

MCR 2.517 PARADIGM FOR EFFECTIVE DIVORCE CASE MANAGEMENT

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Thursday May 4, 2000
Advanced Level Family Law Seminar
Michigan Chapter American Academy of Matrimonial Lawyers
2000 Townsend Hotel
Birmingham, Michigan

I. INTRODUCTION

A. In divorce cases tried in the State of Michigan, Michigan Court Rule 2.517 entitled “Findings by Court,” establishes the trial court’s responsibilities on how the trial court’s original decision and any amendments should be structured.

B. MCR 2.517 can be used as a paradigm for effective divorce case management in these areas of the divorce practice:

- (1) Before the divorce trial findings of fact and conclusions of law may be required on certain types of motions;
- (2) Before the divorce trial begins, Proposed Findings of Fact and Proposed Conclusions of Law should be submitted to the trial court in place of a trial brief;
- (3) At the conclusion of the opponent’s case a motion for dismissal as authorized by MCR 2.504(B)(2) should be considered if the opposing spouse has not demonstrated on the facts and law that he or she is entitled to the relief requested;
- (4) After the trial court’s original decision, MCR 2.517(B) may be used in an effort to persuade the trial court to amend its findings to save the expense and time delay in an appeal to the Michigan Court of Appeals.

II MCR 2.517 FINDINGS BY COURT

Michigan Court Rule 2.517 FINDINGS BY COURT states:

(A) Requirements.

- (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.
- (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.
- (3) The court may state the findings and conclusions on the record or include them in a written opinion.
- (4) Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule. See, e.g., MCR 2.504(B).
- (5) The clerk shall notify the attorneys for the parties of the findings of the court.
- (6) Requests for findings are not necessary for purposes of review.
- (7) No exception need be taken to a finding or decision.

(B) Amendment. On motion of a party made within 21 days after entry of judgment, the court may amend its findings or make additional findings, and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to MCR 2.611. When findings of fact are made in an action tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether the party raising the question has objected too the findings or has moved to amend them or for judgment.

III. MCR 2.504(B) INVOLUNTARY DISMISSAL; EFFECT, states:

(B) Involuntary Dismissal; Effect.

- (1) If the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant.
- (2) In an action tried without a jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

This rule is similar to a case tried before a jury. If the plaintiff in a jury trial fails to establish the right to relief after the conclusion of the plaintiff's proofs, the defendant may move for a directed verdict which may be granted at the discretion of the trial court.

IV. MCR 2.613 LIMITATIONS ON CORRECTIONS OF ERROR, states:

- (A) **Harmless Error.** An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.
- (B) **Correction of Error by Other Judges.** A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

(C) **Review of Findings by Trial Court.** Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. (Emphasis Supplied)

V. COURT'S RESPONSIBILITY TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DECISIONS INVOLVING CERTAIN TYPES OF MOTION

Although MCR 2.517(A)(4) states that Findings of Fact and Conclusions of Law are unnecessary in decisions on Motions unless Findings are required by a particular rule. See e.g. MCR 2.504(B), the Court is required to make Findings of Fact and Conclusions of Law in its decision on certain types of motions:

- (1) In *Jacobs v. Jacobs*, 118 Mich App 16, 324 NW2d 519 (1982) Plaintiff, Jeffrey A. Jacobs, and defendant Judy L. Jacobs were granted a divorce in the Wayne Circuit Court. Defendant was awarded custody of the couple's minor child and plaintiff was ordered to pay child support. Defendant filed a motion to increase the amount of child support and the court referred the matter to the Friend of the Court, which recommended a retroactive increase. Plaintiff filed written objections to the recommendation. The trial judge adopted the Friend of the Court's recommendation and entered an order retroactively increasing child support. Plaintiff appealed. The Court of Appeals reversed and remanded the case with these holdings:

The trial court abused its discretion by entering its order without conducting a prior evidentiary hearing and making findings of fact as required by the court rules. Furthermore, the court's order improperly placed the burden of showing a change of circumstances on the plaintiff.

The trial court erred in failing to consider plaintiff's support obligation to a child from a subsequent marriage.

The trial court also erred in basing its decision without competent evidence adduced at a hearing but solely upon the Friend of the Court's recommendation. There was no agreement between the parties for the court to base its decision solely on the Friend of the Court's recommendation.

- (2) The trial court committed reversible error in denying the defendant-father's motion for a change of custody on the basis of the pleadings and Friend of the Court Report without holding an Evidentiary Hearing where the parties had not Stipulated to the use of the Report of the Friend of the Court as evidence. *Stringer v. Vincent*, 161 Mich App 429, 411 NW2d 474 (1987).
- (1) In *Rossow v. Aranda*, 206 Mich App 456, 522 NW2d 874 (1994), the plaintiff-mother sought physical custody of the parties' oldest daughter pursuant to the provisions of the Child Custody Act of 1970. Pursuant to stipulation of the parties an Order was entered granting the defendant-father physical custody of their child pursuant to a stipulation in the paternity action brought by the plaintiff-mother against the defendant-father.

The trial court denied the plaintiff-mother's request for physical custody and ordered that physical custody remain with the defendant-father.

On appeal the Court of Appeals affirmed the trial court and held:

The plaintiff failed to establish that the stipulation she had executed in the paternity action upon which the order placing physical custody of the child with the defendant had been based was the result of duress or coercion.

A party seeking a change in custody of a child that is already the subject of a prior custody order has the burden of showing first that either there is proper cause for the change or there has been a change in circumstances warranting the change in custody. Until a proper basis for a change in custody is shown, a court is without authority to consider the prior decision regarding custody or to reconsider the best interests of the child or the existence of an established custodial environment. Because the plaintiff failed to show a sufficient change in circumstances, the trial court properly declined to consider the questions of the best interest of the child or the existence of an established custodial environment.

- (4) A trial court that grants a divorce and awards custody of the divorced couple's children may amend or modify the award of custody only for proper cause shown or because of change of circumstances; an intrastate change in the children's domicile, by itself, does not constitute proper cause or change of circumstances upon which to base a change in custody (MCL 722.27[1][c];MSA25.312[7][1][c]). *Dehring v. Dehring*¹

¹*Dehring v. Dehring*, 220 Mich App 163, 559 NW2d 59 (1996).

- (5) In *Gardner v. Gardner*, Court of Appeals Docket number 219485, lower court number 77-738100 DM a trial Court's order granting summary disposition dismissing plaintiff-wife's motion to modify an alimony award was vacated and remanded for evidentiary hearing if requested by any party and court to make findings of fact and conclusions of law on the record or in a written opinion regarding the intent of the parties and their trial counsel on the meaning of the alimony provisions in the divorce judgment:

“ The Court orders under MCR 7.205(D)(2) that the April 22, 1999 order of the Wayne County Circuit Court is **VACATED** and the case **REMANDED** for further proceedings not in consisted with this order. It is unclear whether the circuit court in effect granted summary disposition to defendant or whether it made implicit findings of fact and conclusions of law. Because plaintiff testified on deposition that it was her understanding that alimony could be ordered to continue beyond the parties' 65th birthdays, there appears to be a genuine issue of fact in this regard. On remand the circuit shall hold an evidentiary hearing if requested by any party, and shall make findings of fact and conclusions of law on the record or in a written opinion regarding the intent of the parties and their trial counsel and the meaning of the alimony provisions of the divorce judgment. *Vigil v Vigil*, 118 Mich App 194, 199-200; 324 NW2d 571 (1982), *Mitchell v Mitchell*, 198 Mich App 393, 399; 499 NW2d 386 (1993). In this regard we note that even though the alimony is modifiable periodic alimony and not alimony in gross, the parties remain bound by the terms of the consent judgment, by which they may have agreed to fix the amount or duration of alimony. In this case the existence and placement of the phrase “or until further order of this Court” creates an ambiguity which must be resolved by the circuit court. Finally, we note that retirement income may be considered in evaluating the ability to pay alimony, and so there mere fact that the judgment awards defendant his pension is not dispositive. *McCallister v McCallister*, 205 Mich App 84, 86-87; 517 NW2d 268 (1994).

This Court retains no further jurisdiction.”

(The Honorable Hilda R. Gage)

VI. BEFORE THE TRIAL BEGINS, PROPOSED FINDINGS OF FACT AND PROPOSED CONCLUSIONS OF LAW SHOULD BE SUBMITTED TO THE TRIAL COURT IN PLACE OF A TRIAL BRIEF.

A. Before the trial begins, the family law trial lawyer should submit to the trial court Proposed Findings of Fact and Proposed Conclusions of Law in place of a trial brief.

The reasons are:

- (1) The Proposed Findings of Fact and Conclusions of Law permit the lawyer, as an advocate, to submit to the trial court, in written form, salient facts, crucial issues, applicable law including burden of proof and requested relief.
- (2) The Proposed Findings of Fact and Conclusions of Law integrate into one pleading, the client's entire case.
- (3) Submitting the Proposed Findings of Fact and Proposed Conclusions of Law before the trial dispenses with the need of the trial lawyer to file both a trial brief and proposed finding of fact and conclusions of law under MCR 2.517.
- (4) The Proposed Findings of Fact and Proposed Conclusions of Law inform the trial court of the facts, issues and law applicable to the facts which will enable the trial court to render an informed decision on contested issues in the divorce case.
- (5) The Proposed Findings of Fact and Proposed Conclusions of Law will assist the trial court to focus on, analyze and weigh conflicting testimony in order to reach a decision on the contested issues involved in the case.

B. FORMS RELATING TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER MCR 2.517 FINDINGS BY COURT

- (1) Defendant's Proposed Findings of Fact and Conclusions of Law (form 7.1 - pages 7-F1-7-F11) 1998 Michigan Family Law Fifth Edition published by The Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, Michigan 48109-1444, Toll-free (877) 229-4350; Toll-free fax (877) 229-4351; e-mail address, <http://www.icle.org>.
- (2) Marital Estate and Proposed Division of Marital Estate (Exhibit 7.2, pages 7E7 - 7E11) 1998 Michigan Family Law Journal Fifth Edition, published by Institute of Continuing Legal Education.

VII. MOTION FOR DISMISSAL

A. Under MCR 2.504(B)(2) a motion for dismissal may be appropriate if the opposing lawyer has not shown the right to relief on the facts and law.

B. If the court renders a judgment on the merits against the moving party, the court is required under MCR 2.504(B)(2) to make findings as provided in MCR 2.517.

C. Examples of situations where a motion for dismissal would be appropriate are:

- (1) Contested child custody case where there is an established environment and the non-Custodial parent fails to show by clear and convincing evidence that a change in the child's custody would be in the child's best interest;
- (2) Failure to prove that an asset should be part of the marital estate;
- (3) Failure to prove the value of an asset in the marital estate;
- (4) Failure to prove entitlement to spousal support;
- (5) Failure to prove entitlement to attorney fees and expert witness fees.

VIII JUDICIAL SAFETY VALVE

After the court's original decision, the provisions of MCR 2.517 (B) may be used in an effort to persuade the trial court to amend its findings of fact and amend the Judgment of Divorce. If a Motion to Amend under MCR 2.517(B) is filed within 21 days after the entry of the Divorce Judgment and the court is convinced that its decision was clearly erroneous, the court can amend its finding of fact and judgment of divorce which will save the litigants the expense and delay involved in an appeal to the Michigan Court of Appeals.

Respectfully submitted,

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April 10, 2000
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