

Probate Proceedings and Discovery

By George M. Strander

There has long been tension between the world of probate court matters—generally involving petitions, a respondent, and often multiple interested persons—and that of general civil procedure, which assumes cases with a plaintiff, a summons and complaint, and one or more defendants.¹ Probate court petitions (as opposed to the relatively rare probate court civil suit) are not suits against another party, but typically requests for relief in relation to an estate or the care or treatment of an individual. The rules of Chapter 2 of the Michigan Court Rules, designating parties as plaintiffs and defendants, do not apply easily to many aspects of the probate regime.

Such is the case in the area of discovery.² The current rule at MCR 5.131(A) indicates that “(t)he general discovery rules apply in probate proceedings.” While this directive is not particularly specific, subchapter 2.300 is the one place in the court rules where the rules governing discovery are fully outlined, and these “general discovery rules” assume cases with a dichotomy of plaintiffs and defendants.

In the area of probate, then, the changes to civil discovery rules recently enacted by the Michigan Supreme Court and effective January 1, 2020,³ needed to be drafted to do double duty. First, it was necessary that they adopt the goals of the new civil discovery process, described by Daniel Quick in his article “The New Civil Discovery Rules” as requiring parties to get vital information about their cases earlier in the process and inviting more active judicial case management to deal with discovery issues before they result in a motion to dismiss or a motion to compel.⁴ The purpose behind these new rules is to streamline discovery and increase access to our courts by making the pretrial process more cooperative, efficient,

and cost-effective; one might ask how the new rules specifically accomplish these goals in relation to probate proceedings.

Second, the changes to civil discovery rules needed to improve the application of discovery standards to the probate setting. General discovery rules assume an adversarial action where distinct parties are seeking information to prepare their cases adequately. Interestingly, matters that are contested to the same degree as a lawsuit can exist in probate proceedings; examples might include will contests, actions to remove a trustee, or fights over attorney fees. To the litigating interested persons, discovery can be as important as it is to the plaintiff and defendant in a lawsuit. The other question one might ask, then, is how the new rules fit the general discovery structure to all probate proceedings and especially those actions that display the litigation we expect to need discovery most.

The new amendment to MCR 5.131 answers the two above questions by first making clear that all discovery tools in new subchapter 2.300 (with the exception of mandatory initial disclosures) are open to any interested person in a probate proceeding.⁵ The amendment goes on to carve out a specific minority of probate actions that require mandatory disclosures under amended

MCR 2.302(A).⁶ The aim is to specify those highly litigious probate proceedings that function much like lawsuits and compel “active” interested persons to make disclosures just as plaintiffs or defendants would have to under MCR 2.302(A).⁷ As with the prior version of MCR 5.131, “(d)iscovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.”⁸

Under the enacted amendment to MCR 5.131, mandatory initial disclosures are triggered after the filing of an initial petition by either (1) the filing of a demand for such disclosures by another interested person or (2) the judge’s determining that such disclosures are appropriate after an interested person contests the petition.⁹ Disclosures must be made by both the petitioner and the demanding or objecting interested person. In this way, the rule requires the disclosures when needed and from those who need to provide them, thus limiting “harassment by discovery.”¹⁰ Other interested persons would still receive notice and have rights as dictated by other court rules but would not be mandated to make the above-mentioned disclosures.¹¹

The enacted amendment also provides a mechanism for ordering disclosures from specific interested persons at some point

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after the initiation of a proceeding, or from those in addition to others already needing to make disclosures.¹² This recognizes that the scope of interested persons' interests may not always be apparent at the time a petition is filed, and that another who may not yet have filed a demand for disclosure or otherwise objected may need to make disclosures.¹³

The revised time guidelines for filing mandatory initial disclosures in probate proceedings largely mimic those applying to general civil suits under MCR 2.302(A)(5) and are meant to promote the same ends. Within 14 days of the first hearing on a petition subject to a demand or objection and judge's order, the petitioner must file initial disclosures.¹⁴ Hence, a petitioner in a contested action should be prepared to provide disclosures on relatively short notice.

A demandant's or objecting party's disclosures are expected within 14 days after the due date of the petitioner's disclosures or, if the demand or objection is filed within 14 days of the hearing on the petition, within 28 days of the filing of the demand or objection.¹⁵ This guarantees that the demandant or objecting party has at least 28 days to prepare disclosures. An interested person ordered to make disclosures absent a demand or objection has 21 days after the court order to comply.¹⁶

Discovery for probate court civil suits are, as they have been, governed wholly by the general discovery rules in subchapter 2.300 of the court rules.¹⁷ Therefore, plaintiffs and defendants in these actions, as in all civil suits, must make initial disclosures under MCR 2.302.

In general, the changes to MCR 5.131 add more structure and openness to the discovery process in highly litigated pro-

bate proceedings. As with parties in civil suits, the active interested persons in these actions will get vital information earlier, resulting in a more cooperative, efficient, and cost-effective pretrial process. ■



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ENDNOTES

1. E.g., Hartog & Kovar, Legal NewsRoom, Estate and Elder Law, *Common Mistakes Made in Probate Court: You're not in Civil Court Anymore!* (posted June 3, 2011) <<https://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/posts/common-mistakes-made-in-probate-court-you-re-not-in-civil-court-anymore>> [<https://perma.cc/VZ87-8U38>]. All websites cited in this article were accessed September 6, 2019.
2. See Skidmore, *Discovery in Probate Court Litigation*, 93 Mich B J 36 (May 2014) <<https://www.michbar.org/file/barjournal/article/documents/pdf4article2377.pdf>> for a discussion of some of the unique elements of discovery in probate proceedings. The specific role of discovery in probate proceedings has also been recognized in other states (e.g., *The Tools of War Part Two: How to gather the ammunition necessary for a battle in Probate Court*, Albertson & Davidson, LLP (November 29, 2012) <<https://www.californiatrusterestateandprobateandlitigation.com/06-litigation/02-probate-court-litigation/the-tools-of-war-part-two-how-to-gather-the-ammunition-necessary-for-a-battle-in-probate-court/>> [<https://perma.cc/R3F7-GP32>]).
3. Administrative Order No. 2018-19 (2019).

4. Quick, *The New Civil Discovery Rules*, 98 Mich B J 16 (September 2019) <<http://www.michbar.org/file/barjournal/article/documents/pdf4article3762.pdf>>.
5. MCR 5.131(B)(1) and AO No. 2018-19.
6. AO No. 2018-19. As the note to the 1993 amendment to FR Civ P 26 (which introduced mandatory initial disclosures to federal discovery practice) indicates, such disclosures are meant to "accelerate the exchange of basic information about the case," thereby making for a fairer and more efficient process. The target of the mandatory initial disclosures—abusive discovery—is seen as such a problem that some have termed it "fraud on the court." See Hague, *Fraud on the Court and Abusive Discovery*, 16 Nev L J 707 (2016), available at <<https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1674&context=nlj>> [<https://perma.cc/VM95-NHRH>].
7. Probate litigation has been described as involving "court battles" where "emotions are high and interactions are tense" and which can "greatly disrupt family relationships." *Probate Litigation*, Justia (2018) <<https://www.justia.com/estate-planning/probate/probate-litigation/>> [<https://perma.cc/2GF4-3VY8>].
8. MCR 5.131(B)(3) and AO No. 2018-19.
9. MCR 5.131(B)(2)(a) and AO No. 2018-19.
10. A not insignificant portion of jurisprudence on probate discovery focuses on courts' responses to "fishing expeditions" and "excessive" discovery. See, e.g., *Hammond Estate v Hammond Living Trust*, 215 Mich App 379; 547 NW2d 36 (1996); *Weisman Estate v Miller Canfield*, unpublished per curiam opinion of the Court of Appeals, issued December 23, 2014 (Docket Nos. 317081 and 317085); and *Warner Estate v Brad Warner*, unpublished per curiam opinion of the Court of Appeals, issued February 15, 2018 (Docket No. 337596).
11. Interestingly, Utah has also been exploring probate discovery amendments, including mandatory initial disclosures, as reflected in the proposed Utah Rules of Civil Procedure, Rule 26.4. See Agenda, Supreme Court's Advisory Committee on the Rules of Civil Procedure, Utah Courts (March 27, 2019) <<https://www.utcourts.gov/utc/civproc/2019/03/25/march-27-2019/>>.
12. MCR 5.131(B)(2)(b) and AO No. 2018-19.
13. As noted, a novelty of probate proceedings is that an "interested person" who has a right to notice may not be an "active" litigant. However, at any time, for any of a variety of reasons, such a party can seek relief (e.g., removal of a personal representative) and become the kind of litigant suitable for mandatory disclosure. See, e.g., the discussion on challenges to a personal representative's authority in *Probate Information: Probate & Estate Administration*, Probate and Estate Planning Section, SBM <https://www.michbar.org/public_resources/probate3> [<https://perma.cc/F3S8-BY9X>].
14. MCR 5.131(B)(2)(c)(i) and AO No. 2018-19.
15. MCR 5.131(B)(2)(c)(ii) and AO No. 2018-19.
16. MCR 5.131(B)(2)(c)(iii) and AO No. 2018-19.
17. MCR 5.131(A).