Divorce Trial Practice

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I. Introduction

§7.1 When settlement negotiations and alternative dispute resolution have failed, a trial is necessary. Domestic relations cases are tried before judges of the family division of circuit court. Upon filing a domestic relations action, each case is assigned to a family division judge who will hear and decide those cases requiring judicial resolution. A blind draw method is used for assignment, giving the parties and their respective attorneys no choice in the selection of the judge.

There is no constitutional or statutory right to a jury trial in a domestic relations case. Contested child custody cases are to take priority for hearing and trial assignment over all other civil actions under MCR 2.501(B)(2). MCR 3.210 (C) provides:

> (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 even 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 a 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 file din the action if the notice is mentioned in the caption.
> (5) 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.
> (6) The court may extend for good cause the time within which a hearing must be held and a decision rendered under this subrule.

There are also statutory time restrictions regarding the earliest possible entry of a final judgment. MCL 552.9f provides in relevant part:

> No proofs or testimony shall be taken in any case for divorce until the expiration of 60 days from the time of filing the bill of complaint, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony. In every case

where there are dependent minor children under the age of 18 years, no proofs or testimony shall be taken in such cases for divorce until the expiration of 6 months from the day the bill of complaint is filed. In cases of unusual hardship or such compelling necessity as shall appeal to the conscience of the court, upon petition and proper showing, it may take testimony at any time after the expiration of 60 days from the time of filing the bill of complaint.

II. Pretrial Considerations

A. Resolution of Cases or Issue Prior to Trial

1. In General

§7.2 Lawyers should make every effort to resolve domestic relations cases without proceeding to trial. Alternative dispute resolution, such as arbitration and mediation, is a useful tool to draw out fair and equitable settlements between parties. A trial is an adversarial proceeding which tends to exacerbate ill will and anguish between the parties.

2. Settlement

§7.3 Settlement of a domestic relations case is often a preferable means of resolution for the following reasons:

- The parties are able to control their own destiny rather than leaving the decision to a uninterested third party.
- The expenses associated with preparing for and litigating a divorce are often significant and can be dramatically reduced if settlement occurs prior to trial.
- The length of time the parties must proceed in uncertainty waiting for the final resolution of their divorce, can also be dramatically reduced through prompt settlement, allowing the parties to move forward rather than linger on the past.
- If minor children are involved, settlement demonstrates parent s desire to resolve issues in their children s best interest and further setting a good example for children in dispute resolution.

It is important to preserve a settlement by placing the terms thereof on the record or memorialize the provisions in writing with the parties signing the document. Under MCR 2.507H, an agreement between the parties or their attorneys regarding the proceedings in an action, that is subsequently denied by either party, is not binding unless it was made in open court, or unless it is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

When preserving a settlement on the record it is important to make sure that the client understands the terms of the settlement, prior to stating the provisions on the record. The settlement should be read into the record in a clear and coherent manner, in the event a later dispute of the terms develops. Once the terms of the settlement have been presented into the record, each attorney should question his or her client as follows:

- Have you heard the settlement placed on the record?
- Do you understand the terms of the settlement?
- Do you agree to be bound by the terms of the settlement?

- You understand that you have the right to proceed to a trial before the court and at that time you could do better, worse or the same?
- Are you entering into this settlement freely and voluntarily?
- Do you request the Court to approve the terms of the settlement and enter a judgment of divorce containing the terms of the settlement?

Settlement agreements reached through negotiations between the parties are generally upheld by reviewing courts in the absence of fraud, duress or mutual mistake. *Applekamp v. Applekamp*, 195 Mich App 656, 491 NW2d 644 (1992). Judgments that are entered by consent, based upon settlements are more difficult to set aside than a judgment as a result of trial litigated before a court. *Id*.

3. Alternative Dispute Resolution

§7.4 The parties may be able to resolve many of their differences through a an alternate method of dispute resolution. The parties to a divorce may agree to binding arbitration in domestic relations cases. The parties can then submit for resolution the issues of property division, spousal support, custody and child support. Under MCR 3.602(J), the court shall vacate an award if the award was procured by corruption, fraud, or other undue means; the arbitrator showed partiality or corruption, or there was misconduct prejudicing a party s rights; the arbitrator exceeded his or her powers; or the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the cause, or conducted the hearing to substantially prejudice a party s rights. Under MCR 3.602(K), the court shall modify or correct the award if:

(a) there is an evident miscalculation of figures or an evident mistake in the description of a persons, a thing, or property referred to in the award;
(b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
(c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

It is important that the application to vacate or modify be made within 21 days after delivery of a copy of the award to the applicant, except if it is predicated on corruption, fraud or other undue means, the application must be made within 21 days after the grounds are known or should have been known.

Domestic relations mediation is not normally binding, but rather is subject to rejection or acceptance by the parties under scheme provided in MCR 2.612. The parties may stipulate to binding mediation, however, it is functionally the same as binding arbitration. Decisions made under binding mediation are subject to review for fraud and duress, as well as determination regarding whether the mediator exceeded his or her scope of authority. Review should not be used to correct factual errors. *Frain v. Frain*, 213 Mich App 509, 540 NW2d 741 (1995).

A party cannot be bound by a decision made through a method of alternate dispute resolution, if that party did not agree to the method. *Watson v. Watson*, 204 Mich App 318, 514 NW2d 533 (1994).

The Domestic Relations Arbitration Chapter MCL 600.5070 *et seq*. was enacted on March 28, 2001. This comprehensive scheme is discussed in Chapter 8 Alternative Dispute Resolution. Under the procedures for Domestic Relations Arbitration, an award may be set aside if it is not in the best interests of the parties minor child. This remedy was not available under the prior schemes.

4. Friend of the Court Evidentiary Hearing

§7.5 An evidentiary hearing on contested issues in a divorce case can be conducted by a Friend of the Court Referee, if the parties so stipulate or the court orders a referral. MCL 552.507. A Friend of the Court Referee is an attorney in good standing with the State Bar of Michigan. Under MCR 3.215:

(B) Referrals to the Referee.
- (1) The chief judge may refer motions of a particular kind to a referee, by administrative order.
- (2) To the extent allowed by law, the judge to whom an action is assigned may refer other motions to a referee
  - (a) on written stipulation of the parties,
  - (b) on written motion by a party, or
  - (c) on the judge's own initiative.

(C) Scheduling of the Referee Hearing.
- (1) Within 14 days after receiving a motion under subrule or a referral under subrule (B)(2), the referee must schedule the matter for hearing.
- (2) The referee must serve a notice of hearing on the attorneys for the parties, or on the parties if they are not represented by counsel. The notice of hearing must clearly state that the matter will be heard by a referee.

(D) Conduct of Hearings.
- (1) The Michigan Rules of Evidence apply to referee hearings.
- (2) A referee must provide the parties with notice of the right to request a judicial hearing by giving
  - (a) oral notice during the hearing, and
  - (b) written notice in the recommendation for an order.
- (3) Testimony must be taken in person, except that a referee may allow testimony to be taken by telephone or other electronically reliable means, in extraordinary circumstances.
- (4) An electronic or stenographic record must be kept of all hearings.

The Friend of the Court was created to act as an investigative and fact-finding arm of the domestic relations circuit court. A Friend of the Court Referee is thereby limited by the intent of the creators of the position and should be limited to fact-finding and a investigative functions while purely legal questions should be left to the trial court. *D Allessandro v. Ely*, 173 Mich App 788, 434 NW2d 662 (1988).

Upon written request by either of the parties or motion of the Court, the Court is required to conduct a de novo review hearing on any matter that was subject of the

referee hearing. The hearing provided for in the Friend of the Court Act requires the circuit court to conduct a hearing as if no Friend of the Court hearing had been conducted previously and arrive at an independent conclusion. *Truitt v. Truitt*, 172 Mich App 38, 431 NW2d 454 (1988). The request for a de novo hearing must be made within 21 days after the referee s recommendation has been made available to the parties. MCL 552.507. The request for a de novo review hearing must be made in a timely fashion or it is may be waived. *Constantini v. Constantini*, 171 Mich App 466, 430 NW2d 748 (1988).

A written report and recommendation prepared by the Friend of the Court prior to adjudication of a child custody dispute is not admissible into evidence unless both parties agree to admit the document. The report may be considered by the trial court as an aid to understanding the issues to be resolved, however, the court s ultimate finding must be based on competent evidence produced at a hearing. *Duperon v. Duperon*, 175 Mich App 77, 437 NW2d 318 (1989).

A practical difficulty with the right to a de novo hearing is that the second hearing is held before the trial court. This second hearing creates additional legal and expert witness fees for the client. Scheduling motions for initial and review hearings may also create a delay in resolving the issues contained therein. The parties can avoid further expense and delay if they stipulate that the trial court will review only the transcript of the hearing.

B. Motion to Disqualify the Trial Judge

§7.6 When a lawyer decides that due to a judge s bias or prejudice against the lawyer or client, the client cannot receive a fair and impartial trial, a motion for disqualification should be filed. This remedy should be used sparingly and only when necessary. An unsuccessful motion to disqualify a trial judge may result in repercussions for the party who requested the change.

A motion to disqualify a judge is governed under MCR 2.003. The grounds for such relief are provided in MCR 2.003(B) as follows:

> Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
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> (1) The judge is personally biased or prejudiced for or against a party or attorney.
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> (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
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> (3) The judge has been consulted or employed as an attorney in the matter in controversy.
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> (4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.
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> (5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;
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> (6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(a) is a party to the proceeding, or an officer, director or trustee of a party;
(b) is acting as a lawyer in the proceeding;
(c) is known by the judge to have more than de minimis interest that could be substantially affected by the proceeding;
(d) is to the judge's knowledge likely to be a material witness in the proceeding.

In *Ireland v. Smith*, 214 Mich App 235, 542 NW2d 344 (1995), the court held that the test for determining whether a trial judge should be disqualified is not only whether actual bias exits but also whether there si such a likelihood of bias or an appearance of bias that the judge would be unable to hold a balance between vindicating the interest of the court and the interest of the affected party; even when a judge is personally convinced that the judge is impartial, disqualification is ordered when there are circumstances that cause doubt regarding the judge's partiality, bias or prejudice. On appeal, the Michgian Supreme Court stated, "As indicated, the Court of Appeals disqualified the circuit judge who initially heard this matter in light of all the circumstances, the case should go forward with the judge to whom it has no been assigned. However, we have located in this record no basis for disqualification of the first judge." *Ireland v. Smith*, 451 Mich A457, 469, 547 NW2d 686 (1996).

Letters or even complaint to the judicial tenure commission do not require the disqualification of a trial judge. *People v. Bero*, 168 Mich App 545, 552, 425 NW2d 138 (1988). A trial judge's erroneous ruling, even when "' vigorously and consistently expressed'," is not grounds for disqualification. *Wayne County Prosecutor v. Parole Bd*, 210 Mich App 148, 155, 532 NW2d 899 (1995) (quoting *Mahlen Land Corp v. Kurtz*, 355 Mich 340, 350, 94 NW2d 888 (1959)); *People v. Houston*, 179 Mich App 753, 756, 446 NW2d 543 (1989). Public statements of a judge do not necessarily require disqualification. MCR 2.300(B). The Michgian Code of Judicial Conduct Canon 3(A)(6) "does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions."

As a general rule, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Crampton v. Michigan Dep't of State*, 395 Mich 347, 235 NW2d 352 (1975).

Even when a judge is personally convinced that he or she is impartial, disqualification may be warranted "'where there are circumstances of such a nature to cause doubt as to [the judge's] partiality, bias or prejudice'." *People v. Lowenstein*, 118 Mich App 475, 325 NW2d 462 (1982) (quoting *Merritt v. Hunter*, 575 P2d 623 (Okla 1978)). A mere showing that a judge conducted a prior proceeding involving the same defendant and his brother, without a showing actual bias, is insufficient to require the judge's disqualification from the pending action. *Impullitti . Impullitti*, 163 Mich App 507, 415 NW2d 261 (91987)

A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

C. Bifurcation of Separate Trials in Divorce Cases

§7.7 Occasionally, a party may prefer to have certain issues in a divorce trial decided in separate proceedings. MCR 2.505 Consolidation; Separate Trials, provides:

> (A) Consolidation. When actions involving a substantial and controlling common question of law or fact are pending before the court, it may
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> (1) order a joint hearing or trial of any or all the matters in issue in the actions;
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> (2) order the actions consolidated; and
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> (3) enter orders concerning the proceedings to avoid unnecessary costs or delay.
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> (B) Separate Trials. For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counterclaims, third-party claims, or issues.

The decision whether to grant separate trials is for the trial judge, "The exercise of this power to separate trials rests within the trial court's sound discretion. However, this power should be exercised only upon the most persuasive showing that the convenience of all the parties and the court requires such drastic action or that prejudice to a party cannot otherwise be avoided." *Detloff v. Taubman Co.*, 112 Mich App 308, 310-11, 315 NW2d 582 (1982).

Although bifurcation or a separate trial of one or more claims is authorized by MCR 2.505(B), it is used sparingly. Decisions on many issues in divorce cases must be contained in the same court order. In *Karwowski v. Karwowski*, 313 Mich 167, 172, 20 NW2d 851 (1945), the court stated that divorce decrees "interlocutory in part" are not permissible under statutes governing divorce proceedings, and that a wife's dower interest and the property interests of the parties in a divorce suite must be determined in the final decree. Similarly, in *Engemann v. Engemann*, 53 Mich App 588, 219 NW2d 777 (1974), the court concluded that it was mandatory for the court to dispose of the related matters of spousal support, child support and property when it grants a divorce.

In *Yeo v. Yeo*, 214 Mich App 598, 543 NW2d 62 (1995), the court held that the trial court erred in granting a judgment of divorce while reserving the division of property to a later date. The court noted that MCR 3.211(B)(3) requires that the divorce judgment include a determination of the property rights of te parties. To the extent that MCL 552.19 and MCL 552.401 permit a divorce judgment to contain a property settlement and MCR 3.211(B)(3) requires a divorce judgment to contain a property settlement, the court rule in controlling because it is a procedural issue. Rules of practice contained in statutes are not effective once they are superseded by rules adopted by the supreme court. The rule dictating the mandatory contents of a divorce judge is a rule of practice because it dictates procedure, not substance. MCR 3.211 provides in part:

> (B) A judgment of divorce, separate maintenance, or annulment must include
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> (1) the insurance and dower provisions required by MCL 552.101;
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> (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, and
(2) the person awarded custody must promptly notify the friend of the court in writing when the minor is moved to another address.

By analogy, bifurcation of a divorce trial in a contested child custody case would not be allowed unless there were extenuating circumstances. Note, however, that a final judgment of divorce could be entered that incorporates a temporary custody order to be reviewed at a later date.

In some situations, bifurcation or separate trial is warranted. In *Rickel v. Rickel*, 177 Mich App 647, 442 NW2d 735 (1989), the divorce action was bifurcated by stipulation. The contested custody issue was decided first and a judgment of divorce was entered. Later, on the stipulation of the parties at trial, the issues of child support and property division were decided by the trial court. The appeal did not involve child custody but the amount of child support and the property division.

In *Dobrzenski v. Dobrzenski*, 208 Mich App 514, 528 NW2d 827 (1995), issues in a divorce case were tried by both a referee and a judge in numerous court sessions over an 18-month period and the trial court lost control of the case. The court of appeals ordered bifurcation of the proceedings and reversed al aspects of the property settlement to afford the parties due process of law.

D. Uniform Child Custody and Enforcement Act

§7.8 The Uniform Child Custody and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.* became effective on April 1, 2002, replacing the Uniform Child Custody Jurisdiction Act (UCCJA), MCL 600.651 *et seq*. The UCCJEA is the vehicle governing procedures for child custody disputes when one or both parents reside outside of the State of Michigan. Under the new act, a child s home state has jurisdictional priority and exclusive continuing jurisdiction. Enforcement of custody decrees from other states and modification thereof are also handled within the act.

The UCCJEA imposes pleading requirements in child custody actions not present under the prior act. Either in the first pleading or in an attached sworn statement, each party must provide a statement under oath indicating the child s present address, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The UCCJEA also requires the sworn statement or first pleading to contain information regarding the existence of other child custody proceedings. Further, if a party alleges that a party or child s heath, safety or liberty would be at risk by the disclosure or identifying such information, the court shall seal and not disclose that information to the other party or public unless the court determines the release proper after a hearing. MCL 722.1209.

III. Preparation for Trial

A. In General

§7.9 In a domestic relations trial, the burden of persuasion is the determining factor. Whomever presents the most convincing testimony, exhibits, and arguments in favor of the client s position is likely to prevail. A lawyer is bound to represent his or her client competently, with legal knowledge, skill, thoroughness and preparation, under the Michigan Rules of Professional Conduct. MRPC 1.3 requires a lawyer to act with reasonable diligence and promptness and to pursue a matter zealously within the bound of the law. Timely and organized preparation is the foundation for proper representation.

B. Determining the Issues: The Theme of the Case

§7.10 Representation and proper preparation for trial begins with the intelligent evaluation of the relevant facts and legal issues involved in a case. A domestic relations case might involve:

- Has the proper residency in Michigan been established? A divorce judgment will not be granted unless the plaintiff or defendant has resided in Michigan for 180 days immediately preceding the filing of the complaint. The plaintiff or defendant must also have resided in the county where the complaint was filed for 10 days immediately preceding the filing o the complaint. MCL 522.9. The county residency requirement is jurisdictional and not merely a question of venue. Failure to establish residency in a particular Michigan county will result in a divorce judgment being set aside. *Stamadianos v. Stamadianos*, 425 Mich 1, 385 Nw2d 604 (1986). MCL 522.9 provides an exception to this rule, in that a person may file a complaint for divorce in any county without meeting the 10-day residency requirement if it is set forth in the complaint that the defendant was born in, or is a citizen of, a country other than the United States of America; the parties to the divorce action have a minor child or children; and there is information that would allow the court to reasonably conclude that the minor child or children are at risk of being taken out of the United States of America and retained in another country by the defendant.
- Should a divorce be granted? MCL 552.6 requires that there be a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.
- Should sole or joint custody of the minor child(ren) be granted?
- What type of parenting time provisions should be established for the non-custodial parent?
- What provisions should be made for the support of the minor child(ren)? MCL 552.16(5) defines support to include payment of medical, dental, and other health expenses; child care expenses; and educational expenses. Child support is to be ordered in accordance with the Michigan Child Support Formula. Child support may vary from the formula determination if the court determines that application of the formula would be unjust or inappropriate. The court must also present either in writing or on the record (1) the support amount determined by application of the formula; (2) how the support order deviates from that amount; (3) the value of property or other support awarded in lieu of any payment of support, if applicable; and (4) the reasons why the application of the formula

would be unjust or inappropriate. *Booth v. Booth*, 194 Mich App 284, 486 Nw2d 116 (1992). MCL 52.16(3).

- If a court enters a temporary order, are there any arrears that should be preserved or canceled in the order?
- Who will claim the dependency exemptions for the children on the federal, state and city income tax returns? The custodial parent is entitled to claim the children, unless the parent expressly waives the claim in writing. This may be done using IRS Form 8332, Release of Claim to Exemption for Child of Divorce or Separated Parents. This form allows the release to be for one year or longer. In *Fear v. Rogers*, 207 Mich App 642, 526 NW2d 197 (1994), the Court of Appeals held that a trial court had the authority to order the custodial parent to execute IRS Form 8332 and control which parent could take the exemption.
- Who will be responsible for medical, dental, health and hospitalization expenses and insurance for the minor children and the parties? The Michigan Child support Act requires that one or both of the parents shall obtain or maintain any health care coverage that is available to them at a reasonable cost, as benefit of employment, for the benefit of the parties minor children. If a parent is self-employed and maintains health care coverage, the court shall require the parent to obtain or maintain dependent coverage for the benefit of the parties minor children, if available at a reasonable cost.
- ERISA, the Employee Retirement Income Security Act of 1974, requires employers group health plans to provide coverage for alternate recipients under qualified medical child support orders. 29 USC 1169. This statute gives children of divorced group health plan participants the right to receive health benefit coverage under the participant s employer s plan even if the children do not live with the participant or are not the participant s financial dependents. The statue also allows the carrier to communicate directly with the child s custodial parent and directly reimburse that parent for the child s expenses.
- Should the court award spousal support to either party? Should it be traditional modifiable spousal support or alimony in gross? What are the federal income tax consequences of such an award?
- What are the strategic implications of health insurance coverage for an employee s former spouse as provided under COBRA, the Consolidated Omnibus Reconciliation Act of 1986? See IRC 4980B, 5000. Who will pay the premiums for the COBRA coverage?
- What assets should be included in the marital estate? All of the parties assets whether owned jointly or separately are considered and evaluated.
- What assets, if any, should be excluded from the marital estate? These might include assets covered by a valid antenuptial agreement *Rinvelt v. Rinvelt*, 190 Mich App 372, 475 NW2d 478 (1991); gift or inheritance property *Charlton v. Charlton*, 397 Mich 84, 243 NWW2d 261 (1976); or property a party owned before the marriage *Rogner v. Rogner*, 179 Mich App 326, 445 NW2d 232 (1989).
- What are the fair market values of all assets in the marital estate? In *Steckley v. Steckley*, 185 Mich App 19, 640 NW2d 255 (1990), the trial court erred in not determining the value of plaintiff's interest in several restaurant franchises and in awarding plaintiff his entire interest on the ground that the proofs did not establish a basis on which an accurate valuation of plaintiff s interest could be

made. Defendant was entitled to an equitable share of the valuation of plaintiff s interest in the franchises. The appeals court held that if the trial court did not have ample information from the expert testimony to determine a fair value, it could appoint its own disinterested appraiser. See *Wiand v. Wiand*, 178 Mich App 137, 443 NW2d 464 (1989) where party seeking to include asset in marital estate bears burden of proving its value.

- How will individual and joint liabilities be handled?
- How can the client be protected against potential bankruptcy proceedings?
- How should the marital estate, the real and personal property, be divided?
- What are the tax consequences of the property division, if any?
- Who should pay attorney and expert fees and the costs of the litigation?
- What security is available to guarantee the payment of spousal support and the property settlement?
- How can life insurance coverage be used to secure the payment of child support, spousal support, and the property settlement?
- What orders should be entered in conjunction with the judgment of divorce? These may include Qualified Domestic Relations Orders, Eligible Domestic Relations Orders, military order under the Uniformed Services Former Spouses Protection Act, 10 USC 1408; an order under the Railroad Retirement Solvency Act of 1983, 42 USC 659; Income withholding orders; garnishment of wages. What documents must be prepared and filed or recorded to effectuate the ultimate transfer of assets between the parties? These assets might include trusts, quit claim deeds, documents for IRA transfers, mortgages and financing statements.
- Who will the opposing party call as lay and expert witnesses? What will the substance of each witnesses testimony be? The opposing party should be required by answers to interrogatories or a scheduling order to identify all witnesses that may be called and the substance of each witnesses testimony.

The client's position on each of these issues should be discussed, analyzed and determined. The following factors must be evaluated in deciding how the client s expressed needs should be handled in preparation for and during the trial:

- What statutes, court rules, or case law supports or weakens the client s position?
- What lay and expert witnesses should be consulted and called to testify?
- Will the trial court, under MRE 201(b) take judicial of any facts?
- What exhibits should be offered into evidence?
- What are the client s areas of vulnerability? How should these areas be handled? Should there be a rush to disclosures?

C. Planning the Trial

§7.11 Long before the trial commences, an overall plan or strategy must be developed. The entire case must be organized and summarized in outline form, addressing the following questions:

1. If a trial were to take place, how would the trial judge decide the contested issues? Negotiations should be directed at achieving without a trial what could be anticipated through a trial.
2. How will negotiations be conducted?

3. How will the pretrial conference be handled?
4. Should any pretrial motion be made?
5. What will be presented to the trial court in the opening statement?
6. In what order should the witnesses be presented? Will it contribute to the overall success of the trial to call the opposing spouse or his or her employees or agents for cross-examination? Prior to trial or any evidentiary hearing, the client should always be made aware that he or she may be called first for cross-examination under MCL 600.2161. Under these circumstances, the lawyer may attempt to take advantage of the opportunity to ask his or her client leading questions. Another strategy is to wait to call the client when the lawyer presents his or her client s case.
7. When and how will exhibits be offered into evidence?
8. If a Friend of the Court recommendation has been made, how will it be handled?
9. What critical points should be elicited on cross-examination?
10. How can the closing arguments maximize the testimony and evidentiary highlights of the trial?
11. What will the trial judge s attitude and temperament be toward the case? How will the trial judge relate to the parties, the lay and expert witnesses, and the issues to be decided? How has the trial judge ruled on similar issues in the past? Will the trial judge strictly follow the Michigan Rules of Evidence or make more relaxed rulings on admissibility?
12. How will opposing counsel conduct himself or herself? Will he or she make numerous objections to testimony and exhibits offered as evidence so that there must be strict compliance with the Rules of Evidence?
13. Does the trial lawyer have a complete understanding of the facts and legal principles involved in the case?

D. Trial Notebook

§7.12 In preparing for trial and during trial, an organized three-ring notebook with dividers is an essential aid to effective preparation and presentation. The notebooks should be divided to include:

1. Pleadings in chronological order;
2. Applicable law;
3. Motions in limine;
4. Opening statements;
5. Direct examination, including a list of all lay and expert witnesses in the order in which they will be called;
6. Exhibits, including a list of all exhibits in the order in which they will be introduced;
7. Points to be made on cross-examination of the opposing spouse and witnesses called by opposing counsel;
8. Depositions or parts of depositions needed for impeachment purposes*;
9. Closing arguments;
10. Proposed findings of fact and conclusions of law under MCR 2.517.

*Depositions are admissible only as provided in the Michigan Rules of Evidence.

Statements in depositions that are not hearsay may be used for impeachment purposes. MRE 801(d). Deposition testimony is not excluded when the declarant is unavailable as a witness at trial if the testimony is

> given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
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> For purposes of this subsection only, unavailability of a witness also includes situation in which:
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> A The witness is at a grater distance than 100 miles form the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
>
> B On motion and notice, such exceptional circumstances exist as to make it desirable, if the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. MRE 804(b)(5)

Answers to interrogatories may used to the extent permitted by the Michigan Rules of Evidence. MCR 2.309(D)(3).

E. Lay Witnesses

§7.13 The trial court must receive relevant evidence, which means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Generally, lay witnesses should be called to testify to matters that support a client s position on the issues. Lay witnesses may be called to testify on the issues such as cause of marital breakdown, fault, relations between the parties, relations between the parties and their children, child care, income, expenses, ownership of assets, contributions to acquisitions of assets and liabilities, and improvements to values of assets and liabilities.

A person is competent to testify as a witness, unless the courts find otherwise after questioning the person regarding his or her physical or mental capacity to testify truthfully and understandably. MRE 601. A witness must have personal knowledge of a matter in order to testify to that matter. Evidence of proof of personal knowledge may consist of the witness own testimony. MRE 602.

A lay witnesses' testimony should be in the form of opinion or inferences only if (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness testimony or the determination of a fact in issue. MRE 701.

It is not unusual for the issue of admissibility of lay testimony to arise in domestic relations cases. In *Lee v. Lee*, 191 Mich App 73, 477 NW2d 429 (1991), the trial court refused to hear testimony regarding the state equalized value of the martial home. The court ordered the home be sold and the proceeds be divided. The Court of Appeals held this to be an abuse of discretion since the parties were long-time residents of the home

and had personal knowledge of the home's value.

A common problem with testimony in domestic relations matters revolves around the admissibility of conversations between the parties. Complications can be avoided by laying a proper foundation for admissibility by presenting the following questions to the client:

- Did you have a conversation with your spouse about the separation?
- When did the conversation take place?
- Where did the conversation take place?
- What was the form of the communication?
- Who was present?
- What was said?

F. Expert Witnesses

1. In General

§7.14 Domestic relations law often requires analysis of complex matters. In order to better understand such issues, expert witnesses are frequently necessary. MRE 702 Testimony by Experts, provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Effective as of September 1, 2003, MRE 703 and MRE 1101 have been amended. MRE 703 Bases of Opinion Testimony by Experts, now provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.

This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter. The revision to MRE 703 aims to eliminate evidence based upon a hearsay foundation. This modification does not allow reliance on underlying sources not admitted into evidence. This modification under the Michigan Rules is inconsistent with that of the Federal Rules of Evidence, FRE 703, which does not contain a blanket prohibition of reliance on sources not admitted into evidence. This amendment corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony.

Under the new MRE 1101(b)(9), a trial judge is allowed to consider a friend of the court report prepared pursuant to MCL 552.505(1)(d) or (e), which:

> may include reports and evaluations by outside persons or agencies if requested by the parties or the court.

The modification of MRE 1101 appears to allow a psychological evaluation relying

on hearsay that is attached or included in a Friend of the Court Recommendation to be considered by the court.

2. Areas in Which Experts Are Needed

§7.15 The use of expert witnesses should be considered in cases involving the following matters:

Contested child custody cases: psychologists, psychiatrists, and social workers are often called as witnesses to give expert opinions on child custody matters. The Michigan Child Custody Act of 1970, MCL 722.21 *et seq*. authorizes a court to:

> Utilize a guardian ad litem or the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes. MCL 722.27(d)(1).

The act also requires the court to consider, evaluate and determine the parties mental and physical health in determining the best interests of the children.

Spousal support: under *Hanaway v. Hanaway*, 208 Mich App 278, 296, 527 NW2d 792 (1995), the court of appeals stated:

> ...where both parties are awarded substantial assets, the court, in evaluating a claim for alimony, should focus on the income-earning potential o the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves. Given the length of the marriage, the magnitude of the martial estate, and defendant s capital position and earning potential after the divorce, the plaintiff should not be expected to consume her capital to support herself.

A CPA or financial planner could be used to analyze these issues. A cash flow analysis for each spouse can also be presented to determine the practical implications of a support award. A CPA can specify the net income each spouse will need to meet his or her expenses. If permanent spousal support is requested, the services of a vocational rehabilitation specialist may be helpful in providing testimony about what job skills the person seeking support can acquire.

Valuation of assets in the marital estate: real property, as well as personal property should be evaluated. Personal property includes stock, stock options, professional degrees, occupational licenses, pension plans and profit sharing plans.

Tax implications of support and division of assets: a qualified tax expert can assist the trial judge in making fair and equitable decisions about the division of property. Visual aids can be very useful in demonstrating the tax impacts of support, expenses, cash flow and division of marital property.

When selecting expert witnesses it is crucial that the expert have the necessary expertise and experience to make a convincing presentation to the court. An expert should be able to handle intense cross-examination and interaction with the court.

The lawyer should have a retainer agreement or written contract with any

expert witness engaged to prepare for or testify at trial. The agreement should include arrangements for fees, costs and charges for the expert, the client (not the lawyer) will pay these fees, costs and charges, how the expert will assist the lawyer with preparation, and that the expert will assist to expose weaknesses in the opposition s expert on the same matters.

MCL 600.2164(1) provides that expert witness shall not be paid a sum in excess of the ordinary witness fees provided by law, unless the court awards a larger sum. Any such witness who receives a larger amount or a person paying such amount, should be found guilty of contempt of court. This statute also provides that not more than 3 experts shall be allowed to testify on either side as to the same issue in any given case. MCL 600.2614(2).

G. Confidentiality Issues

1. In General

§7.16 In a domestic relations trial, a lawyer may be confronted with the confidentiality issues. Under MRE 501, except as modified by statute or court rule, privilege is governed by common law. Communications between professionals such as therapists, doctors, attorneys,, accountants, clergy, dentist, psychiatrists, family therapist and private investigators and their patients or clients are privileged. The privilege of confidential communications may be waived by the party possessing such privilege.

2. Marriage Counseling

§7.17 Under MCL 333.16091 *et seq*., the Michigan Public Health Code, communications between a marriage and family therapist and client are privileged and are subject to waiver of the privilege only when disclosure is required by law or is necessary to protect the health or safety of an individual; when the therapist is a defendant in a civil, criminal, or administrative action (in which case the waiver is limited to that action); and when a written waiver is obtained from each adult involved din the therapy. *See MCL 33.16911.*

3. Tax Documents

§7.18 Under 26 USC 6103, federal income tax returns and return information are confidential. This confidentiality may be waived, however, by filing a lawsuit requesting economic damages. In *Fassihi v. Saint Mary Hosp of Livonia*, 121 Mich App 11, 328 NW2d 132 (1982), plaintiff filed a joint tax return with his new wife and the return was held to be discoverable as long as it was produced directly to the court, in camera, which redacted the wife's information from the return. A payer of child support has been compelled to produce unredacted joint income tax return and W-2's for his nonparty current wife in a Friend of the Court child support modification proceeding. The payee's claim that her former husband was hiding or diverting income to his new wife was the basis for the request. *Carr v. Pott* (*In re Pott)*, 234 Mich App 369, 593 NW2d 685 (1999). 26 USC 6103(l)(6) permits the disclosure of certain tax return information to support enforcement agencies, but only to the extent necessary to establish and collect child support obligations and to locate individuals who owe these obligations. Communications between a certified public accountant and a client are also protected as confidential and privileged under MCL 339.732.

4. Physician-Patient Privilege in Custody Disputes.

§7.19 Spouses often waive this privilege when involved in child custody disputes to allow the court to have all of the facts at its disposal when determining the outcome of the matter. The Court of Appeals has held, however, that a party may raise the physician-patient privilege to preclude testimony about the party s mental or physical health. Despite the Child Custody Act of 1970, MCL 722.21 *et seq*., identifying the parties mental and physical health as one of the twelve best interest factors in determining custody of a minor child, the has upheld the privilege. *Navarre v. Navarre*, 191 Mich App 395, 479 NW2d 357 (1991).

If faced with an opposing party refusing to waive this privilege in a child custody dispute, the lawyer for the party requesting the waiver should:

- argue to the court that the opposing spouse has waived the privilege if any testimony is presented in answers to interrogatories or depositions regarding the question of that spouse s mental and physical health;
- argue to the court that the opposing spouse should not be allowed to present any evidence on the issue of mental and physical health, unless a full disclosure of the information is made. MCR 2.314(B)(2) provides that a party that asserts such privilege and thus prevents discovery of information, may not introduce any physical, documentary, or testimonial evidence relating to the party s medical history or mental or physical condition. Under this court rule, sanctions are available to assertions of privilege at a deposition as well as request for production of documents, answers to interrogatories, or when moving for a protective order;
- request the trial court appoint an expert witness under MRE 706 to conduct an independent evaluation.

5. Therapists.

§7.20 Either parent may waive the therapist-patient privilege on behalf of the child to allow a child's therapist to testify. *Thames v. Thames*, 191 Mich App 299, 477 NW2d 496 (1991). Conversations with therapist have been protected from disclosure. *Jaffee v. Redmond*, 518 US 1 (1996), in a wrongful death action, a party sought to obtain therapy notes from sessions with a police officer and therapist after an on-duty shooting resulting in death. While the Supreme Court held that the conversations between the officer and her therapist and the resultant notes were protected from disclosures under FRE 501, the matter has been remanded at 142 F3d 409 (7th Cir 1998).

6. School Employees.

§7.21 MCL 600.2165 prevents school employees from reveal confidential communications from students in civil and/or criminal court proceedings. No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to

whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian.

7. Private Investigators.

§7.22 Any communication by a client to a private investigator, licensed under MCL 338.840 *et seq*., and any information that is obtained in connection with an assignment for the client is privileged. Further, the identify of a private investigator s client is privileged from disclosure when its disclosure would be tantamount to disclosure of the substance of confidential communications between the private investigator and his or client. *Ravary v. Reed*, 163 Mich App 447, 415 NW2d 240 (1987).

8. Material Prepared for Litigation.

§7.23 Under MCR 2.302(B)(3)(a), documents and other materials prepared in anticipation of litigation are privileged. To waive this privilege, the court rule requires good cause must be shown.

H. Exhibits

§7.24 Prior to trial, the lawyer should organize all the exhibits in the order in which he or she intends to introduce them into evidence. A list of exhibits should be submitted to the court and opposing counsel as well. All proposed exhibits should be marked and submitted to the court reporter and the court before the trial commences to save time during the proceedings.

I. Preparing the Client and Witnesses to Testify.

§7.25 The lawyer must thoroughly prepare the client and witnesses prior to any depositions or testimony at trial are taken. *See Exhibit 7-1.* An extremely nervous witness should be given a list of typed questions that will be asked during direct examination. Witnesses should be advised regarding proper attire and demeanor for courtroom appearances. A lawyer should discuss possible questions opposing counsel may ask a witness on cross-examination. A witness should be advised to closely listen to the question asked of him or her and answer that specific question. A witness should also be advised to answer questions truthfully to avoid subjecting oneself to perjury.

J. The Trial Brief

§7.26 A trial brief is a valuable tool in negotiations and at trial. If drafted properly, the court may use it not only as a guide during the trial, but also in reaching its final decision on contested issues. A trial brief should include:

- issues to be decided by the trial court;
- a concise statement of the facts, including the circumstances of the parties at the time of the marriage, ages, occupations, educations, assets, liabilities, incomes, expenses and any special circumstances;
- roles of the parties during the marriage;
- causes of separation and breakdown of the marriage;
- marital misconduct or fault;
- statement of the parties current incomes, how they were computed, tax obligations, and net incomes with confirming documentation if the incomes are to be introduced into evidence;

- statement about the need for spousal support and a request for said relief;
- brief analysis of each of the 12 factors of the Child Custody Act of 1970, MCL 722.21 *et seq*.;
- statement about the request for child support, if there are minor children, and a chart listing the weekly or monthly expenses for the children if they are extraordinary or if you will be argument for a deviation from the child support guidelines;
- statement of the marital estate with fair market values, less any encumbrances, to allow for a determination of equity to be awarded between the parties;
- statement providing how the assets should be divided (*See Exhibit 7-2*);
- include legal support in the form of case law and statutes as support for the court s final disposition of the matters of contention;
- statement about any miscellaneous items of importance that need to be addressed by the court, such as parenting time and transportation of minor children; and
- statement of relief requested.

Preparing a trial brief provides counsel with a review of the facts and law of the case. It will also act as good courtroom resource during trial. It is also crucial to have material on the rules of evidence readily available during trial.

IV. The Pretrial Conference

§7.27 MCR 2.401 governs pretrial procedures, conferences and scheduling orders. This rule permits the court to order the parties to appear for a conference at any time after the filing of an action. The court may order the conference on its own initiative or at the request of a party. The court may also order more than one conference be held.

The court may order the parties have an early scheduling conference. Issues to be considered during this conference include jurisdiction, venue, frivolousness of a case, complexity of the case, as well as any other matter provided in MCR 2.401(C)(1).

At a regularly pretrial conference, issues to be considered are the simplification of issues, time needed for discovery, amendments to pleadings, admissions of fact, limitation of the number of expert witnesses, consolidation of actions for trial, settlement, mediation, witnesses, estimated length of the trial, whether all claims have been jointed, as well as those matters listed in MCR 2.401(B)(1).

At either an early or regular pretrial conference, or later if the court decides, the court will establish times for the completion of discovery, the exchange of witness lists, and other matters the may deem appropriate and then place the matters in a scheduling order. Scheduling should be done after meaningful consultation with all counsel of record. MCR 2.401(B)(2).

The trial court may require the attorneys to submit trial briefs identifying all of the issues involved in a case. MCR 2.401(D). The court rule directs the attorneys to be thoroughly familiar with the case and to appear with the authority necessary to participate fully in the conference. MCR 2.401(E). The court also has authority to direct the parties and their agents, representatives of lien holders, or representatives of insurance carriers to appear. MCR 2.401(F) Failure to attend constitutes default or dismissal unless the court finds such would cause manifest injustice or there was no

culpable negligence. MCR 2.401(G).

Once discovery has been completed, if the court determines that the action is not ready for trial due to a party s lack of reasonable diligence, the court may assess expenses, including attorney fees under MCR 2.401(H).

Witness lists must be filed and served on opposing counsel no later than the date specified in the scheduling order. The list must include names and addresses of the witnesses. The list must also provide if a witness is an expert and identify his or her field of expertise. Witnesses called merely to lay a foundation as record holders may be identified generally. The court, however, may prohibit a witness from testifying if he or she is not on the witness list. MCR 2.401(I).

Lawyers often make the mistake of preparing for the pretrial conference in haste and without proper care. At the pretrial conference, the lawyer should be prepared to present clear, succinct and persuasive points of the case while disclosing and addressing the weak points. To avoid animosity, anguish, agony, emotional repercussions and expense of a trial, open and frank discussion with the trial judge is the best approach to bring about resolution of disputed issues.

V. The Trial

A. In General

§7.28 The trial of domestic relations case is much like a dramatic play that must be presented in an interesting and convincing manner to an audience of only one- the trial judge. Boring and repetitious presentations of the exhibits and witnesses should be avoided.

A divorce trial consists of the following:

1. The court rules on pretrial motions or motions in limine.
2. Plaintiff's lawyer makes an opening statement. Defendant's lawyer either makes an opening statement or reserves the right to do so until the beginning of Defendant's case.
3. Plaintiff presents witnesses on direct examination and subject to cross-examination by the defense counsel. Plaintiff conducts redirect examination after the defendant's cross-examination. Rebuttal testimony is permitted depending on the circumstances.
4. Exhibits are offered for admission into evidence. The court rules on the admissibility of the exhibits.
5. If the trial court does not admit particular testimony or evidence that are important to the issues to be resolved, the plaintiff's counsel should make an offer of proof to preserve the issue on appeal.
6. Plaintiff rests.
7. Defendant may move for a directed verdict at the close of evidence offered by plaintiff. *See MCR 2.515*. Although motions for a directed verdict or judgment are not used very often in a divorce trial, there are opportunities for such an approach. For example, in a contested child custody hearing if the non-custodial parent fails to make a prima facie case showing by clear and convincing evidence that it would be in the best interests of the child to change custody, a motion for a directed judgment would be appropriate.
8. Defendant presents his or her case in the manner provided above.

9. Plaintiff presents closing arguments.
10. Defendant presents closing arguments.
11. Plaintiff present rebuttal arguments.
12. The lawyers have an opportunity to present findings of fact and conclusions of law under MCR 2.517.
13. The court then decides the case at the conclusion of closing arguments or takes the case under advisement and makes its decision later.

During the course of a trial, no more than one attorney for a party may examine or cross-examine a witness, under MCR 2.507(C).

The court may appoint interpreters when necessary under MCR 2.507(D), MRE 604. The trial court may also limit the amount of time allowed for opening and closing arguments. MCR 2.507(F).

MRE 611 requires the court to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. A judge may limit the number of witnesses testifying at trial as provided in MCR 2.401(B).

Lawyers may cross-examine a witness on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination about matters that were not testified to on direct examination. Leading questions should not be used during direct examination except as necessary to develop testimony. Ordinarily, leading question are permitted in cross examination. If a party calls a hostile witness an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to state the intent to ask a leading question before the questioning begins or before the questioning moves past preliminary questions. MRE 611(c).

Under MRE 614, the court may call witnesses and all parties have the right to cross-examine these witnesses. The court may interrogate witnesses called by either the court or a party. Objects to the court calling or interrogating a witness must be made at the appropriate time.

MRE 103 provides that error cannot be predicated on a ruling admitted or excluding evidence unless a substantial right of a party is affected and a timely objection to or motion to strike admitted evidence or an offer of proof for excluded evidence appears on the record.

B. Stipulations.

§7.29 An effort should be made to stipulate to as many facts, issues, exhibits to be admitted into evidence, and areas of relief as possible. Stipulations save both lawyers and judges time and allow the court to focus on the contested issues in the case. However, a stipulation by the parties regarding a matter of law is not binding on a court. *Yeo v. Yeo*, 214 Mich App 598, 543 NW2d 62 (1995)

An agreement or consent between the parties or their attorneys regarding the proceedings that is subsequently denied by either party is not binding unless it was made in open court or unless evidence of the agreement is in writing and subscribed by the party against whom the agreement is offered or by that party s attorney. MCR 2.507(H).

C. Pretrial Motions.

§7.30 Before trial begins, the lawyer should explore the necessity of any pretrial motions (motion in limine) which might dramatically affect how the case will be tried.

A motion in limine is important in contested child custody cases to determine whether the trial court will permit a parent or other witness to testify to the child s hearsay statements under the hearsay exceptions of MRE 803. The exceptions include the child s present-sense impression,, MRE 803(1); exited utterances, MRE 803(2); child s then-existing state of mind, emotion, physical condition or sensation, MRE 803(3); statements made for medical treatment, MRE 803(4); and statements about sexual acts, MRE 803A. Additionally, there are residual or catchall exceptions to the hearsay rules provided in MRE 803(24) and MRE 804(b)(6). These exceptions allow the admission of statements that are not specifically covered by any of the other hearsay exceptions but have the same circumstantial guarantees of trustworthiness. For the hearsay to be admitted under one of the catchall exceptions, the court must find that (1) the statement is offered as evidence of a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (3) the general purpose of the evidence rules and the interest of justice will be best served by allowing the statement into evidence. MRE 803(24), MRE 804(b)(6). A statement may not be admitted under the catchall exceptions unless the proponent of the statement notifies the adverse party of the proponent s intention to offer the statement and the particulars of it, including the name and address of the declarant. The proponent must notify the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the evidence.

A motion in limine is also important in cases that involve marital misconduct. It is improper for a trial court to hold the parties to a standard of moral conduct and behavior appropriate for marital partners, thus, evidence of one party s extramarital affair that occurred after the breakdown of the martial relationship and after the complaint for divorce was filed would be irrelevant. *Knowles v Knowles*, 185 Mich App 497, 462 NW2d 777 (1990).

A motion in limine may also be used to test a judge's attitude toward contested issues in the case and give the lawyer an indication about what evidence will be necessary to prove his or her case.

D. Sequestration of Witnesses.

§7.31 At the request of a party or on its own motion, the court may order witnesses excluded from the courtroom to prevent them from hearing other witnesses testimony. The trial court may not exclude a party or a person whose presence is shown by a party to be essential to the presentation of his or her cause of action. MRE 615.

In a divorce case with disputed facts and numerous lay witnesses who will testify form personal observations about those facts, a motion to exclude or sequester witnesses should be made before the trial begins. The advantages of this approach are that witnesses will testify from their independent recollections; it demonstrates whether witnesses have been coached; witnesses do not have an opportunity to become familiar with the cross-examination questions or the techniques of the cross-examiner; and the solemnity of the trial is emphasized impressing upon the witnesses that the are witnesses and not advocates of either party.

E. Opening Statements.

§7.32 The opening statement is the lawyer's opportunity to persuade the court of the fairness and justice of the client's cause of action. The opening statement should not be waived. The plaintiff's counsel should make an opening statement that specifically describe the parties, proceedings, facts, issues, and relief requested. The plaintiff's lawyer should reject any trial court attempt to minimize the importance of the opening statement.

After the plaintiff's opening statement, the defendant's counsel should immediately make an opening statement responding to the plaintiff's statement. This provides the court with a balanced perspective on what will be demonstrated at trial. The defense attorney should reserve his or her opening statement only when there is significant surprise testimony that should not be disclosed at the beginning of the trial.

F. Direct Examination

1. In General

§7.33 Before the trial, counsel should have prepared the client and the witnesses for their testimony. The lawyer should decide when during the trial the direct examination of the client will be most effective. The lawyer should present the client s testimony in chronological or logical order so it is easy for the judge to follow and understand. The lawyer should not shy away from presenting any detrimental aspects of the case on direct examination, as her or her client may present more convincing evidence on the issue. It is usually wise to disclose and explain the weaknesses in the client s case before the opposing lawyer exploits them on cross-examination.

The lawyer should frame questions on direct examination so that the opposing counsel cannot interpose objections that the court will sustain. Avoid asking questions that knowingly violate the rules of evidence.

The lawyer should anticipate evidentiary objections and be prepared to confront them. If opposing counsel objects to a question and the object ion is overruled, the lawyer should ask essentially the same question that he or she asked before the objection. The lawyer should not be distracted by a barrage of objections but should stay focused with the question he or she asked so the appropriate answer can be elicited.

When the judge sustains an objection to the admissibility of testimony or an exhibit, to preserve the issue for appeal, the lawyer must make an offer of proof. MRE 103(a)(2) The offer of proof provides the trial court with an adequate basis to make a ruling and further provides the court of appeals with enough information to evaluate a claim of error. A trial judge is rarely justified in refusing leave to make a separate record. Unless there is a compelling reason to deny a request to make an offer of proof on a separate record, the request should be granted. *Hileman v. Indreica*, 385 Mich 1, 187 NW2d 411 (1971) Objections to admissibility not properly raised at trial cannot be later asserted on appeal. *Kocks v. Collins*, 330 Mich 423 (1951)

Direct examination should conclude with a persuasive thought and emotion. For example, in a contested child custody case, the mother could be asked, "Ms. Jones, as the mother of Sally Jones, ten years of age, and Billy Jones, four years of age, what impact will awarding you custody of your two children have on the children?"

2. Expert Witnesses

§7.34 Lawyers need to exercise great care in the direct examination of expert

witnesses. Expert witnesses testimony should be presented to make it believable and persuasive.

Direct examination of expert witnesses should establish that

- the witness has professional expertise within his or her specialized area that will assist the trial court in understanding the evidence or determining facts at issue;
- the witness has taken enough time to evaluate all of the evidence in the case that relates to his or her area of expertise;
- the witness is charging reasonable fees for services rendered;
- the witness does not have any preconceived notion or bias toward one party or the other;
- the witness' opinion is based on logic and common sense;
- the witness' testimony makes more sense than that of the expert witnesses produced by the opposing side;
- the reasons behind the witness' opinion are supported by evidence produced at trial; and
- the witness readily acknowledges any problems in the case and does not steadfastly maintain an untenable position out of loyalty to a client or lawyer.

Exhibit 7.3 demonstrates how direct examination of an expert witness should be conducted.

MRE 702 Testimony by Experts provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case .

Effective September 1, 2003, the facts or data in a particular case upon which an expert bases an opinion or inference shall be in evidence. Amended MRE 703 and Amended MRE 1101.

G. Cross-Examination

1. In General

§7.35 The objectives of cross-examination are:

A. secure admissions that are supportive of the client's version of the facts and theory of the case;
B. impeach or minimize the credibility of the opposing spouse's testimony and other testimony offered in support of his or her position;
C. minimize the credibility of witnesses testifying for the opposing spouse and other testimony offered in support of the opponent's case; and
D. evoke a favorable intellectual and emotional response from the trial judge; that is, persuade the trial judge to make a decision favorable to the client.

Under MRE 611, a witness may be cross-examined on any matter that is relevant to any issue in the case, including credibility. The judge may limit cross-examination about matters that were not testified to on direct examination. Leading questions are ordinarily permitted on cross-examination.

In *Darwish v. Darwish*, 100 Mich App 758, 300 Nw2d 399 (1980), the appeals court stated that the trial court, in determining the value of certain real property, erred in considering, over objection, an appraisal letter that one party submitted after the close of proofs without giving the adverse party an opportunity for cross-examination.

In preparing for cross-examination, attorneys should be sure that they know the facts in the case and are familiar with the contents of the pleadings, affidavits, depositions, answer to interrogatories, and other information obtained in discovery. Counsel should also be aware of the judge's personality, temperament, and attitude toward men, women, children, marriage, divorce, fault, trials, assets, liabilities, income, expenses, political affiliations, and expert witnesses. Counsel should also be familiar with the personality of the husband or wife to be cross-examination. Is the wife or the husband a good spouse, a good parent, a drinker, a know-it-all, an abuser, a nagger, or a neurotic?

In a divorce case, the cross-examiner should follow these methods of cross-examination:

- Establish a rapport with the party or witness by making statements such as, "You realize that I represent Mary Smith, the plaintiff wife in this case," or "Let's go over the facts that we agree on before we discuss the matters we disagree on."
- Keep eyes and attention fixed on the person being cross-examined. The cross-examiner should carefully observe the person being cross-examined for any body language that demonstrates areas of vulnerability or weakness.
- Stand in a place in the courtroom where the party or witness cannot make visual contact with opposing counsel.
- Adopt a reasonable demeanor. The cross-examiner should ask clear and concise questions in a spirit of fair play. Trial judges are not impressed or persuaded by attorneys who bully and badger witnesses on cross-examination.
- Control the witness. The witness should not be allowed to control the lawyer.
- Refrain from asking open-ended questions that result in long, rambling answers that harm the client's case.
- Leave well enough alone.
- Develop a plan. The cross-examiner should develop and use a plan of attach to expose the opposing party's areas of vulnerability and weakness. This plan should be coherent and chronological and avoid boring and repetitious cross-examination.
- Ask leading questions that suggest answers such as, "It is true that...," "It is correct that...,""It is a fact that..."
- Avoid repeating the opposing party's version of the facts.
- Pin down the witness on details. Vague cross-examination is meaningless

and a waste of time.

- Refrain from asking questions unless the answer will benefit the case.
- Make big points in cross-examination early and avoid small triumphs or victories.
- Prevent the witness from evading the question, which can distract the cross-examiner. The cross-examiner should have the court reporter read back the question as stated and require the witness to answer the question.
- Do not allow interruptions from opposing counsel that assist the party or witness in answering questions on cross-examination.
- Attempt to show that the party's or witness testimony is unreasonable, improbable, or violates commons sense.
- End cross-examination on a dramatic and persuasive point.

The scope and during of cross-examination rests in the sound discretion of the trial court. The exercise of this discretion will not be reversed absent a clear showing of abuse. *People v. Taylor*, 386 Mich 204, 191 NW2d 310 (1971). It is the trial judge's responsibility to use his or her discretion to permit and limit attacks on credibility. The judge must ensure discretion to permit and limit attacks on credibility. The judge must ensure that questions seeking to elicit evidence indicated bias, prejudice, interest, or inconsistent statements are not unduly limited or improvidently extended. The trial judge must also be alert to questions that harass, intimidate, or belittle a witness. *People v. Layher*, 464 Mich 756, 631 NW2d 281 (2001)

2. Assertion of Privilege Against Self-Incrimination

§7.36 Under the Michigan Child Custody Act of 1970, MCL 722.21 *et seq.*, a circuit court judge is required to decide the custody of minor children based upon the best interests of the children. This standard means that the court must consider the 12 factors under the act, including moral fitness of he parties involved. MCL 722.23(f). A party who is asked about adulterous activities may assert he privilege of self-incrimination. Adultery is a felony in Michigan with a one-year statute of limitations. MCL 750.30 *et seq.* If the constitutional privilege against self-incrimination is asserted in a divorce trial, the lawyer should immediately determine whether the one-year statutory period for prosecution has elapsed. If it has, the privilege no longer applies.

Although there are no Michigan cases that deal directly with the privilege, appellate courts in other states have dealt with the matter, with different outcomes. *See Minor v. Minor, 240 So2d 301 (Fla 1970), Christenson v. Christenson, 281 Minn 507, 162 NW2d 194 (1968), Molloy v. Molloy, 46 Wis2d 682 , 176 NW2d 292 (1970).*

3. Expert Witnesses

a. Preparation

§7.37 In preparation for the cross-examination of the opponent's expert, counsel should consider that the witness file may be a fertile source of evidence that the witness has an interest, bias, or prejudicial relationship with the opposing party or lawyer. This file may also reveal mistakes or uncertainties. If possible, the attorney should examine and analyze the expert witness file before the trial.

b. The Expert's Qualifications

§7.38 If opposing counsel calls an expert witness who is a recognized expert in a field and attempts to enter a list of impressive credentials into the record, the attorney should stipulate that the witness is an expert. Opposing counsel may still want to have all the credentials on the record and can refuse such a stipulation. At other times, an attorney may want to cross-examine the opponents s expert on his or her qualifications when the witness is first called to the stand. Such cross-examination may be requested should ordinarily be permitted-before the expert witness expressed opinions concerning the issues in the case. *Perri v. Tassie,* 293 Mich 464, 292 NW 370 (1940).

c. Approaches

§7.39 In the cross-examination of expert witnesses in a divorce trial the following questions and points should be considered:

- Are they truly qualified experts in their speciality?
- Will their opinions assist the trial court in understanding the evidence ro determining facts at issue?
- Do they have any biases or prejudices for or against a party or a lawyer?
- Have they devoted adequate time and preparation to formulate an intelligent opinion?
- Have they charged reasonable fees for preparing for and testifying at trial?
- What percentage of their incomes are derived from testifying as expert witnesses? Are they professional witnesses?
- Have they done work for or previously testified for the opposing spouse or opposing counsel? If so, develop the nature and extent of the work that was done and the fees that were received.
- Are their opinions timely? Have the facts or circumstances changed so that an opinion should change?
- Are their analyses and opinions consistent with those of other experts in the field? Make the witnesses agree that legitimate differences of opinion exist between qualified experts in their fields.
- Attorneys should use the opposition's experts to corroborate theories that provide a basis for their own experts' opinions.
- Do written reports that the expert witnesses prepare reveal areas of vulnerability and weakness on which they can be examined? Reports should be reviewed thoroughly.
- Can any learned treatise impeach the testimony of the expert witnesses? Statements in a learned treatise that is established as a reliable authority by the testimony or admissions of an expert witness, by other expert testimony, or by judicial notice are admissible for impeachment purposes only, MRE 707 allows statements from learned treatises to be read into evidence but they may not be received as exhibits.
- Is there sufficient factual date to support the expert witnesses' opinions?
- Should additional information be gathered or additional work done before the expert can be certain of his or her opinion?

H. Evidence Problems

1. In General

§7.40 The case of *Fletcher v. Fletcher*, 447 Mich 871, 526 NW2d 889 (1994)

demonstrates the importance of the proper presentation of evidence at the trial or evidentiary hearing in a contested custody case. There is no de novo appellate review of trial court decisions in contested child custody cases.

Under MCR 722.28 of the Child Custody Act of 1970, a trial court's decision must be reviewed in accordance with Section 8 of the act, which provides:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made finding of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

MCL 722.28 designates three different standards of review regarding trial court's decision in contested custody matters, which are:

1. Findings of fact are to be reviewed under the great weight of the evidence standard. A reviewing court should not substitute its judgment on the question of facts unless they clearly preponderate in the opposite direction. *Fletcher*, 447 Mich at 878. An appellate court will not reverse the trial court's factual finding unless left with a definite and firm conviction that a mistake has been made. *McNamara v. Horner,* 249 Mich App 177, 642 NW2d 385 (2002).
2. Discretionary rulings are to be reviewed for palpable abuse of discretion. A result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but rather the exercise of defiance, not the exercise of reason, but rather passion or bias. *Fletcher, supra* at 879-880.
3. Questions of law are to be reviewed for clear legal error. When a trial court incorrectly chooses, interprets or applies the law, the appellate court must correct the legal error. *Id* at 881.

2. Preference of a Minor Child

§7.41 Under the Michigan Child Custody Act of 1970, in a contest child custody case in a divorce proceeding the court must consider and evaluate the reasonable preference of the child if the court considers the child to be of sufficient age to express his or her preference. MCL 722.23(i).

Michigan courts have repeatedly held that a child should be permitted to express his or her preference during in an in camera conference with the judge. *Burghdoff v. Burghdoff*, 66 Mich App 608, 239 NW2d 679 (1976). The child is then free from the direct participation in the traumatic courtroom struggle between his or her parents and is spared the pain and embarrassment of personally revealing the selection of one of the parent's as custodian. An interview may thus constitute balancing of the interests of both the child and the litigant since it minimizes the psychological impact on the child and at the same time allows the interest party to produce all evidence that is necessary to enable the court to arrive at a fair and just determination in the child's best interests. *Marshall v. Stefanides,* 17 Md App 364, 302 A2d 682 (1973).

Therefore, a child who has already experienced the emotional trauma of his or her

parents' separation is relieved from the additional streess of crooss- examination and testifying. *Patrick v. Patrick* 99 Mich App 132m 297 NW2d 635 (1980). By conducting an in camera interview, the child's preference can be determined without the pain of openly choosing sides. *Gulyas v. Gulyas*, 75 Mich App 138, 254 NW2d 818 (1977).

Questions of procedures and scope of in camera interviews of minor children in contested custody cases have long been an issue in this state. In *Molloy v. Molloy*, 243 Mich App 595, 628NW2d 587 (2000), the Michigan Court of Appeals was faced with the issue of whether a trial court can use information gathered from an in camera interview with a minor child that is beyond the scope of the child's reasonable preference in fashioning a custody determination. While the Michigan Court of Appeals found the trial court had committed error in not limiting the in camera child interview the child's preference as to parental custody, the court was bound to follow the *Hilliard v. Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998)(the scope of the trial court's in camera interview was not limited to the child's reasonable preference). The Court of Appeals ordered a special panel convene to resolve the conflict between *Hilliard* and *Molloy*, and further held in abeyance the remand of the underlying case. The Michigan Court of Appeals held in *Molloy v. Molloy*, 247 Mich App 348, 637 NW2d 803 (2001), that in camera questioning of a minor child in a child custody case should be limited to the reasonable inquiry into the child's parental preference. The Court further held that a record of every in camera interview was necessary to protect the rights of the child and the integrity of the custody decisions.

On April 29, 2002, the Supreme Court of Michigan issued its ruling in *Molloy v. Molloy*, 466 Mich 852, 643 NW2d 574 (2002), affirming the decision of the Court of Appeals, but vacated the portion holding that inc camera interviews "shall be recorded." The Supreme Court opened an admiin9strative file to examine the produces for taking in camera testimony in contested child custody cases.

3. Offer of Proof

§7.42 Failure to permit an offer of proof results in reversible error if no compelling reason for the denial is placed on the record. In *Hileman v. Indrecia*, 385 Mich 1, 187 NW2d 411 (1971), the judge's denial of counsel's request to make a separate record, or offer of proof, was reversible error:

> The instance is rare indeed where the trial judge is justified in refusing leave to make a separate record under Rule 604 [GCR 604(1963)]...Appellate courts manifestly need such separate records for proper appraisal on review of that which has been denied in open court, and that thought prompts still another.
>
> Judicial denial of a litigant customary right in a court of record to record anything, no matter how quaint, strange or uncouth it may be, had best be support by the persuasion of most compelling reasons. The judge, bent on any such denial, should himself record with detail what we are pleased to call a "good cause" explanation of such unusual action. He must realize that the only other remedy available to counsel is the making up of counsel's own record of that which the judge has banned, followed by prompt filing of that record (or tender of filing it) as part of the clerk's record of the cause.

> Here the trial judge has provided nothing which tends to disclose the intent of performing an act of judicial discretion; hence there was no exercise thereof. He saw only an attempt to impeach one's own witness and, on that assumption, refused to permit the making of a record for appellate purposes. 385 Mich at 17

I. Attorney Fees

§7.43 Under MCR 3.206(C) a party in a domestic relations matter is entitled to request attorney fees if that party is unable to bear the expense of the action and the other party has such an ability. MCR 3.206(C) Attorney Fees and Expenses provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

The Staff Comment to this amendment indicates that this provision was modified in April 1, 2003, effective September 1, 2003, in an attempt to reduce the number of hearings stemming out of vindictive or wrongful behavior, to shift the costs associated with wrongful conduct to the party engaging in the improper behavior, to further remove the ability of a vindictive litigant to apply financial pressure to the opposing party, also to create a financial incentive for attorneys to accept a wronged party as a client, and finally to foster respect for court orders.

J. Proposed Findings of Fact and Conclusions of Law

§7.44 The timely submission of proposed findings of fact and conclusions of law under MCR 2.517 is one of the most effective and valuable trial techniques. These finding permit the lawyer, as an advocate, to state to the trial court salient facts, crucial issues, applicable law and requested relief. Proposed findings are a form of closing argument to assist the court in reaching its decision. It is important to submit the proposed findings before the court makes its decision. *See Form 7.1.*

K. Rebuttal Evidence

§7.45 Rebuttal evidence is offered to answer, defeat, refute, contradict, or explain evidence that the adverse party produces. The admissions of rebuttal evidence is within the trial court's discretion. *Joiner v. Michigan Mut Ins Co,* 137 Mich App 464, 357 NW2d 875 (1984). As a general rule, rebuttal evidence is admissible only when a new matter has been developed form the opponent's evidence. *Argenta v. Shahan*, 135 Mich App 477, 354 NW2d 796 (1984), *rev'd on other grounds by Ouellette v. Kenealy*, 424 Mich 83, 378 NW2d 470 (1985). Evidence that does not rebut or tend to dispute the adverse party's evidence is not admissible as rebuttal evidence. *People v. Reese*, 86 Mich

App 50, 272 NW2d 192 (1978).

L. Closing Arguments

§7.46 In domestic relations cases, the closing argument is the highpoint of the case. It is the moment of truth when the lawyer must tie the client's case togther.

Presentations vary from case to case depending on the facts, law, and the personalities of the judge and opposing counsel. The attorney should prepare for closing arguments during the trial by making daily notes in the trial notebook on crucial testimony and significant exhibits.

The closing argument should address all of the issues that have been presented to the court by applying the appropriate burden of proof. Does the issue to be decided require proof by a preponderance of the evidence or by clear and convincing evidence?

Generally, the closing argument should cover

A. the facts;
B. the case theme;
C. the law applicable to the case;
D. crucial testimony of the parties and witnesses;
E. relevant exhibits;
F. weaknesses in the opposing spouse's case;
G. the relief requested, with supporting facts, testimony, exhibits, and the logic and common sense that support the client's position;
H. how justice will be served in the client obtains the relief requested; and
I. the repercussion if the client's requested relief is denied.

Closing arguments should be delivered with conviction and enthusiasm, showing a passionate belief in the justice of the client's cause of action.