CASE LAW AND LEGISLATIVE UPDATE

By

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D. MEDICAID ELIGIBILITY – SBO TRUST – COUNTABLE ASSETS
Hegadorn v DHHS, 503 Mich 231; 931 NW 2d 571 (2019)

V. CONCLUSION

I. INTRODUCTION

Materials address new court rules, legislation, and appellate court decisions in the probate area that have occurred within the last year.

II. COURT RULE AMENDMENTS

A. E-FILING – ADM 2002-37, Effective May 1, 2019

1. MCR 1.109 – Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access

Key Point: Attorneys are required to use e-filing for required case types in courts where electronic filing has been implemented. All other filers may only be mandated to use e-filing upon SCAO approval under AO 2018-XX. MCR 1.109(G)(3)(f).

Observation: Extremely useful. Clarifies that attorneys, as officers of the court, must use e-filing in courts where it has been implemented. Restricting ability to mandate non lawyer e-filing only with SCAO approval addresses access to justice issue raised by State Bar and provides clear guidelines for courts as they plan for implementation of e-filing.

2. MCR 2.107 – Service and Filing of Pleadings and Other Documents

Adds e-filing to methods of service. **MCR 2.107(C)(1)(a)&(2)(a).**

3. MCR 2.107(C)(4) – Alternative Electronic Service

Deletes current **MCR 2.107(C)(4)**, which allowed for service via email between parties (and court) per stipulation, and replaces it with the following:

Electronic filing required by authorized users per general e-filing rule (**MCR 1.109(G)**). If exceptions exist to this general rule – i.e., party not authorized user, no party exempt from e-filing, not registered with e-filing system, unknown e-mail address – parties may agree to alternative electronic service.

Stipulation may be made among some\all parties, and may also include agreement to alternative electronic service of notices\court documents by court by filing agreement with court\friend of the court. Alternative electronic service may be by e-mail, text

message, or sending e-mail\text to log into secure website to view notices\court papers. **MCR 2.107(C)(4)(a).**

Attorneys who agree to e-service must use e-mail address on file with State Bar. Agreement for service via text or text message alert must list phone number for service and provide for immediate notification if number changes. **MCR 2.107(C)(4)(b).**

Attorney\party must include in agreement conditions\limitations of e-mail\text service, including maximum size of document that may be attached, designation of exhibits as separate documents, obligation (if any) to provide paper copies of e-mail\texted documents, and names\e-mail addresses of others in attorney's office authorized to receive e-service on party's behalf. **MCR 2.107(C)(4)(c).**

Documents must be in PDF format or other format which prevents alteration. If served by alert, must be in PDF or other format with available free downloadable reader. **MCR 2.107(C)(4)(d).**

E-mail\text message must identify in subject line or beginning of text court name, case number, and title of each sent document. **MCR 2.107(C)(4)(f).**

Electronic service transmission sent at\before 11:59 PM deemed served on that day. If sent on Saturday, Sunday, legal holiday, or day court closed per order deemed served next business day. **MCR 2.107(C)(4)(g).**

Attorney\party can immediately withdraw from agreement with written notice to party(ies)\court as appropriate. **MCR 2.107(C)(4)(h).**

Alternative electronic service complete upon transmission unless party\court\friend of court learns service unsuccessful. If undeliverable, person responsible for service must send via mail per **MCR 2.107(C)(3)** or by delivery per **MCR 2.107(C)(1)** or **(2)** (personal service, electronically per **MCR 1.109(G)(6)(a)** and include copy of undeliverable notice. Court\friend of court must retain undeliverable notice. **MCR 2.107(C)(4)(i).**

Party\court\friend of court must maintain archived record of sent items until judgment\final order entered and all appeals completed. **MCR 2.107(C)(4)(j).**

Court\friend of court not required to create functionality it does not have\accommodate more than one alternative electronic service standard. **MCR 2.107(C)(4)(k).**

Party\attorney requesting alternative electronic service must submit request to update\modify\withdraw to court independent from any request sent to friend of the court. **MCR 2.107(C)(4)(l).**

Observation: Provisions substantially similar to current version of **MCR 2.107(C)(4)**, with addition for text message\text message alert options and transmission after regular court hours. Query how often this provision will be used once e-filing becomes widespread.

4. MCR 2.117 – Appearances

Written appearances by party\attorney must comply with caption requirements of **MCR 1.1.09(D)(1)(b)** – i.e., court name, parties, case number, identification of document, name\address\bar # phone # for attorneys, name\address\phone number of in pro per parties**. MCR 2.117(A)(1) and (B)(2)(a).**

Attorney no longer to be served with documents after limited appearance ends or order removing attorney entered. MCR 2.117(E).

5. MCR 2.403 – Case Evaluation

If evaluation not made immediately following hearing, ADR clerk must serve it on each party within 14 days of hearing. **MCR 2.403(K)(1).**

6. MCR 2.508 – Jury Trial of Right

Jury trial demand must be filed as separate document. **MCR 2.508(B)(1)**.

Note: New SCAO Form, MC 22, Jury Demand, to be used for this purpose.

7. MCR 2.602 – Entry of Judgments and Orders

Orders\judgments must be entered under court seal where e-filing implemented. **MCR 2.602(A)(4).**

New Provision for Seven (7) Day Orders: Hearing must be scheduled upon filing of first objection. Other parties may file objections until end of 7 day period. Objecting party must send notice of hearing per **MCR 2.602(B)(3)(c)**. Hearing on all objections must be scheduled within 14 days of first objection filing or as soon as practical afterward. **MCR 2.602(B)(3)(d).**

No motion fee to be charged for proposed judgment\order noticed for settlement. **MCR 2.602(B)(4).**

8. MCR 2.603 – Default and Default Judgment

Party seeking default must serve parties with default judgment. Proof of service must be filed with court. **MCR 2.603(B)(4).**

Observation: Significant change. Shifts duty of service from court to party requesting default judgment.

9. MCR Rule 5.105 – Manner and Method of Service

E-service permissible, including on foreign consul and attorney general, if per **MCR 1.109(G)(6)(a)** they are a registered user. **MCR 5.105(A)(2)(b).**

When required, e-service of document must be made in accordance with **MCR 1.109(G)(6)(a). MCR 5.105(B)(5).**

10. MCR Rule 5.107 - Other Papers (Documents) Required to be Served

Changes "papers" to "documents" throughout rule.

11. MCR 5.108 – Time of Service

Adds a provision regarding electronic service and mandates must be done within 7 before hearing\adjourned date. MCR 5.108(C).

Observation: With new general service rules, could result in less effective time re: e-mail
Before 11:59 PM of business day counts as service on that date.

12. MCR 5.113 - Form, Captioning, Signing, and Verifying Documents

Removes requirement that documents be "substantially in the form approved by the State Court Administrative Office" and changes this to mandate that "if SCAO has approved form for a particular purpose, it must be used when preparing that particular document for filing with the court." **MCR 5.113(A).**

Observation: Major change. Many programs exist (Hot Docs, etc.) which attorneys use to prepare documents electronically; these should still be acceptable.

Delivery of wills and codicils to court per **MCL 700.2515** (deposit for safekeeping) and **MCL 700.2516** (delivery by custodian after testator's death) to be done by personal delivery or registered mail. **MCR 5.113(C).**

Observation: Useful amendment. Clarifies that these original wills cannot be filed electronically.

13. MCR 5.125(C)(19) – Interested Persons – DD Guardianship

Individual, individual's attorney, petitioner, individual's presumptive heirs, preparer of report\other appropriate person who performed evaluation, director of facility where individual is resident, GAL (if appointed), such other persons as court may determine.

Note: Does not include nominated guardian as interested person, which is inconsistent with other EPIC interested persons subrules in **MCR 5.125(C).**

14. MCR 5.205 – Address of Fiduciary

Fiduciary's address change notification still required to be sent by mail within 7 days to court and interested persons, even if fiduciary is authorized e-filing user.

15. MCR 5.310 - Supervised Administration

Inventory required to be filed for supervised estates per **MCR 5.307(A).**

Observation: Reasonable requirement to mandate filing in supervised estates, where virtually all aspects of administration are under court scrutiny.

16. MCR 5.409(C)(5) – Accounts

Eliminates option of presenting financial institution statement to court; must now file either statement or verification of funds within 30 days after end of accounting period.

Observation: Filing requirement may have been inserted because presentment language could have become moot with widespread implementation of e-filing in probate courts.

17. MCR 5.501 – Trust Proceedings

Mandates filing of acceptance by trustee to their appointment as fiduciary for court appointment of person not named in creating document (**MCR 5.501(D)**) or qualification of trustee appointed by court order or via testamentary trustee in will admitted to probate (**MCR 5.501(E)**)

Observation: Prior rule required execution only, not filing.

B. E-FILING – ADM 2002-37, Effective September 1, 2019

1. AO 2019-2 – Requirements for E-Filing Access Plans

Requires that courts who seek to impose mandatory e-filing on all litigants must first submit e-filing access plan for SCAO approval. Each plan must conform to SCAO model and ensure at least one computer workstation per county. SCAO may revoke e-filing access plan due to litigant grievances.

Note: SCAO has posted a model e-filing access plan, which must be used for courts who desire to mandate e-filing for all users.

2. MCR 1.109(G)(3) – E-Filing – Mandated User - Exemption

Mandated e-filing user can be exempted on showing of good cause. The following factors should be considered in determining whether good cause has been demonstrated:

- Lack of reliable access to electronic device that includes internet access.

- Whether person must travel unreasonable distance for public computer access or has limited access to transportation and is unable to access e-filing system from home.

- Whether person has technical ability to use\understand e-mail\e-filing software.

- Whether access from home system or via public terminal presents safety issue.

- Any other relevant factor raised by person.

MCR 1.109(G)(3)(g).

Following persons exempt from e-filing automatically upon request:

- Person with disability that prevents\limits person's ability to use e-filing system.

- Limited English proficiency that prevents\limits person's ability to use e-filing system.

- Party confined, including but not limited to jail\prison, juvenile detention, committed to medical\mental health facility.

MCR 1.109(G)(3)(h).

Exemption Request Mechanics

Must be filed in paper with court where case will\has been filed. Paper documents to be processed if submitted at same time as exemption request. Documents deemed filed on day submitted if they meet filing requirements of **MCR 1.109(D)**. Additional requirements:

- SCAO exemption request form must be used; no filing fee.

- Request must state reasons individual cannot use e-filing. Supporting documents may also be submitted.

- Judge must issue order on request within two business days of filing.

- Clerk must promptly mail order. Request\supporting documentation\order must be placed in court file. If no case file, documents t\b maintained in group file.

- Length of Exemption\Validity: Applies only to court in which filed and for life of case; exemption waived if person electronically registers with e-filing system. Person who waives exemption may file another request for exemption.

MCR 1.109(G)(3)(i).

Observation: Exemption process currently only applicable to attorneys, who are the sole mandated users. Process will become much more relevant\heavily utilized if e-filing mandated for all users.

C. E-FILING – ADM 2002-37, Effective January 1, 2020

1. MCR 1.109 - Filing Standards

Except for SCAO forms, font size must be 12 or 13 point for body text and at least 10 point for footnotes. **MCR 1.109(D)(1)(a).**

2. MCR 2.116, 2.119 - Summary Disposition\Motion Practice

Where e-filing implemented, judge's copy of motion, response, brief, affidavits, and reply brief may not be required. **MCR 2.116(G)(1)(c); MCR 2.119(A)(2)(d).**

3. MCR 2.222 - Change of Venue; Venue Proper

Transferring court must order party moving for change of venue to pay filing fee to receiving court, unless fee waived per MCR 2.002. **MCR 2.222(D)(1).**

Case records must be sent by transferring court per change of venue order and Trial Court Records Management Standards and by a secure method. **MCR 2.222(D)(2).**

Receiving court must (1) temporarily suspend filing fee payment and open case and (2) notify moving party of new case number, amount due, and due date. **MCR 2.222(D)(3).**

Moving party must pay filing fee to receiving court within 28 days of transfer order; no additional action until payment made. Receiving court must order case sent back to transferring court if fee not paid within 28 days of order. **MCR 2.222(E)(1).**

If jury fee paid, must be forwarded to receiving court as soon as possible after records transferred. **MCR 2.222(E)(2).**

4. MCR 2.223 - Change of Venue; Venue Improper

Transferring court must order party moving for change of venue to pay filing fee to receiving court, unless fee waived per MCR 2.002. Court may also order plaintiff to pay reasonable compensation\attorney fees to defendant if case filed in wrong court. **MCR 2.223(B)(1).**

Case records must be sent by transferring court per change of venue order and Trial Court Records Management Standards and by a secure method. **MCR 2.223(B)(2).**

Receiving court must (1) temporarily suspend filing fee payment and open case and (2) notify moving party of new case number, amount due, and due date. **MCR 2.223(B)(3).**

Moving party must pay filing fee, costs, and expenses as ordered by transferring court to receiving court within 28 days of transfer order or receiving court will dismiss action; no additional proceedings until payment made. **MCR 2.223(C)(1).**

If jury fee paid, must be forwarded to receiving court as soon as possible after records transferred. **MCR 2.223(C)(2).**

5. MCR 2.225 - Joinder of Party to Control Venue

Transferring court must order party moving for change of venue to pay filing fee to receiving court, unless fee waived per **MCR 2.002**. Court may also order plaintiff to pay reasonable compensation\attorney fees necessary to accomplish transfer. **MCR 2.225(B)(1).**

Case records must be sent by transferring court per change of venue order and Trial Court Records Management Standards and by a secure method. **MCR 2.225(B)(2).**

Receiving court must (1) temporarily suspend filing fee payment and open case and (2) notify moving party of new case number, amount due, and due date. **MCR 2.225(B)(3).**

Plaintiff must pay filing fee and any expenses\attorney fees ordered to receiving court within 28 days of transfer order or receiving court will dismiss action. **MCR 2.225(C)(1).**

If jury fee paid, must be forwarded to receiving court as soon as possible after records transferred. **MCR 2.225(C)(2).**

6. MCR 2.227 - Transfer of Actions – Lack of Jurisdiction

Transferring court must order party moving for change of venue to pay filing fee to receiving court, unless fee waived per **MCR 2.002**. Court may also order plaintiff to pay reasonable compensation\attorney fees for filing case in wrong court. **MCR 2.227(B)(1).**

Case records must be sent by transferring court per change of venue order and Trial Court Records Management Standards and by a secure method. **MCR 2.227(B)(2).**

Receiving court must (1) temporarily suspend filing fee payment and open case and (2) notify moving party of new case number, amount due, and due date. **MCR 2.227(B)(3).**

Plaintiff must pay filing fee and any expenses\attorney fees ordered to receiving court within 28 days of transfer order or receiving court will dismiss action. **MCR 2.227(C)(1).**

If jury fee paid, must be forwarded to receiving court as soon as possible after records transferred. **MCR 2.227(C)(2).**

7. MCR 5.128 - Change of Venue

Specifies that change of venue procedure governed by **MCR 2.222** and **2.223**, except that court must also transfer original of unadmitted will or certified copy of admitted will.

8. MCR 5.302 - Commencement of Decedent Estates

When e-filing implemented and application\petition indicates will available and not in court's possession, copy of will\codicil must be attached to application\petition. Originals must be filed within 14 days of filing or case dismissed without notice\hearing. Dismissal notice will be served on petitioner\interested persons. **MCR 5.302(A)(2).**

Observation: Possible interim step to ultimate change of sending only electronic version of will to court.

9. MCR 5.731 - Access to Records

Clarifies that case records filed under Mental Health Code are public except as otherwise indicated by court rule\statute.

10. MCR 8.119(I)(4) - Sealed Records

Clarifies that materials subject to motion to seal must be made nonpublic temporarily pending ruling on motion.

D. DISCOVERY – ADM 2018-19, Effective January 1, 2020

1. MCR 5.131 – Probate Discovery Rule - Discovery in civil actions in probate court is governed by **MCR 2.300**. **MCR 5.131(A).**

Observation: Useful; retains same language from current **MCR 5.131(B)**. However, significant changes have been adopted for **MCR 2.300**.

General **MCR 2.300** discovery rules apply to probate proceedings, but initial\mandatory disclosures under **MCR 2.302(A)** required only under limited circumstances described below.

Note: Unless otherwise ordered by court, any interested person in a probate proceeding is considered a party for discovery rule application purposes. **MCR 5.131(B)(1).**

Mandatory Initial Disclosures – Probate Proceedings – MCR 5.131(B)(2)

Demand\Objection. Required only if by time of first hearing on petition initiating proceeding either:

- Non-petitioner interested person files demand and properly serves all interested persons or

- Interested person verbally or in writing objects\contests petition, properly serves any objection\response on interested persons, and judge determines mandatory initial disclosure appropriate. Except if court provides otherwise, when mandatory initial disclosures required, they must be provided by petitioner and demandant\objecting interested person.

  MCR 5.131(B)(2)(a).

Observation: Key point – allows Judge, in most circumstances, to determine whether to require mandatory initial disclosures. Court rule recognizes unique dynamics of probate proceedings vs other civil cases.

Court Order. On own interested person\own motion, court can require mandatory disclosures from designated interested person(s) or require additional interested persons to make disclosures. **MCR 5.131(B)(2)(b).**

Time Requirements. Petitioner must serve initial disclosures within 14 days after first hearing on petition subject to demand\objection.
Demandant\objector must serve initial disclosures within later of 14 days after petitioner's disclosure due date or 28 days after demand\objection filed.
If mandatory disclosures ordered by court per objection by interested person (and determination disclosure appropriate), interested person's disclosures due within 21 days of order.

MCR 5.131(B)(2)(c).

Scope of Discovery – Probate Proceedings
Discovery limited to any matters raised in petitions\objections pending before the court**.** **MCR 5.131(B)(3).**

Observation: Useful; retains limitation language from current **MCR 5.131(B)** – prevents one-sided fishing expeditions under cloak of fiduciary letters.

2. Subchapter MCR 2.300 – General Civil Discovery Rules

Note: The following is a general overview of these provisions.

a. MCR 2.301 – Availability\Timing of Discovery

For cases requiring initial disclosures, party may seek discovery only after serving its initial disclosures per **MCR 2.302(A)**; otherwise discovery can be sought when authorized by rules, stipulation, or court order.

b. MCR 2.302 – Duty to Disclose\General Discovery Rules

1) Unless exempted by rules, stipulation, or court order, party must, without request, provide:

- Factual basis of claims\defenses and their legal theories, including citations if necessary to reasonably understand them;
- Name and, if known, address\phone number of each person likely to have discoverable information disclosing party would use for claims\defenses;
- Copy or description of documents\electronically stored information (ESI)\tangible items to use for claims\defenses;
- Computation of damages claimed;
- Copy of insurance\indemnity\surety agreement under which another person may be liable for all\part of judgment; and
- Anticipated areas of expert testimony.

MCR 2.302(A)(1).

2) Cases exempt from initial disclosure are listed in **MCR 2.302(A)(4).**

3) Limitation of Discovery of Electronic Materials – MCR 2.302(B)(6) – Court may limit frequency\extent of electronically stored information, considering whether it could be obtained from source more convenient\less burdensome\less expensive and whether party seeking discovery has had ample opportunity to obtain information sought.

4) Supplementing Disclosures and Responses – New MCR 2.302(E)(1)(a) – Party who disclosed under **MCR 2.302(A)** or responded to interrogatory\request for production\request for admission must supplement\correct disclosure in timely manner if (1) new\additional information discovered\revealed or party learns disclosure incomplete\incorrect in some material respect (No duty to supplement if additional\corrective information otherwise made known to parties during discovery or in writing.) or (2) ordered by court.

5) Changes to Discovery Procedure – MCR 2.203(F) – Stipulation may not change scheduling order deadlines without court approval (current version only requires judicial authorization if extending discovery deadlines).

6) Signing of Disclosures, Discovery Requests, Responses, and Objections; Sanctions - MCR 2.302(G) – Sub rule now applicable to disclosures, since they must include legal theories under proposed **MCR 2.302(A)(1)(b).**

7) Filing and Service of Disclosure and Discovery Materials – MCR 2.302(H) – Sub rule now applicable to disclosures.

c. Discovery Subpoena to a Non-Party – MCR 2.305 - Subpoena can issue to non-represented party only per court order or after parties have had reasonable opportunity to obtain lawyer per **MCR 2.306(A). MCR 2.305(A)(1).**

d. Depositions on Oral Examination of a Party – MCR 2.306

- Seven (7) hour maximum per deposition. **MCR 2.306(A).**
- For depositions of public\private corporation, partnership, association, or governmental agency, notice must be served at least 14 days before deposition. Within 10 days of service, entity can serve objections\file protective order motion. Party seeking discovery may either move to enforce notice or proceed on topics with no objection. **MCR 2.306(B).**

e. Interrogatories to Parties – MCR 2.309 – 20 interrogatory maximum on by each represented party on each separately represented party. Interrogatory with "discrete subparts" considered single interrogatory. **MCR 2.309(A)(2).**

f. Requests for Production of Documents and Other Things; Entry on Land for Inspection and Other Purposes – MCR 2.310 – Definition of document expanded to include sound recordings, images or data stored in any medium, including electronically stored information (ESI). ESI means any electronically stored information, regardless of system, format, or properties. **MCR 2.310(A)(1)&(2).**

g. Request for Admission - MCR 2.312 – Request must clearly by identified in caption & before each request that it is a request for admission. **MCR 2.312(A).**

h. Failure to Serve Disclosure or to Provide or Permit Discovery; Sanctions – MCR 2.313

1) Permits party to move for sanctions\compel disclosure if party fails to serve required disclosure. **MCR 2.313(A)(2)(a).**

2) Expenses for motion to compel discovery may be awarded where motion filed and compliance obtained even where court not required to rule on motion, unless court finds motion filed before good faith attempt to obtain information without court action. **MCR 2.313(A)(5)(a).**

3) If party fails to disclose, supplement, or identify witness per **MCR 2.302(A)or(E)**, cannot use information unless failure harmless\substantially justified. Also, on motion and opportunity to be heard, court may order payment of expenses (including attorney fees), inform the jury, and impose other sanctions. **MCR 2.313(C)(1).**

4) Failure to Preserve Electronically Stored Information – MCR 2.313(D) – If information which should have been preserved is lost because of party's failure to take reasonable steps to preserve it and cannot be restored\replaced via additional discovery, court may:

- Upon finding prejudice due to information loss, order measures no greater than necessary to cure prejudice, or

- Upon finding party acted with intent to deprive other party of use of information, order appropriate remedies, including presumption lost information unfavorable to party, order\jury instruction on presumption of unfavourability, or dismissal\entry of default.

i. Removal of Disclosure and Discovery Materials from File – MCR 2.316 – Expanded to include disclosure materials per **MCR 2.302(A).**

3. Subchapter 2.400 – Pretrial Procedure; Alternative Dispute Resolution; Offers of Judgment; Settlements

a. Pretrial Procedures; Conferences; Scheduling Orders – MCR 2.401

1) Additional items added to list of matters which can be discussed in early scheduling conference\included in scheduling order. **MCR 2.401(B)(1).**

2) Discovery Planning – MCR 2.401(C) – Upon court order\written party request, parties must confer and prepare proposed discovery plan. Plan must address all disclosure\discovery matters, and include proposed deadlines. Plan (including noting disagreements) may be submitted to court as part of motion\stipulation. Appropriate sanctions, including attorney fees, may be imposed against attorney\party for failure to participate in good faith to develop plan.

3) Final Pretrial Conference and Order – MCR 2.401(H) – Court may hold final pretrial conference, which can be combined with settlement conference. Court can order preparation of joint pretrial order, which can include a number of items listed in this sub rule.

4) Electronically Stored Information (ESI) Conference, Plan and Order – MCR 2.401(J).

- If case reasonably likely to include discovery of ESI, parties may agree, motion can be filed, or judge can order ESI conference, which shall include consideration of numerous items listed in this sub rule. **MCR 2.401(J)(1).**

- Plaintiff (unless parties agree otherwise) must submit ESI discovery plan to court within 14 days of ESI conference, including statement of issues where parties disagree. Discovery plan may include numerous items listed in sub rule. **MCR 2.401(J)(2).**

- Attorneys for parties at ESI conference must be sufficiently familiar with client's technology to competently address ESI issues; client representative\outside expert can be brought for assistance. **MCR 2.401(J)(3).**

- Court may enter ESI discovery order per ESI discovery plan, motion, stipulation, or *sua sponte*. **MCR 2.401(J)(4).**

5) Mediation of Discovery Disputes – MCR 2.411(H) – Discovery disputes may be sent to mediation via court order or stipulation. Parties may agree to use same mediator selected for general mediation of case. Unless need for expedited attention, court can order discovery disputes submitted to mediation first. Court may appoint expert per **MRE 706** in cases involving complex issues of electronically stored information.

4. Subpoena; Order to Attend – MCR 2.506 – Subpoena document requests must comply with **MCR 2.302(B)** and any scheduling order. Objections appearance subpoena may be filed before designated appearance time, which will be adjudicated per **MCR 2.506(H)**. (This provision inapplicable to discovery subpoenas\requests for document to party where discovery available). Copy of document\tangible item subpoena must be provided to opposing party\counsel. **MCR 2.506(A)(1).** In specifying discovery of unreasonably accessible information, court may specify who will bear cost. **MCR 2.506(A)(3).**

E. PROTECTED PERSONAL INFORMATION – COURT RECORDS\CONFIDENTIAL INFORMATION\REDACTION – ADM 2017-28, Effective January 1, 2021

1. In General - A series of court rule changes related to the maintenance and redaction of confidential information in court records have been enacted. The amendments are effective January 1, 2021 – the target date for full statewide implementation of e-filing.

2. Protected Personal Identifying Information (PPII) MCR 1.109(D)(9)

PPII cannot be included in public document\attachment except per rules. PPII defined as:

- Date of birth
- Social security\national ID number
- Driver's license\state ID card number
- Passport number
- Financial account numbers

MCR 1.109(D)(9)(a)

Observation #1: Home\personal telephone numbers removed from proposed PPII list and will not be confidential. This information is used internally by courts and externally by other users (i.e., GALs, attorneys, etc.) to contact petitioners – extremely important in large courts with high number of in pro per cases.

Observation #2: Making date of birth confidential will cause difficulties for external users, particularly those with larger courts. Usefulness as identifier for external users will

only grow over time, with advent of e-filing and a statewide consolidated database\access system.

3. Filing, Accessing, and Serving PPII – MCR 1.109(D)(9)(b)

PPII required by law\court rule or necessary to court to identify person in a case to be provided on SCAO form\manner established and is nonpublic. (i)

If social security number required, last four digits only to be filed. (ii)

Fields for PPII will not be included on SCAO forms (except for separate, non-public PPII forms). (iii)

PPII only available to parties\interested persons, unless parties stipulate to access to other person(s). (v)

Party\court not exempt from serving document containing PPII filed with court except by court order. (vi)

Order to Redact Personal Identifying Information: For just cause, on party\court's own motion any personal identifying information can be made confidential (PPII already confidential). If home address\phone number made confidential order must designate alternative address\number for contacting party. (vii)

Local court forms may not contain fields for PPII; document cannot be rejected, case dismissed, or other negative action taken for failing to file PPII on local form. **MCR 1.109(D)(9)(c)**

4. Failure to Comply with PPII Court Rule Requirements - MCR 1.109(D)(9)(d)

- Protection waived if party submits own PPII and does not provide info in form\manner per court rule. (i)

- Court on own initiative can seal improperly filed documents\order redacted documents t\b filed. (ii)

5. Court Entry of PPII

To be entered per SCAO standards (to be established) for use per state\federal law. Information cannot be displayed as part of case history. **MCR 1.109(D)(9)(e).**

6. Request for Copy of Document with PPII\Redaction – MCR 1.109(D)(10)

Redaction sole responsibility of attorneys\parties filing documents. Court will not review\redact except per this subrule. **MCR 1.109(D)(10)(a).**

Observation: Useful to place burden on parties; would be significant resource drain on courts if they had to screen documents before accepting for filing.

7. Document Requests

For copy requests for documents filed on\after 3\1\06, court must review\redact social security numbers. Not applicable to certified\true copies required by law or copies for use for which social security number provided. **MCR 1.109(D)(10)(b).**

Note: Significant burden on Courts to perform social security redactions on copy requests. Consider seeking clarification that this applies to social security numbers on death certificates. Original proposal only applied to documents filed on\after 1\1\21, effective date of amendments; adopted version requires redaction for documents filed on\after effective date of **ADM 2006-02**.

8. Redaction of PPII\Personal Identifying Information - MCR 1.109(D)(10)(c)

- PPII redaction upon written request of person to whom it applies; no fee – request is nonpublic. (i)

- Affected party\person can file ex-parte motion for personal identifying information to be redacted or made confidential\nonpublic. Hearing on motion at court's discretion. Order t\b entered if party\person's privacy interest outweighs public's interest in information. Motion t\b on SCAO form, must specify information t\b redacted, and kept as nonpublic document. (ii)

- Exhibits with PPII – Written redaction request can be filed. No motion fee, must specify PPII t\b redacted, and kept as nonpublic document. Order t\b entered if party\person's privacy interest outweighs public's interest in information. (iii)

9. Certification of Redacted Record - MCR 1.109(D)(10)(d)

True copy can be issued stating information redacted per law\court rule or sealed per court order.

10. Maintenance of Redacted PPII - MCR 1.109(D)(10)(e)

Document to be maintained per SCAO standards (to be established).

11. Definitions – MCR 1.109(H)

Confidential, nonpublic, redact, redacted document, sealed.

12. Court Records\Reports; Duties of Clerks – MCR 8.119

    a. Case History – PPII – MCR 8.119(D)(1)(a)

PPII in case management system maintained for state\federal law purposes; cannot be displayed as case history, including when transferred to Archives of Michigan.

Note: Significant burden on Courts to maintain bifurcated system.

b. Access to Records - MCR 8.119(H)

Courts must provide access to records maintained electronically, but cannot be provided via publicly accessible website if PPII not redacted.

Note: Significant burden on Courts to maintain bifurcated system. On line access not yet permitted; anticipates adoption of amended version of **AO 1999-4**, effective 1\1\21.

13. Administrative Order 1999-4 – Trial Court Records Management Standards

Court records must be made available electronically to same extent as available at courthouse, provided personal data identifiers not publicly available. PPII must be nonpublic. SCAO to develop standards\forms to ensure PPII provided to court separately from filed documents except as provided by law.

Note #1: Increasing importance with e-filing\transition to all documents being on-line; heightens potential for identity theft\concerns with redaction.

Note #2: Can\will case access system be configured to allow viewing only on-line? Consistent with mandate that availability be same as that at the courthouse. Is there a mechanism to allow electronic ordering\payment of files and remote printing via on-line access, for non-certified and certified copies?

III. NEW LEGISLATION

A. KEVIN'S LAW – ASSISTED OUTPATIENT TREATMENT \PERSON REQUIRING TREATMENT 2018 PA 593 – EFFECTIVE MARCH 28, 2019

1. Synopsis: This legislation facilitates the use of assisted outpatient treatment (AOT) by (1) replacing the term alternative treatment with AOT throughout Chapter 4 of the Mental Health Code and (2) providing that initial combined treatment orders can be for up to 180 days. Additional provisions, including definition of person requiring treatment and transport orders, are also modified.

2. Person Requiring Treatment Definition

(c) amended to read as follows (additions underlined):
An individual who has mental illness, whose judgment is so impaired by that mental illness and whose lack of understanding of the need for treatment has caused him or her to demonstrate an unwillingness to voluntarily participate in or adhere to treatment that is necessary, on the basis of competent clinical opinion, to prevent a relapse or harmful deterioration of his or her condition, and presents a substantial risk of physical or mental harm to the individual or others.
(d) (AOT criteria) eliminated.

MCL 330.1401.

The following additional definitions have been modified:

- "AOT" may include case management services under a psychiatrist's supervision developed based on person centered planning per Sec. 712 of the Mental Health Code. **MCL 330.1100a(8).**
- "Consent" includes guardian empowered under EPIC to provide consent. **MCL 330.1100a(19).**
- "Emergency situation" includes scenario where individual has mental illness that impairs their judgment so they are unable to understand their need for treatment and presents a risk of harm. **MCL 330.1100a(29).** (addition underlined)
  Note: Lowers threshold for obtaining transport order. Facilitates earlier intervention in mental health crisis situations to prevent\mitigate further deterioration of individual's condition.
- "Involuntary mental health treatment" includes AOT; alternative treatment stricken. It does not include guardian under EPIC authorized to consent to mental health treatment**. MCL 330.1400(f).**

3. Transport Order

Transport order must be executed within 10 days of issuance. If not, responsible law enforcement agency must report to court reason not executed. **MCL 330.1436(2).**

AOT Only Transport Order – Assessment must be conducted immediately upon arrival at preadmission screening unit\hospital; individual must be released at end of examination unless determined immediate hospitalization required. If hospitalized immediately, petition with two clinical certifications must be filed within 24 hours of examination; petition must request involuntary hospitalization and may request combined treatment. **MCL 330.1436(3).**

Observation: Codified 10day deadline useful. Mechanics of reporting non-execution of transport orders to courts unclear.

Deferrals for proposed combined orders can be for up to 180 days total, with hospitalization limited to 60 days. **MCL 330.1455(6).**

Observation: Coordinates deferral provisions with new maximum length for AOT (previously referred to as alternative treatment) orders.

For AOT only petitions, psychiatrist must testify unless they signed petition, in which case one physician or licensed psychologist must testify; requirement that a psychiatrist also testify has been eliminated. Waiver of AOT only petitions permitted, in which case clinical certificate must be presented to court before hearing. **MCL 330.1461(2).**

4. AOT Treatment Plan - Psychiatrist required to supervise preparation\implementation of AOT treatment plan, which must be completed within 30 days of entry of order; copy of plan must be sent to court within 3 days of completion of plan, to be maintained in individual's file. **MCL 330.1468(3).**

5. Treatment Orders

Initial Orders – Hospitalization 60 days, AOT 180 days, combined 180 days, with 60 day maximum hospitalization period. **MCL 330.472a(1).**

Note: Alternative treatment now called AOT. Codifies 180 day period for AOT orders which was optional under 2017 amendments to Kevin's Law.

Second Orders – Involuntary treatment (inpatient, outpatient, or combination) up to 90 days. **MCL 330.1472a(2).**

Third\Subsequent Orders – Involuntary treatment (inpatient, outpatient, or combination) up to 1 year. **MCL 330.1472a(3)&(4).**

Decision to release individual from AOT treatment program must be made by psychiatrist. **MCL 330.1474(1).**

MENTAL HEALTH TREATMENT\CONSENT
2018 PA 595 – EFFECTIVE MARCH 28, 2019

If assisted outpatient treatment (AOT) order includes case management plan to provide care coordination, must be under psychiatrist supervision and developed per person centered planning under section 712 of Mental Health Code. **MCL 330.1100a(8).**

Consent includes written agreement by guardian executed per EPIC's terms. **MCL 330.1100a(19).**

Gives guardian authorized under EPIC ability to execute voluntary hospitalization consent. **MCL 330.1415(b).**

Patient's rights, including right to object to treatment, must be told to patient; no longer required to be on form. **MCL 330.1416.**

Authority to give notice of intent to terminate voluntary treatment extended to full or limited guardian and patient advocate, if these individuals authorized to give consent to mental health treatment. **MCL 330.1419.**

Note: Ability to terminate treatment extended to mental health treatment provider and mental health treatment, not hospitalization only.

Observation: Facilitates implementation of EPIC changes that extend authority to make mental health treatment decisions to guardians (as authorized by probate court).

B. JUDICIAL ADMISSION\INTELLECTUAL DISABILITY TREATMENT 2018PA 596 – EFFECTIVE MARCH 28, 2019

Changes the term "judicial admission" to "intellectual disability treatment".

Modifies the following terms throughout the intellectual disability treatment chapter of the Mental Health Code, **MCL 330.1500** et seq.:

- "Treatment" instead of "judicial admission".
- "Facility" instead of "center".
- "Outpatient program" instead of "program".

Adds following definitions:

- "Alternative program of care and treatment" (to be developed based on person centered planning per Sec. 712 of Mental Health Code). **MCL 330.1500(b).**
- "Treatment" – Admission to facility or outpatient treatment under psychiatrist's supervision developed based on person centered planning per Sec. 712 of the Mental Health Code. **MCL 330.1500(f).**

Mandates that SCAO will prepare forms to be used for intellectual disability proceedings. **MCL 330.1501.**

Treatment Options\Criteria: Provides that outpatient or inpatient treatment may be ordered for individual diagnosed with intellectual disability. Adds a second basis for treatment (danger to self\others retained): If individual arrested and charged with offense that was result of intellectual disability. **MCL 330.1515(b).**

Observation: Extremely helpful. Facilitates de-criminalization of mental illness and placing individuals on treatment track. Clarification that treatment can be inpatient or outpatient also highly beneficial.

Note: Prosecutor must be notified of individual's release from facility if arrested\charged with offense which was result of intellectual disability. **MCL 330.1525(3).**

C. GUARDIAN – ABILITY TO CONSENT TO MENTAL HEALTH TREATMENT 2018 PA 594 – EFFECTIVE MARCH 28, 2019

Gives guardian power to consent to mental health treatment on behalf of ward subject to the following conditions:

- Authority to consent to inpatient hospitalization can only be exercised if court specifically grants this power in its order.

- If ward objects\refuses treatment, guardian\other person must file involuntary treatment petition.

MCL 700.5314(c).

Guardian given power to execute, reaffirm, or revoke nonopioid directive for ward. **MCL 700.5314(f).**

Guardian required to list on annual report any mental health treatment received by ward, and whether guardian executed, reaffirmed, or revoked a nonopioid directive. **MCL 700.5314(j)(v)&(vii).**

Observation: Tremendous step forward to promote early intervention on behalf of ward. Eliminates disparate treatment under law, which allowed guardian to consent to all medical procedures except those involving mental health.

IV. CASE LAW

A. JOINT BANK ACCOUNT – RIGHT OF SURVIVORSHIP – CO-OWNERS INTEREST

Estate of Lewis v Rosebrook, - Mich App - ; - NW 2d - (2019), #343,765, rel'd. 7\16\19

1. This 3-0 ruling by the Court of Appeals reversed a decision by the Montcalm Probate Court approving the removal by one co-owner of the entire balance of the funds of three joint bank accounts and remanded the case for further proceedings to determine the value of the non-withdrawing joint owner's proportional share of these assets.

2. **Lewis** involved an unmarried couple involved in a long-term relationship. He established three joint accounts which he primarily, if not exclusively, funded. At the end of their relationship, Rosebrook, Lewis' longtime partner, withdrew $255,000 from these accounts – virtually their entire balances. Lewis' daughter (plaintiff) became conservator and filed a civil action to obtain these monies; upon her father's death she became personal representative of his estate and continued the litigation. The trial court ruled that Lewis and his long-term girlfriend were co-owners of the accounts and had equal interests in them. As a result, Rosebrook (defendant) had the ability to withdraw all the funds from these accounts. The plaintiff appealed.

3. The appeals court reversed the trial court's decision regarding the defendant's right to remove virtually all the monies from the joint accounts. It noted that under Michigan jurisprudence, including the joint bank account statute, MCL 487.703, two aspects of these accounts are often contested: survivorship rights and contribution, access, ownership, and use of funds

while the joint tenants are alive. The presumption of equal contribution, access, and ownership can be rebutted.

The Court of Appeals declared that the issue in **Lewis** was one of contribution, not survivorship, as the withdrawals occurred when both joint owners were alive. The probate court correctly determined that these accounts were not established for convenience, that Lewis intended to convey an interest to the defendant as joint tenant with right of survivorship, and as co-owners had equal access to use of these monies. However, the determination that the defendant had the right to withdraw all of the monies was incorrect. They noted that the language of **MCR 487.703** permits a joint tenant to withdraw the entire account balance, the statute does not discharge the withdrawing co-owner from liability to the non-withdrawing co-owner. Also, no common law right in Michigan supports the ability of a co-tenant to appropriate the tenancy's entire corpus, including the other co-tenant's interest. Since the defendant was an equal owner but appropriated virtually all of the funds, she was liable under a theory of conversion to return all monies over her 50% proportionate share.

4. This case clarifies the withdrawal rights of joint bank account owners when all joint tenants are alive. Unlike at death, when surviving joint owner is entitled to 100% of the assets, a joint tenant may only withdraw their proportionate share.

5. Application for leave to appeal has not been filed.

B. DEVELOPMENTAL DISABILITY – TRANSFER OF WARD – INJUNCTION
In re Brosamer, - Mich App - ; - NW 2d - (2019), #346,394, rel'd. 5\16\19

1. This unanimous Court of Appeals decision affirmed the order of the Lenawee Probate Court enjoining the transfer of a developmentally disabled individual from one residential placement to another.

2. In **Brosamer**, the guardian of the developmentally disabled individual sought and obtained an ex parte order prohibiting the transfer pursuant to **MCR 330.1536** on the basis that it would be detrimental to the ward. The respondent local community health authority appealed.

3. The appellate panel disagreed with the respondent's argument that the probate court revised **MCR 330.1536** to create a transfer veto right for the guardian. The statute provides in pertinent part:

> Sec. 536. (1) A resident in a facility may be transferred to any other facility, or to a hospital operated by the department, if the transfer would not be detrimental to the resident and the responsible community mental health services program approves the transfer.

(2) The resident and his or her nearest relative or guardian shall be notified at least 7 days before any transfer, except that a transfer may be effected earlier if necessitated by an emergency. In addition, the resident may designate 2 other persons to receive the notice. If the resident, his or her nearest relative, or guardian objects to the transfer, the department shall provide an opportunity to appeal the transfer.

* * *

The appeals court noted that the probate court's finding that the transfer would be detrimental to the ward was well supported by the evidence, and it narrowly tailored its role to this statutory standard.

4. The Court of Appeals also rejected the respondent's assertion that granting a permanent injunction was an abuse of the probate court's discretion. No bar to seeking a lifting of the injunction exists if the ward's transfer would not be detrimental to her wellbeing.

5. This decision provides useful guidance on the circumstances and criteria under which **MCL 330.1536** can be utilized to prohibit the transfer of a developmentally disabled ward's residential placement.

6. Application for leave to appeal has not been filed.

C. TRUSTS – UNDUE INFLUENCE – CONFIDENTIAL\FIDUCIARY RELATIONSHIP

In re Khalil Trust, - Mich App - ; - NW 2d - (2019), #341,142, rel'd. 5\14\19

1. This 3-0 ruling by the Court of Appeals vacated its March 12, 2019 opinion in this matter, again ruled that the probate court discounted inexplicably the petitioner's evidence, and failed to create a record adequate for review. It vacated the trial court's order summarily dismissing the undue influence claim and remanded the case for further proceedings to be conducted on the record.

2. The petitioners in **Khalil**, children and trust beneficiaries, alleged that another sibling unduly influenced their mother to allot to himself a disproportionate share of the assets of the trust. Virtually all the proceedings were conducted off the record in a series of "hearings" in the judge's chambers. Petitioners asserted that they twice asked (in chambers) that the settlor be deposed show she was unduly influenced by her son. They further declared they had established the presumption of undue influence. The court ordered the son to prepare an accounting; following a teleconference with the attorneys, a forensic account review was ordered. After it was filed with the court but before the scheduled hearing date the court "denied" the petitioner's request for relief. Although it noted that various hearings were conducted and the matter was ultimately taken under

advisement, none of the "hearings" were conducted on the record and as a result no transcripts were ordered.

The judge summarily dismissed the petitioner's claims that the settlor improperly transferred trust assets to her son. The court also rejected their undue influence claim, stating that the existence of a confidential or fiduciary relationship was not alleged or established; a mere family relationship does not create a fiduciary relationship. The petitioners appealed.

3. Petitioners argued that the dismissal of their claims was premature, as the respondent co-trustees had not filed a summary disposition motion and petitioners were not provided with an opportunity for rebuttal. The appeals court noted that the only issue before them was whether the probate court properly resolved the petitioners' undue influence claim. The appellate panel noted that the trial court prematurely dismissed the petitioners' claims without the respondents filing a motion. Evidence creating a genuine issue of material fact was presented and should have been addressed at a hearing; this information was revealed by the forensic accounting ordered by the probate court. As a result of the failure to consider this evidentiary contest, the petition was improperly dismissed.

   The Court of Appeals also held that dismissal of the petitioners' undue influence claim was also erroneous since a genuine issue of material fact was created by conflicting evidence. While noting that the petitioners' briefs and motions were not artfully drafted, they alleged and presented evidence tending to show a fiduciary relationship with the respondent son. They also proffered evidence that he benefited from his managed trust transactions and he had the opportunity to influence the settlor. The premature dismissal of the case prevented the petitioners from deposing the settlor to potentially flesh out these allegations. The appellate panel noted the petitioners' allegation that multiple requests to depose the settlor had been rejected by the trial court at in chambers "hearings." Since the summary dismissal of their undue influence claim was being dismissed, it would be possible to again seek a deposition.

4. This case stands for the proposition that it is highly beneficial to conduct formal hearings on the record. Doing so will allow contested issues to be adjudicated in an appropriate manner consistent with the rights of the parties and the trial court's decision.

5. Application for leave to appeal has not been filed.

D. MEDICAID ELIGIBILITY – SBO TRUST – COUNTABLE ASSETS
Hegadorn v DHHS, 503 Mich 231; 931 NW 2d 571 (2019)

1. This unanimous (6-0) decision by the Michigan Supreme Court held that an irrevocable "solely for benefit of" (SBO) trust for a community spouse, which includes assets formerly owned by an institutionalized spouse, does not automatically make the trust assets countable for an initial Medicaid eligibility determination of the institutionalized spouse.

2. **Hegadorn** involved two consolidated cases in which the plaintiffs, two elderly women (institutionalized spouses) were receiving long term care at nursing homes at their own expense. Each plaintiff's husband (community spouses) subsequently created an irrevocable trust solely for his own benefit (SBO trust); each couple transferred the majority of their assets into the trust, and each institutionalized spouse then applied for Medicaid benefits. The Department of Health and Human Services (DHHS) determined that the entire value of the SBO trusts were countable for determining Medicaid eligibility and denied their applications. An administrative appeal was denied, the Circuit Court reversed this decision, the Court of Appeals consolidated the cases and reinstated their denial in a published ruling. **320 Mich. App. 549; 904 NW 2d 904 (2017).** Application for leave to appeal was granted by the Michigan Supreme Court.

3. The Supreme Court ruled that the Court of Appeals incorrectly determined that the ability of an irrevocable trust, which includes former assets of an institutionalized spouse, to make payments to the community spouse does not automatically make those assets countable for an institutionalized spouse's initial Medicaid eligibility determination. They provided a thorough analysis of applicable federal statutes Michigan's Medicaid Manual.

   The Supreme Court noted that the rules do not assume assets placed in an irrevocable trust are available to the Medicaid applicant, but rely on the "any circumstances rule" of sec. 1396p(d)(3)(B). They determined that the individual for purposes of this rule refers to the institutionalized spouse – to the exclusion of the community spouse – who, by definition, is neither applying for nor receiving Medicaid benefits. The any circumstances rule makes irrevocable trust assets available to the Medicaid applicant only if circumstances exist under which payment from the trust could be made to\for the benefit of the applicant. However, the Court declined to order that the plaintiff's Medicaid applications be approved, and instead vacated the administrative hearing decision and remanded each case to the appropriate administrative tribunal for the proper application of the any-circumstances test. (Opinion, pgs. 33-34).

4. Chief Justice McCormack wrote a concurring opinion in which she agreed with the majority that the individual under sec. 1396p(d)(3)(B) refers to the Medicaid applicant. However, she noted that if the transfers by the plaintiffs trigger a divestment penalty, it is unlikely this planning strategy would be viewed as a success. While this issue was correctly left for a case where it is actually presented by the parties, she addressed it here to caution

individuals who may consider using irrevocable trusts to attempt to obtain Medicaid eligibility, particularly when other, well settled strategies exist.

5. What conclusions can be drawn from this decision? 1. SBO trusts funded at least partially by an institutionalized spouse do not automatically make them ineligible to receive Medicaid benefits, but must be evaluated pursuant to the any circumstances test. 2. Use of this Medicaid planning technique should be viewed with caution and other more established strategies considered.

V. CONCLUSION

Knowledge of the preceding court rule amendments, recent legislation, and new case law will enhance your skills as a probate practitioner.

Rev. 10\19