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March 11, 2013

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RE: Administrative Order 2010-12
Default Judgment Rule MCR 3.210

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Dear Ms. Boomer,

Treasurer
Hon. Laura Baird
Lansing, MI

The Michigan Judges Association Board of Directors has reviewed the final revisions of the proposed amendments to MCR 3.210. The Board supports adoption of the version dated January 9, 2013 (attached) which we now believe addresses everyone's concerns.

Immediate Past President
Hon. Timothy G. Hicks
Muskegon, MI

Thank you for your attention.

Court of Appeals
Representative
Hon. William B. Murphy

Very truly,

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Lita M. Popke
President, Michigan Judges Association

ADM 2010-32 - Proposed Amendment to MCR 3.210
re: Defaults in Divorce Cases

By: Hon. Kathleen Feeney, 17th Judicial Circuit Court, Family Division, Kent County, MI
 Hon. Joan Young, 6th Judicial Circuit, Family Division, Oakland County, MI
 James J. Harrington III, Esq., Novi, MI, Chair-elect Family Law Section

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Attachment “A” — Current MCR 3.210 in force & effect
 Attachment “B” — ADM 2010-32: proposed MCR 3.210 “final” May 7, 2012
 Attachment “C” — Correspondence, Hon. Elwood Brown, December 27, 2012.
 Attachment “D” — ADM 2010-32: clean copy, revised January 9, 2013

I. OVERVIEW

For many years, our Michigan Court Rules have provided that Default Cases in Divorce cases¹ “...are governed by MCR 2.603”. The current “Default” court rule, MCR 2.603 is well suited to address civil actions at law, including commercial, personal injury, and other cases primarily dealing with money damage claims. Because Divorce cases deal with equitable issues, including but not limited to Custody, Parenting Time, Child Support, Spousal Support, and similar issues, it has been legally and logically difficult to meaningfully apply Default standards to Divorce cases.

A pertinent example includes the prerequisites to “set aside” a Default or a Default Judgment in a divorce case. MCR 2.603(D)(1) requires that a motion to set aside a default or a default judgment (except when grounded upon lack of jurisdiction) shall be granted **only:**

“...if good cause is shown and an affidavit of facts showing a meritorious defense is filed.”

In a civil action, demonstration of a “meritorious defense” make eminent sense: if there is “no defense” to a civil action at law, what is the point of continuing the litigation?

¹ Current MCR 3.210 (attachment A)

Divorce cases are inherently different from civil actions. What is a “meritorious defense” to a claim to custody? What is a “meritorious defense” to a petition for parenting time? Or to child support, or spousal support, or to a claim to an award of particular assets, or a disparate property award?

More specifically, what is a “meritorious defense” to a Complaint for Divorce? If the only factual allegations in the Complaint deal with “residency” or “the breakdown of the marriage” does this mean that a “meritorious defense” would only apply to those issues? During the course of the discussions and analysis underlying the current proposals commentators² have observed that construing and applying MCR 2.603 to divorce cases means that a default entry is limited to factual allegations in a complaint.

The proposals to modify MCR 3.210 have been the subject of discussion, review, analysis, evaluation, and testimony for a number of years. Not one, but two³ formal Court Rule proposals have been submitted to the Michigan Supreme Court. The input of scores of Judges, practitioners, and other interested parties have resulted in major changes to the proposals over the years. The attached Court Rule, referred to as the “May 7, 2012 final version” reflect years of discussion, and negotiated compromise.

This presentation is intended to facilitate understanding of the judicial problems that have given rise to ADM 2010-32, the perceived necessity of addressing these issues, and the flexibility afforded our trial courts as they grapple with the surge of *in pro per* litigants who are straining the resources and limits of the Michigan judicial system.

Initial consideration should address the practical and legal difficulties arising out of the application of MCR 2.603 to divorce cases.

II. THE CONFLICTING INTERPLAY BETWEEN “JUDICIAL FACT FINDING” AND MCR 2.603.

The energy and resources devoted to careful crafting of a divorce-specific Default court rule arises in significant part when the underlying appellate directive to our trial courts to make “fact

² Respected legal commentators such as James Ryan, Plymouth, MI and Max McCullough, Mt. Clemens, MI have persuasively argued precisely this point. Their “monograph” on our Michigan Court Rules has been considered by the Committee members in their recommendations on MCR 3.210.

³ ADM 2008-09, dated July 8, 2009, proposed Amendments to MCR 3.210 & MCR 3.211 and provided for taking proofs in a “summary manner”. This proposal was not adopted, and was followed by the present ADM 2010-32, (Attachment B); prior proposals initially included language regarding acceptance of proofs “not otherwise admissible”. The “final” proposal was circulated May 7, 2012.

findings” in divorce case collides with the status of defaulted parties in divorce cases.

Our trial courts are mandated to make “fact finding” in support of their decisions on custody, parenting time, support, property and all other issues involved in a divorce case. Failure to make “fact finding” will mandate a remand in most circumstances. The fact finding obligation exists whether a party has participated in a divorce litigation or not.

Fact finding is problematic in a Default context. A defaulted party could have critical information regarding custody, parenting time, support, or property.

Should a trial court to turn a blind eye to proposed information regarding child abuse or domestic violence — because the proposed evidence comes from a defaulted party?

This problem has increased over the years because of the Michigan economy which has made it more difficult for parties in divorce cases to retain counsel to protect their rights. Either “self representation” or “no representation” of defendants in divorce cases has created a quandary for trial courts: a Judge is required to make “fact findings” on all material issues in a divorce case, but is justice denied when a defaulted party has relevant and critical information or evidence which is material to a court’s award of custody, parenting time, support or property?

Likewise, is justice delayed when a trial court is presented with only one of two alternatives at the point of concluding the case through entry of a Default Judgment? What should a trial court do when a defaulted party appears in court prior to, or at the point of entry of a Default Judgment? Under MCR 2.603, either the Judge “sets aside the default or default judgment” and the case continues for an indeterminate period of time in the future, or the Court refuses to grant relief, and the defaulted party is unable (in many circumstances) to furnish the court critical information, evidence, or testimony that is material to the Court mandate to make “fact finding”.

The trial court is mandated to make “fact findings” in support of its rulings. This can be a complex task: consider that there are 12 “best interests factors”; there are 10 or more property factors; there are 14 or more spousal factors; there are 9 parenting time factors; the Court is required to apply the Child Support Formula, unless it determines that a “deviation” is appropriate which involves a multi-factor analysis.

Fact finding is mandated whether or not a party is defaulted. Consider *Koy v Koy*, 274 Mich App 653 (2007), that involved a remand from the Court of Appeals to the trial court for additional fact findings on both property division and on a determination of “non-modifiable” spousal support even in the face of a defaulted party who was not permitted to testify:

“Accordingly, even though [the defaulted] defendant was properly precluded from participating in the proceedings, the trial court was still required to equitably divide the marital property and to make findings of fact to support that decision. The trial court's failure to make findings of fact on the record precludes this Court's review of whether the

division of marital property was equitable. . . . Even though the trial court appeared to rely solely on the representations of plaintiff's counsel in dividing the property, the record is simply not adequately developed regarding counsel's representations or the evidence she relied on regarding the marital assets. On remand, therefore, the record must be properly developed in this regard and the trial court shall make findings of fact supporting its property division." Id. at 559-560.

Similarly, Judge Feeney was the trial judge in *Hunt v Hunt*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2009 (Docket No. 285266). The opinion illustrates the complexity of dealing with default cases.

"In divorce cases, however, even when a default has been entered, the trial court has a responsibility to "adequately develop" the record and make findings of fact in support of its decisions." Hunt, supra slip op at 4, citing Koy, supra at 659.

In that case, Mr. Hunt's request to participate was denied, but he was permitted to furnish testimony upon examination by the Court and provide limited evidence regarding the child support, custody, parenting time, and property division factors. The Court also considered Child Protective Services reports and other documentary evidence deemed relevant without requiring the author of the reports to testify.

Given the complexity of the issues in *Hunt* case, i.e., child sexual abuse, spousal abuse, collectibles, etc., the trial court properly exercised its discretion to make findings for appellate review. The purpose of ADM 2010-32 is to provide direction to the trial courts that they have discretion with respect to testimony or input from a defaulted party, without having to engage in an "either / or" exercise of setting aside a default or not.

It is critical that the trial courts retain control of the cases before it. There are legitimate concerns regarding any court rule modifications which might open the door to "gaming the system" and encouraging "strategies of delay" in order to frustrate the orderly processes of concluding a divorce case.

The May 7, 2012 "final" version of the proposed Amendment to MCR 3.210 (Attachment B) addresses these issues by permitting the judge to retain the power to control the process, and the extent to which a defaulted party may participate in the proceedings, by use of the critical term "may".

The trial court is not required to permit a defaulted party to take any action in the case; or, the defaulted party "may" take a limited role; or, a role relating to those issues which the trial court believes to be pertinent and relevant to the issues before it.

ADM 2010-32 also addresses the role of "Consent Judgments" in divorce cases, which have been the practice for decades, but our Michigan Court Rules are devoid of any reference to them.

III. CONSENSUS & ADM 2010-32.

In order to provide guidance to the bench and bar, representatives from across the state gathered in workgroups over the several years to review and recommend changes to the current default and default judgment rules to make them workable for domestic relations practitioners and Family Division Judges.

As a result of this review process, simple yet effective strategies for assuring due process were recommended, such as requiring the party who is moving for the entry of a default judgment mail the proposed judgment, along with the notice of hearing, to the defaulted party. This is not required under the current rules.

Moreover, providing for the entry of a "consent judgment" only makes sense; legal antiquities, such as "withdrawing" a properly filed answer so a judgment can be entered, are inefficient, unnecessary, and outside common practice today.

The "final" version of ADM 2010-32, dated May 7, 2012, (Attachment B) was the product of these years of discussions and meetings, and debate, negotiation, and modification. Many of the participants in the prior proposed Court Rule Amendment, ADM 2008-09 actively assisted in continuing the discussion and debate that gave rise to ADM 2010-32.

Literally scores of Judges and practitioners shared their comments and insights and practical suggestions regarding ADM 2010-32. Under the leadership of Judges Joan Young, Oakland County, and Judge Kathleen Feeney, Kent County a task force was established consisting of both Judges and Referees and attorneys regarding ADM 2010-32. Committee meetings were held on both sides of the State of Michigan. A committee meeting was held on June 24, 2010 at the Michigan Hall of Justice in Lansing, MI.

A partial list of those participating in this process by virtue of being members of the committee, or committee meeting attendance, or comment or suggestions, or critical input has included: Hon. Kathleen Feeney, Hon. Joan Young, Hon. Elizabeth Pezzetti, Hon. John Hammond, Hon. Jon A. Van Allsburg; Hon. Linda Hallmark, Hon. Eugene Arthur Moore; Hon. James Alexander; Hon. Laura Baird; Hon. M. Richard Knoblock; Hon. Mary Ellen Brennan; Hon. Michael F. Sapala; Hon. Pamela L. Lightvoet; Hon. Paul E. Hamre; Hon. Paul E. Stutesman; Hon. Stephen D. Gorsalitz; Hon. Susan Dobrich; Hon. Tracy A. Yokich; Hon. William J. Caprathe; Hon. Cheryl Mathews; Hon. Christopher Yates; Hon. James Alexander; Hon. Lisa Gorcyca; Hon. Lita Masini Popke; Steven D. Capps; Barbara J. Kelly; Connie R. Thacker; the late Jon Ferrier; David G. Case; David L. Harrison; David T. McAndrew; Deborah L. McKnabb; Dennis C. Kolenda; Elizabeth A. Sadowski; Gregory A. Tasker; Jennifer M. Galloway; John W. Lewis; Michael F. Gadola; Scott G. Bassett; Margo Nichols; Lori A. Buiteweg; Kathleen Allen, James J. Harrington, III.

ADM 2010-32 was the subject of testimony before the Michigan Supreme Court on May 16, 2012. Additional time has been afforded the proponents of ADM 2010-32 to elicit the support of

the State Bar of Michigan, consider the input of other practitioners, and address concerns of the Michigan Probate Judges Association.

The “final” draft of ADM 2010-32, dated May 7, 2012, represents the culmination of the debate, discussion, negotiation and compromise. The following points are of paramount importance:

- The initial focus of predecessor proposal ADM 2008-09 and the current ADM 2010-32 upon some kind of “relaxed evidentiary standard” or “summary presentation” of evidence, or admission of “inadmissible evidence” has been removed from the “final” draft.
- Initial draft language that would have made a defaulted party’s participation in the case a matter of “right” has been eliminated. The extent to which a defaulted party “may” participate in a case is a matter for the sound discretion of the court.
- Insertion of the “notice” provision⁴ to a party who has participated in some aspect of a case is not only a matter of fundamental fairness and due process, but provides an even handed control over “gaming” the system by the party not in default who would take advantage of a defaulted party by failing to provide notice of filings of papers in a case. Because Subsection (d) is a “notice” provision, there is no inconsistency with Subsection (e) which vests complete authority in the trial court to determine the extent of a party in default’s participation in the court process.
- The participation of a party who is in default⁵ is limited to the manner in which the court may direct. It does not confer substantive rights upon a defaulted party. It provides the trial court with discretion to permit the kind of participation set forth in *Hunt v Hunt*, supra.
- The burden rests upon the proponent of a Default Judgment or a Consent Judgment to satisfy the Court that its terms and provisions are in accord with Michigan law. However, the proposals also vest the Court with ultimate discretion to refer the Judgment back to the drafter if unsatisfactory.

The Michigan Judges Association has supported establishing a court rule for defaults in divorce cases. The Family Law Section has supported establishing a court rule for defaults in

⁴ Proposed MCR 3.210(B)(2)(D) is a “notice” provision, and recognizes that a party may “appear” at various stages of a case. This “appearance” does not serve to set aside the default, nor does it confer substantive rights on a defaulted party.

⁵ Proposed MCR 3.210(B)(e) specifically limits participation of a party “on in the manner as the Court may direct”.

divorce cases. With one qualification⁶ (which is the subject of discussion herein, involving a perceived conflict between Subsection (d) and (e) of ADM 2010-32), the Michigan Probate Judges Association supports a court rule for defaults in divorce cases.

Discussions with Judge Brown, President of the MPJA and Judge Young have addressed possible confusion association with the current subsection (d) of the May 7, 2012 proposal, which currently reads:

May 7, 2012 draft - (see attached Exhibit B.

- (d) A party in default may appear in a case under this subchapter by filing an appearance or motion, or by participating in any scheduled court proceedings, referee hearings, mediations, arbitrations, or other ADR proceedings. A party who has appeared in a case under this subchapter must be served with a copy of every paper later filed in the case.

However, this subparagraph - as drafted - does not make a specific connection, or provide linkage, between subsection (d) and subsection (e) of ADM 2010-32. Subsection (e) specifically sets forth the role of the trial court regarding the extent of participation of a defaulted party in a divorce case.

The following language, slightly modified, addresses this issue in succinct fashion:

January 9, 2013 modified Subsection (d). (see Attachment D).

- (d) A party in default may appear in a case under this subchapter by participating in any scheduled court proceeding⁷, referee hearing, mediation, arbitration, or other ADR proceeding, as permitted by (e) herein, or by filing an appearance or by motion.

This modified language satisfies the concerns of the Michigan Probate Judges Association, who supports the entirety of the proposed Court Rule with this additional language.

The dialogue and consensus which has followed Judge Brown's December 27, 2012 correspondence illustrates the fact that there is no "perfect" court rule or court rule amendment. It would be impossible to obtain a unanimous consensus of every attorney, Referee, or Judge in the State Bar of Michigan on any particular proposal, much less ADM 2010-32. The present proposal, as modified and amended over a period of years, and with the suggested modification above addressing the concerns of the MPJA is as close to a "consensus" product as one could desire.

⁶ Correspondence of Hon. Elwood Brown to Michigan Supreme Court, December 27, 2012. (Attachment C, herein). See, Questions & Answers #4 & #5, page 8.

⁷ A slight grammatical change has been made as well: the May 7, 2012 language has "plurals" with respect to the various court proceeding. The plurals have been removed in this proposed modification, January 9, 2013 Attachment D.

It is sincerely hoped that united support from the Michigan Judges Association, the Michigan Probate Judges Association, the Family Law Section of the State Bar of Michigan, and the State Bar of Michigan will be recognized by the Michigan Supreme Court through implementation of ADM 2010-32 as set forth herein.

IV. QUESTIONS & ANSWERS re: ADM 2010-32.

- #1 - *Does ADM 2010-32 Permit Introduction of "Inadmissible Evidence" into a Default Hearing?*

Answer: No.

Comment: Prior versions of ADM 2010-32 contained language regarding "inadmissible evidence". This language has been removed in the "final" version. A court retains inherent authority to determine what, if any, evidence it determines is relevant and material and admissible.

- #2 - *Does ADM 2010-32 Permit a litigant to "game the system" and implement a delay strategy for strategic purposes?*

Answer: No.

Comment: Pursuant to the "final" version of ADM 2010-32, a party who has been the subject of a default or a default judgment does not have the "right" to have the default set aside. This party does not have a "right" to participate in the process. The trial court is the "gate keeper" and solely determines who, how, and under what circumstances a "defaulted party" may participate in the divorce litigation.

Instead of having a black-white, either-or, all-or-nothing ruling of whether or not a party does, or does not, have a Default or Default Judgment set aside, the trial court could determine the extent to which a defaulted party could submit evidence or testimony on a limited basis regarding a specific issue.

- #3 - *Is ADM 2010-32 a "road map" for litigants to take advantage of the system and trigger an unfair advantage to the party who has not appeared or participated in the litigation?*

Answer: No.

Comment: Clearly, any and all court rules that deal with procedural issues are a "road map" to litigants and their attorneys. The current provisions of MCR 2.603(D)(1) provide specific direction to defaulted litigants

(“meritorious defense”); not only that, but if a default is set aside, the litigant may have free rein to implement all discovery which should have occurred previously, and unnecessarily delay and protract the litigation.

The risk for the litigant who wishes to “game” the system is that while a court “may” permit participation by the defaulted party, the court is not required to do so. Under the current court rule, a court cannot “partially” set aside a default. It is “all or nothing”. Under proposed ADM 2010-32 a court could grant zero relief and no participation, or a court could permit limited participation or submission of evidence limited strictly to the issues upon which the court is mandated to make “fact finding” .

#4 - *Is MCR 3.210 (B)(2)(d) a “notice” provision?*

Answer: Yes.

Comment: A party is recognized as having “appeared” in a case by virtue of filing an appearance or a motion or participating in a hearing, mediation, arbitration, etc. This provision does not mean that such an appearance voids or sets aside a “default” . It does mean that once having appeared, such a party is entitled to notice and a copy of every paper later filed in the case.

#5 - *Is MCR 3.210(B)(2)(d) inconsistent⁸ with MCR 3.210(B)(2)(e)?*

Answer: No.

Comment: A party in default may “appear” at various stages of a case, either voluntarily, or by court Order; for example, a party appears at an FOC hearing, or at a mediation. An *in pro per*, self-represented litigant may not even know what a default is, or what the procedure is to set aside a default. Subsection (d) recognizes that once a party in default “appears” in such a fashion, they must be served a copy of every paper later filed in the case.

Subsection (d) should not be read to confer substantive rights, and one who “appears” in a case in such fashion has no more rights than any other defaulted party. The proposed modified language set forth above creates the direct linkage between (d) and (e) and resolves any ambiguity.

Subsection (e) contains a series of “may” actions a court might permit.

⁸ This “inconsistency” was addressed in the December 27, 2012 correspondence to the Michigan Supreme Court by the Hon. Elwood Brown, President, Michigan Probate Judges Association and has been addressed at Page 7 herein.

However, this participation is solely limited to “the manner in which the Court may allow”.

- #6 - *Does a defaulted party have an absolute right to participate in discovery or file motions or referee hearings or FOC investigations?*

Answer: No.

Comment: The substantive rights of a defaulted party are not enlarge by MCR 3.210. Such participation is not as a matter of right, but “only in the manner as the Court may allow” . See MCR 3.210(B)(2)(e).

- #7. - *Should “Consent Judgments” be addressed by ADM 2010-32?*

Answer: Yes.

Comment. For decades attorneys have been submitting “Consent Judgments” which are approved, signed, and enforced by our circuit courts. While it is appropriate for the court rules to reflect current and historic practice, it is equally important that courts maintain the authority to approve Consent Judgments that are in accord with Michigan law, and to reject those that are not.

Respectfully submitted,

Hon. Kathleen Feeney, 17th Judicial Circuit Court, Family Division, Kent County, MI
Hon. Joan Young, 6th Judicial Circuit, Family Division, Oakland County, MI
James J. Harrington III, Esq., Novi, MI, Chair-elect Family Law Section

(4) A notice of income withholding may not be used by the friend of the court or the state disbursement unit to determine the specific allocation or distribution of payments.

(D) Notice to Attorneys.

(1) Copies of notices required to be given to the parties also must be sent to the attorneys of record.

(2) The notice requirement of this subrule remains in effect until 21 days after judgment is entered or until postjudgment matters are concluded, whichever is later.

Rule 3.209 Suspension of Enforcement and Dismissal

(A) Suspension of Enforcement.

(1) Because of a reconciliation or for any other reason, a party may file a motion to suspend the automatic enforcement of a support obligation by the friend of the court. Such a motion may be filed before or after the entry of a judgment.

(2) A support obligation cannot be suspended except by court order.

(B) Dismissal. Unless the order of dismissal specifies otherwise, dismissal of an action under MCR 2.502 or MCR 2.504 cancels past-due child support, except for that owed to the State of Michigan.

Rule 3.210 Hearings and Trials

(A) In General.

(1) Proofs or testimony may not be taken in an action for divorce or separate maintenance until the expiration of the time prescribed by the applicable statute, except as otherwise provided by this rule.

(2) In cases of unusual hardship or compelling necessity, the court may, upon motion and proper showing, take testimony and render judgment at any time 60 days after the filing of the complaint.

(3) Testimony may be taken conditionally at any time for the purpose of perpetuating it.

(4) Testimony must be taken in person, except that the court may allow testimony to be taken by telephone or other electronically reliable means, in extraordinary circumstances.

(B) Default Cases.

(1) Default cases are governed by MCR 2.603.

(2) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.

(3) If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court.

(4) If the court determines that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment in conformity with the court's opinion.

(5) If the court determines not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it.

(C) Custody of a Minor.

(1) When the custody of a minor is contested, a hearing on the matter must be held within 56 days

(a) after the court orders, or

(b) after the filing of notice that a custody hearing is requested,

unless both parties agree to mediation under MCL 552.513 and mediation is unsuccessful, in which event the hearing must be held within 56 days after the final mediation session.

(2) If a custody action is assigned to a probate judge pursuant to MCL 722.26b, a hearing on the matter must be held by the probate judge within 56 days after the case is assigned.

(3) The court must enter a decision within 28 days after the hearing.

(4) The notice required by this subrule may be filed as a separate document, or may be included in another paper filed in the action if the notice is mentioned in the caption.

(5) The court may interview the child privately to determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. The court shall focus the interview on these determinations, and the information received shall be applied only to the reasonable preference factor.

(6) If a report has been submitted by the friend of the court, the court must give the parties an opportunity to review the report and to file objections before a decision is entered.

(7) The court may extend for good cause the time within which a hearing must be held and a decision rendered under this subrule.

(8) In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

(D) The court must make findings of fact as provided in MCR 2.517, except that

(1) findings of fact and conclusions of law are required on contested postjudgment motions to modify a final judgment or order, and

(2) the court may distribute pension, retirement, and other deferred compensation rights with a qualified domestic relations order, without first making a finding with regard to the value of those rights.

Rule 3.211 Judgments and Orders

(A) Each separate subject in a judgment or order must be set forth in a separate paragraph that is prefaced by an appropriate heading.

(B) A judgment of divorce, separate maintenance, or annulment must include

- (1) the insurance and dower provisions required by MCL 552.101;
- (2) a determination of the rights of the parties in pension, annuity, and retirement benefits, as required by MCL 552.101(4);
- (3) a determination of the property rights of the parties; and
- (4) a provision reserving or denying spousal support, if spousal support is not granted; a judgment silent with regard to spousal support reserves it.

(C) A judgment or order awarding custody of a minor must provide that

- (1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor,
- (2) the person awarded custody must promptly notify the friend of the court in writing when the minor is moved to another address, and
- (3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act, MCL 722.31.

(D) Uniform Support Orders

(1) Any provisions regarding child support or spousal support must be prepared on the latest version of the Uniform Support Order approved by the state court administrative office. This order must accompany any judgment or order affecting child support or spousal support, and both documents must be signed by the judge. If only child support or spousal support is ordered, then only the Uniform Support Order must be submitted to the court for entry. The Uniform Support Order shall govern if the terms of the judgment or order conflict with the Uniform Support Order.

(2) No judgment or order concerning a minor or a spouse shall be entered unless either:

- (a) the final judgment or order incorporates by reference a Uniform Support Order, or
- (b) the final judgment or order states that no Uniform Support Order is required because support is reserved or spousal support is not ordered.

(3) The clerk shall charge a single judgment entry fee when a Uniform Support Order is submitted for entry along with a judgment or order that incorporates it by reference.

Rule 3.210 Hearings and Trials

(A) [Unchanged.]

(B) Default Cases.

(1) ~~Default cases are governed by MCR 2.603. Application. This subrule applies to the entry of a default and a default judgment in all cases governed by this subchapter. See MCR 3.201(A)(1) and (2).~~

~~(a) If a default is requested for failure to plead or otherwise defend as provided by these rules, subrule (B)(2) applies.~~

~~(b) If a default is ordered as a sanction under other rules, the order shall specify what actions the sanctioned party is prohibited from taking, and all other rights provided by law and these rules remain unrestricted.~~

~~(c) A default establishes (i) the requesting party's right to relief, (ii) the truth of well-pled material facts, and (iii) entitles the requesting party to proceed to entry of a default judgment.~~

(2) ~~A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule. Entry of Default.~~

~~(a) A party may request the entry of a default of another party for failure to plead or otherwise defend. Upon presentation of an affidavit by a party asserting facts setting forth service and failure to plead or otherwise defend, the clerk must enter a default against the party.~~

~~(b) The party who requested entry of the default must provide prompt notice that the default has been entered to the defaulted party and all other parties and persons as provided by MCR 3.203, and file a proof of service.~~

~~(c) Once the default of a party has been entered, and before entry of the default judgment, that party may not file any pleadings, but may file a motion to set aside the default under subrule (B)(3).~~

~~(d) A party in default may appear in a case under this subchapter by filing an appearance or motion, or by participating in any scheduled court proceedings, referee hearings, mediations, arbitrations, or other ADR proceedings. A party who has appeared in a case under this subchapter must be served with a copy of every paper later filed in the case.~~

- (e) If the default of a party has been entered for failure to plead or otherwise defend, that party may (1) the Court may permit that party to participate in all discovery as provided in Subchapter 2.300; may file motions; and that party is entitled to notice of and participation in all scheduled court proceedings, referee hearings, mediations, arbitrations, other ADR proceedings, and friend of the court investigations and participation in same only in the manner as the Court may allow, and trial.
- (f) If a default is ordered as a sanction under other rules, the court may impose limitations on the defaulted party's right to participate in the action.
- (3) If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. **Setting Aside Default.** A default may be set aside, before the entry of the default judgment, upon verified motion of the defaulted party showing good cause, or that the court lacks jurisdiction over the defendant or over the subject matter.
- (4) If the court determines that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment in conformity with the court's opinion. **Notice of Hearing and Motion for Entry of Default Judgment.**
- (a) A party moving for default judgment must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party at least 14 days before the hearing on entry of the default judgment, and promptly file a proof of service.
- (b) Notice shall be served in the manner provided by MCR 3.203 or by any manner permitted by the court which is reasonably calculated to give the defaulted party actual notice of the proceedings and an opportunity to be heard.
- (c) If the default is entered for failure to appear for a scheduled trial or hearing, notice under this subrule is not required.
- (5) If the court determines not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it. **Entry of Default Judgment.**
- (a) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of a party because of failure to appear at the hearing on entry of the requested default judgment, or by consent, and the case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.
- (b) Proofs for a default judgment may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. Nonmilitary affidavits required by law must be filed before a default judgment is entered in

cases in which the defendant has failed to appear. A default judgment may not be entered against a minor or an incompetent person unless the person is represented in the action by a conservator or other representative, except as otherwise provided by law.

- (c) The moving party must present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law. The court may consider relevant and material affidavits, testimony, documents, exhibits, or other evidence not otherwise admissible.
- (d) In cases involving minor children, the court may take testimony and receive or consider relevant and material affidavits, testimony, documents, exhibits, or other evidence not otherwise admissible from either party, as necessary, to make findings concerning the award of custody, parenting time, and support of the children.
- (e) If the court does not approve the proposed judgment, the party who prepared it must, within 14 days, submit a modified judgment in conformity with the court's ruling pursuant to MCR 2.602(B)(3), or as otherwise directed by the court.
- (f) Upon entry of a default judgment, the moving party must serve a copy of the judgment as entered by the court on the defaulted party within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.

(6) Setting Aside Default Judgment.

- (a) A motion to set aside a default judgment, except when grounded on lack of jurisdiction over the defendant, lack of subject matter jurisdiction, failure to serve the notice of default as required by subrule (B)(2)(b), or failure to serve the proposed default judgment and notice of hearing for the entry of the judgment under subrule (B)(4), shall be granted only if the motion is filed within 21 days after the default judgment was entered and if good cause is shown.
- (b) In addition, the court may set aside a default judgment or modify the terms of the judgment in accordance with statute or MCR 2.612.

- (7) Costs. An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

(C)-(D)[Unchanged.]

(E) Consent Judgment.

**ATTACHMENT B
PROPOSED MCR 3.210 - May 7, 2012**

- (1) At a hearing, a A party, or all parties, may present to the court for entry a

judgment approved as to form and content eonsent and signed by all parties and their attorneys of record.

- (2) If the court determines that the proposed consent judgment is not in accordance with law, the parties shall submit a modified consent judgment in conformity with the court's ruling within 14 days, or as otherwise directed by the court.
- (3) Upon entry of a consent judgment, the moving party must serve a copy of the judgment as entered by the court on all other parties within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.

MICHIGAN PROBATE JUDGES ASSOCIATION

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December 27, 2012

Michigan Supreme Court
Supreme Court Clerk
P O Box 30052
Lansing, MI 48909

Re: ADM File No. 2010-32

Dear Clerk:

It is the understanding of the Michigan Probate Judges Association (MPJA) that the Supreme Court has not taken final action on the proposed changes to MCR 3.210 as set forth in the above-referenced file.

At its December 2012 meeting the Executive Board for MPJA reviewed the latest revisions of the proposed changes to this Court Rule. Although several improvements have been made to the original proposal, there remains an inconsistency in its current form, specifically between the provisions outlined in MCR 3.210(B)(2)(d) and (e). For that reason, the Board voted to oppose the amendments.

However, if MCR 3.210(B)(2)(d) were revised to allow a defaulted party to participate as permitted under MCR 3.210(B)(2)(c), MPJA would support the proposed amendments.

If you have any questions about MPJA's position, please feel free to call me at 810-985-2010 or Judge Lisa Sullivan, who chairs the MPJA Domestic Relations Subcommittee, at 989-224-5194.

Sincerely,



Hon. Elwood L. Brown
MPJA, President

Cc: Michigan Judges Association, c/o Hon. Joan Young ✓

Attachment C
Correspondence Hon. Elwood Brown
December 27, 2012

Rule 3.210 Hearings and Trials

(A) [Unchanged.]

(B) Default Cases.

- (1) Application. This sub rule applies to the entry of a default and a default judgment in all cases governed by this subchapter. See MCR 3.201(A)(1) and (2).
- (2) Entry of Default.
 - (a) A party may request the entry of a default of another party for failure to plead or otherwise defend. Upon presentation of an affidavit by a party asserting facts setting forth service and failure to plead or otherwise defend, the clerk must enter a default against the party.
 - (b) The party who requested entry of the default must provide prompt notice that the default has been entered to the defaulted party and all other parties and persons as provided by MCR 3.203, and file a proof of service.
 - (c) Once the default of a party has been entered, and before entry of the default judgment, that party may not file any pleadings, but may file a motion to set aside the default under subrule (B)(3).
 - (d) A party in default may appear in a case under this sub chapter by participating in any scheduled court proceeding, referee hearing, mediation, arbitration, or other ADR proceeding as permitted by (e) herein or by filing an appearance or by motion. A party who has appeared in a case under this subchapter must be served with a copy of every paper later filed in the case.
 - (e) If the default of a party has been entered for failure to plead or otherwise defend, the Court may permit that party to participate in discovery as provided in Subchapter 2.300; file motions; and that party is entitled to notice of all scheduled court proceedings, referee hearings, mediations, arbitrations, other ADR proceedings, and friend of the court investigations and participation in same only in the manner as the Court may allow.
- (3) Setting Aside Default. A default may be set aside, before the entry of the default judgment, upon verified motion of the defaulted party showing good cause, or that the court lacks jurisdiction over the defendant or over the subject matter.

- (4) Notice of Hearing and Motion for Entry of Default Judgment.
- (a) A party moving for default judgment must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party at least 14 days before the hearing on entry of the default judgment, and promptly file a proof of service.
 - (b) Notice shall be served in the manner provided by MCR 3.203 or by any manner permitted by the court which is reasonably calculated to give the defaulted party actual notice of the proceedings and an opportunity to be heard.
 - (c) If the default is entered for failure to appear for a scheduled trial or hearing, notice under this subrule is not required.
- (5) Entry of Default Judgment.
- (a) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of a party because of failure to appear at the hearing on entry of the requested default judgment, or by consent, and the case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.
 - (b) Proofs for a default judgment may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. Non military affidavits required by law must be filed before a default judgment is entered in cases in which the defendant has failed to appear. A default judgment may not be entered against a minor or an incompetent person unless the person is represented in the action by a conservator or other representative, except as otherwise provided by law.
 - (c) The moving party must present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law. The court may consider relevant and material affidavits, testimony, documents, exhibits, or other evidence.
 - (d) In cases involving minor children, the court may take testimony and receive or consider relevant and material affidavits, testimony, documents, exhibits, or other evidence from either party, as necessary, to make findings concerning the award of custody, parenting time, and support of the children.

- (e) If the court does not approve the proposed judgment, the party who prepared it must, within 14 days, submit a modified judgment in conformity with the court's ruling pursuant to MCR 2.602(B)(3), or as otherwise directed by the court.
 - (f) Upon entry of a default judgment, the moving party must serve a copy of the judgment as entered by the court on the defaulted party within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.
- (6) **Setting Aside Default Judgment.**
- (a) A motion to set aside a default judgment, except when grounded on lack of jurisdiction over the defendant, lack of subject matter jurisdiction, failure to serve the notice of default as required by sub rule (B)(2)(b), or failure to serve the proposed default judgment and notice of hearing for the entry of the judgment under sub rule (B)(4), shall be granted only if the motion is filed within 21 days after the default judgment was entered and if good cause is shown.
 - (b) In addition, the court may set aside a default judgment or modify the terms of the judgment in accordance with statute or MCR 2.612.
- (7) **Costs.** An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

(C)-(D)[Unchanged.]

(E) Consent Judgment.

- (1) At a hearing, a party, or all parties, may present to the court for entry a judgment approved as to form and content and signed by all parties and their attorneys of record.
- (2) If the court determines that the proposed consent judgment is not in accordance with law, the parties shall submit a modified consent judgment in conformity with the court's ruling within 14 days, or as otherwise directed by the court.
- (3) Upon entry of a consent judgment, the moving party must serve a copy of the judgment as entered by the court on all other parties within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.