely,

Hon. Kathleen A. Feeney
17th Judicial Circuit Court