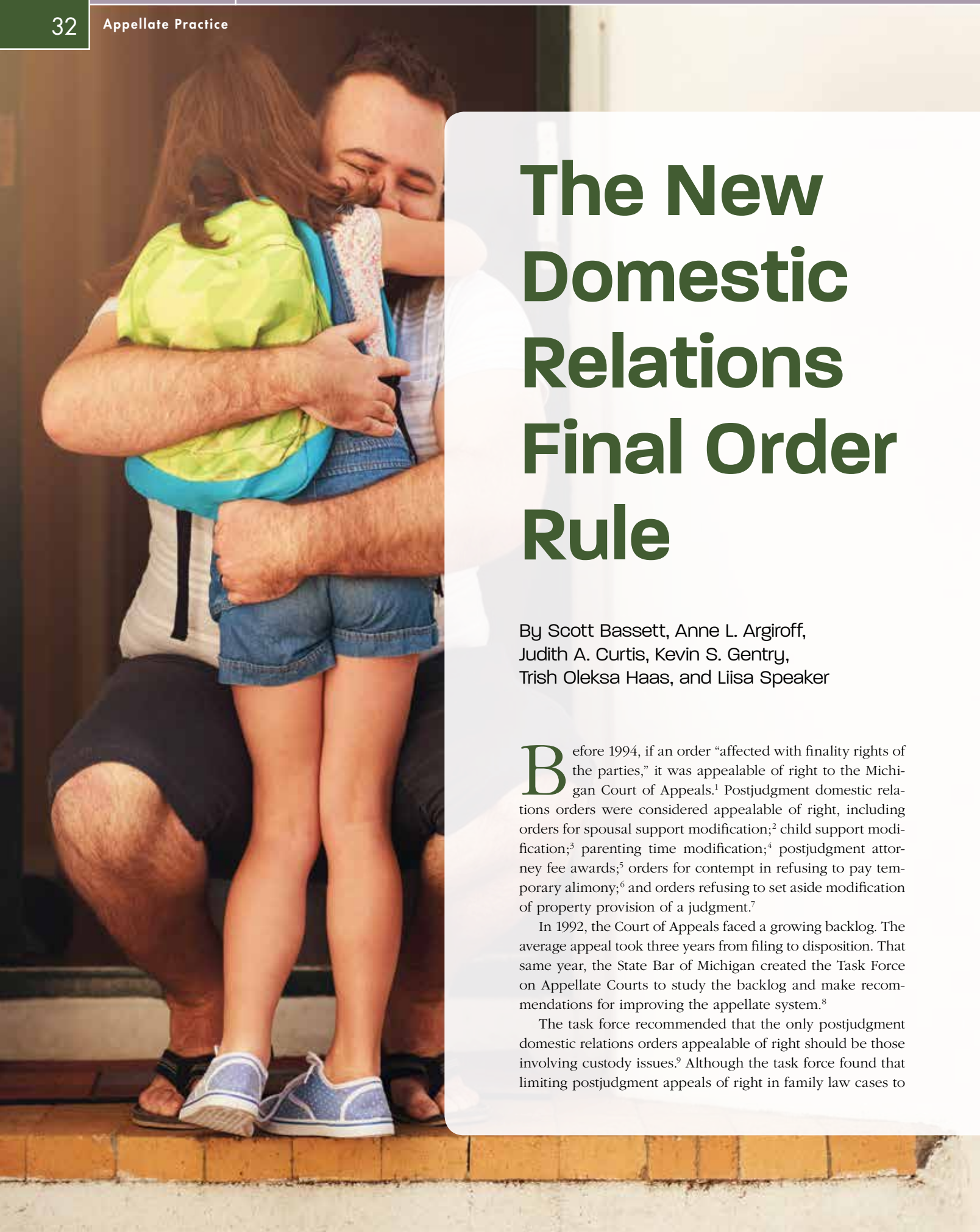

The New Domestic Relations Final Order Rule

By Scott Bassett, Anne L. Argiroff, Judith A. Curtis, Kevin S. Gentry, Trish Oleksa Haas, and Liisa Speaker

Before 1994, if an order "affected with finality rights of the parties," it was appealable of right to the Michigan Court of Appeals.[1] Postjudgment domestic relations orders were considered appealable of right, including orders for spousal support modification;[2] child support modification;[3] parenting time modification;[4] postjudgment attorney fee awards;[5] orders for contempt in refusing to pay temporary alimony;[6] and orders refusing to set aside modification of property provision of a judgment.[7]

In 1992, the Court of Appeals faced a growing backlog. The average appeal took three years from filing to disposition. That same year, the State Bar of Michigan created the Task Force on Appellate Courts to study the backlog and make recommendations for improving the appellate system.[8]

The task force recommended that the only postjudgment domestic relations orders appealable of right should be those involving custody issues.[9] Although the task force found that limiting postjudgment appeals of right in family law cases to

those affecting custody would reduce the Court's docket, it noted that there were no actual statistics to show the potential effect on the docket or where the Court should focus its resources.[10]

The 1994 amendment

In 1994, the Supreme Court amended MCR 7.203 to exclude postjudgment domestic relations orders other than an "order affecting the custody of a minor." The 1994 amendment effectively ended appeals of right for postjudgment child support and spousal support orders. The rule was initially construed as excluding most postjudgment parenting time orders and some custody-related orders.

The meaning of "a postjudgment order affecting the custody of a minor," however, evolved over the years. It came to include more than merely orders changing physical custody.[11]

Gray areas remained, particularly with parenting time. Appellate attorneys included supplemental jurisdictional statements with their claims of appeal explaining why the order appealed satisfied the MCR 7.202(6)(a)(iii) definition of "affecting" custody. Counsel would also submit simultaneous applications and claims if the jurisdictional issues were unclear. Some appeals of right were dismissed anyway, leaving the appellant with the lesser option of filing a delayed application for leave to appeal. Others survived the initial jurisdictional review.

Recent changes in interpretation

Around 2016, there was a change in the way the Court of Appeals applied the "affecting…custody" language of the rule. Not only were appeals from orders granting or denying significant changes to parenting time being dismissed at the initial jurisdictional review, but so were other appeals, including those from legal custody issues such as school enrollment. In two published decisions affirming "lack of jurisdiction" dismissals, the Court of Appeals held that "affecting custody" meant only orders granting or denying physical custody. Legal custody was not "custody" for purposes of the final order rule, and parenting time orders were not final orders "affecting" custody.[12]

Two appeals reached the Michigan Supreme Court on the question of whether orders resolving school enrollment disputes between parents sharing legal custody were appealable by right. After a mini-oral argument on application, the Supreme Court used one of the cases, *Marik*, to overrule the Court of Appeals in *Ozimek* and declare that the final order rule included "legal custody."[13] The Supreme Court remanded *Marik* to the Court of Appeals and opened administrative file ADM 2017-20 to consider amending MCR 7.202(6)(a)(iii).

AT A GLANCE

The amended rule restricts appellate jurisdiction in postjudgment domestic relations cases.

Rule changes affecting the Court's jurisdiction have not been supported by statistical analysis.

Where justified by the facts, motions can be drafted to improve the prospect for an appeal by right.

ADM 2017-20

On April 19, 2018, the Supreme Court issued an order proposing to amend MCR 7.202(6)(a)(iii) to include as appealable by right an order that "grants or denies a motion to change legal custody, physical custody, domicile, parenting time, grandparenting time, school enrollment or religious affiliation; or authorizes or denies medical or mental health treatment."[14] This proposal essentially codified the de facto pre-2016 status quo while adding all parenting time orders to the definition of "final order." It was a modest expansion of the Court of Appeals' jurisdiction over postjudgment domestic relations appeals, but still a reduction of the Court's pre-1994 jurisdiction.

Although the Supreme Court's ADM 2017-20 proposal was well-received by many practitioners, including the SBM Family Law and Appellate Practice sections, there was opposition. The Court of Appeals submitted an alternative proposal that would restrict an appeal by right to an order that "grants or denies a motion to change legal custody, physical custody, or domicile."[15]

Ultimately, the Supreme Court adopted the Court of Appeals' proposal. Effective January 1, 2019, the amended MCR 7.202(6)(a)(iii) defines a final postjudgment order appealable by right as an order that "grants or denies a motion to change the legal custody, physical custody, or domicile of a minor."

Interpretation of the 2019 amended rule

The text of the new rule is narrower than the prior version (removing the phrase "affecting the custody of a minor"). The concern is that various orders, including parenting time, and legal custody issues such as school enrollment, healthcare, and

religious upbringing appear to now be appealable by leave only. But the rule is still open to interpretation.

It is necessary to look at the substance of a motion—not just its title—and how a grant or denial of a motion affects the child or children involved.[16] For example, a motion entitled "motion to modify parenting time" may result in a change of custody, i.e., a change to a child's established custodial environment, just as a motion to change a child's school may involve modification of an established custodial environment.[17]

In *Lieberman v Orr*, the Court of Appeals recognized the fine balance between what one parent requests and the actual effect on a child's custody and established custodial environment:

> In the instant matter, the plaintiff's proposal would reduce the children's overnights with defendant from 225 a year to 140 a year; the 85-day reduction is a nearly 40% decrease in the time the children would spend with defendant. Time spent with the children would be primarily on the weekends and in the summer. "If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Shade*, 291 Mich App at 27. Accordingly, even if one could construe plaintiff's motion as simply one seeking the modification of parenting time, the *Vodvarka* framework would still apply because the proposed changes would alter the children's established custodial environment with defendant.[18]

Lieberman addressed the effect of quantitative and qualitative changes in parenting time on a child's established environment, including a joint established custodial environment with both parties. Other cases, such as *Pierron v Pierron*, recognize the effect a school change may have on a child's established custodial environment.[19]

The rule leaves open interpretation as to what is a change in legal or physical custody.[20] The rule is more appropriately construed as permitting appeals of right from orders arising from motions that effectively result in a change of custody. This construction would be consistent with the design of the Child Custody Act.[21]

The new rule is silent about "grandparenting time" orders, and it does not appear to encompass postjudgment orders in Revocation of Paternity Act (ROPA) cases. These two areas, at a minimum, raise constitutional issues concerning the scope of parental authority/custody over children. In *Varran v Granneman*, the Court of Appeals construed the previous final order rule, emphasizing the effect of seeking grandparenting time on a parent's fundamental right to make decisions concerning the care, custody, and control of a child.[22] In the ROPA line of cases, postjudgment orders denying or granting a change in parental status (e.g., that a man is or is not a father) are variants of orders granting or denying motions to change physical or legal custody. These considerations go to the heart of what custody is—and the current rule should be construed to include grandparenting time and ROPA cases.[23]

Michigan statutes and caselaw have long recognized the importance of children. The Child Custody Act places an independent and paramount burden on the state, through the trial court, to ensure the best interests and welfare of children.[24] Appeals concerning children have priority over other appeals. Thus, it would be consistent to construe this amended rule more broadly in favor of permitting appeals of right concerning postjudgment orders involving children.[25]

Improve your chances for an appeal by right

When contemplating a motion involving a child, trial counsel should pay special attention to the title and the impact of the relief requested. Under the new rule, how the motion is drafted may determine whether the order deciding that motion is appealable by right or by leave. On its face, the rule only permits an appeal by right from an order granting or denying a motion to change physical custody, legal custody, or domicile.

These matters are rarely black and white. A request to modify parenting time could change the child's established custodial environment.[26] For example, a request by one parent to receive an additional overnight per week, or 52 more days per year, means that the other parent is losing 52 days per year with his or her child.[27] The number of days needed to change the child's established custodial environment varies from case to case. It is a fact-intensive and child-centric inquiry.

Similarly, a request to change the child's school could change the established custodial environment.[28] A request for the court to side with one parent over the other about medical treatment for the child can change the legal custodial relationship of whom the child looks to for care, discipline, guidance, and the necessities of life, as contemplated by MCL 722.27(1)(c).[29] The bottom line is that filing a motion could affect a child's life in significant ways. The trial attorney should carefully consider whether to title the motion as a motion to change physical custody, a motion to change legal custody, or a motion to change domicile if supported by the particular facts.

Such an approach benefits both parties. If the motion is granted, the responding parent will have an appeal by right. If the motion is denied, the moving party will have an appeal by right.

Conclusion

The existence of appeals of right fundamentally affect children and Michigan families. To the extent that parties are now left with an application for leave to appeal as the only remedy, this discretionary process can never replace the guarantee of mandatory review. Even if leave is granted, the entire process is longer than through an appeal by right.

Postjudgment orders concerning *modifiable* issues such as custody and parenting time are, by definition, based on new

facts.[30] These postjudgment orders are more like final judgments/orders under MCR 7.202(6)(a)(i), which involve appellate review of facts for the first time. Denying appeals of right for these postjudgment cases denies mandatory appellate review of new factual situations.

As noted by the task force in 1993, the need for statistical information as to how the Court is to allocate its resources is crucial in considering court rule amendments. Defining postjudgment appeals of right should be made after consideration of the pertinent statistics as well as acknowledgment of the paramount importance of issues concerning children in the judicial system. ■

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ENDNOTES

1. MCR 7.203(A) and *Gherardini v Ford Motor Co*, 394 Mich 430, 431; 231 NW2d 643 (1975).
2. *Boyles v Brown*, 396 Mich 97, 97; 237 NW2d 474 (1976).
3. *Chandler v Chandler*, 24 Mich 176, 178 (1871) and *Torakis v Torakis*, 194 Mich App 201, 202; 486 NW2d 107 (1992).
4. *Van Koevering v Van Koevering*, 144 Mich App 404, 405; 375 NW2d 759 (1985) and *Stevenson v Stevenson*, 74 Mich App 656, 657; 254 NW2d 337 (1977).
5. *Gove v Gove*, 71 Mich App 431, 433; 248 NW2d 573 (1976).
6. *Ross v Ross*, 47 Mich 185, 187; 10 NW 193 (1881).
7. *Gundick v Gundick*, 208 Mich 34, 39; 175 NW 168 (1919).
8. Webster, *Introduction to the Task Force on Appellate Courts, Report and Recommendations*, 72 Mich B J 875, 895 (1993).
9. *Id.* at 898–899, discussing Recommendation #4.
10. *Id.*
11. See, e.g., *Thurston v Escamilla*, 469 Mich 1009; 677 NW2d 28 (2004) (changing child's domicile); *Varran v Granneman*, 312 Mich App 591, 606–607; 880 NW2d 242 (2015) (grandparenting time); *Sulaica v Rometty*, 308 Mich App 568, 570, 576; 866 NW2d 838 (2014) (parenting time order involving significant modification); *Rains v Rains*, 301 Mich App 313, 323–324; 836 NW2d 709 (2013) (denying change of domicile); and *Wardell v Hincka*, 297 Mich App 127, 132–133; 822 NW2d 278 (2012) (denying motion to change custody; the phrase "affecting…custody" is broad and encompasses a range of postjudgment orders). See also *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010) (change in parenting time or school affecting the established custodial environment) and *Lieberman v Orr*, 319 Mich App 68, 93; 900 NW2d 130 (2017) (parenting time modification may be of sufficient magnitude to affect the child's custody or established custodial environment).
12. *Ozimek v Rodgers*, 317 Mich App 69, 80; 893 NW2d 125 (2016) and *Madson v Jaso*, 317 Mich App 52, 66–67; 893 NW2d 132 (2016).
13. *Marik v Marik*, 501 Mich 918; 903 NW2d 194 (2017). On remand, the Court of Appeals held that the school change denial order in *Marik* is a final order under MCR 7.202(6)(a)(iii), restoring the pre-2016 status quo. *Marik v Marik*, unpublished order of the Court of Appeals, entered April 3, 2018 (Docket No. 336087).
14. Administrative Order No. 2017-20, 503 Mich ___ (2018).
15. Comment from Michigan Court of Appeals on ADM 2017-20 (August 20, 2018).
16. *King v Arbic*, 159 Mich App 452, 456; 406 NW2d 852 (1987) (focus on substance of motion).
17. The Child Custody Act of 1970, MCL 722.21 *et seq.*, is designed "to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Pierron v Pierron*, 282 Mich App 222, 243; 765 NW2d 345 (2009), aff'd 486 Mich 81; 782 NW2d 480 (2010). MCL 722.27(1)(c) requires threshold findings before a court is authorized to modify a prior order, as well as stringent evidentiary levels of proof before modification.
18. *Lieberman v Orr*, 319 Mich App at 90–91.
19. *Pierron v Pierron*, 282 Mich App at 249.
20. Physical custody is never actually defined in the Child Custody Act, but has been adopted generally as a description of division of time spent with the parents.
21. MCL 722.27(1)(c).
22. *Varran v Granneman*, 312 Mich App at 620–621.
23. Also, a trial court order allocating legal decision-making between joint legal custodians depending on the subject (such as medical decision-making)—awarding sole legal custody over just one aspect of a child's life—is improper and should constitute a "change" in legal custody and therefore fall within the amended rule.
24. MCL 722.24(1).
25. In comparison, MCR 7.202(6)(a)(iv) allows appeals of right from all postjudgment orders granting or denying attorney fees, of any amount.
26. *Shade v Wright*, 291 Mich App 17, 27–29; 805 NW2d 1 (2010).
27. See, e.g. *Simon v Simon*, unpublished per curiam opinion of Court of Appeals, issued July 24, 2012 (Docket No. 308528).
28. *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010).
29. *Shulick v Richards*, 273 Mich App 320, 327–329; 729 NW2d 533 (2006).
30. MCL 722.27(1)(c) allows a court to modify custody or parenting time only on a showing of "proper cause" or "change of circumstances." See also Curtis, *Appeals of Right—Post-Judgment Family Law Modifiable Orders*, 19 Mich App Practice J 14 (Winter 2015).