

FAMILY LAW SECTION
Respectfully submits the following position on:

*
ADM File No. 2014-12

*

The Family Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Family Law Section only and is not the position of the State Bar of Michigan.

The State Bar's position in this matter is to support the proposed amendment.

The total membership of the Family Law Section is 2,897.

The position was adopted after a discussion and vote at a scheduled meeting. The number of members in the decision-making body is 21. The number who voted in favor of this position was 18. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of Section:

Family Law Section

Contact person:

Mathew Kobliska, Co-Chair of the Court Rules & Ethics Committee

E-Mail/Phone:

mkobliska@dpkzlaw.com

Regarding:

[2014-12 – Proposed Amendment of Rule 3.211 of the Michigan Court Rules](#)

The proposed amendment of MCR 3.211 would provide language to allow the parties to stipulate (in their judgment of divorce, separate maintenance, or annulment) to postjudgment binding arbitration of identified personal property under MCL 600.5070 *et seq.*

Date position was adopted:

November 1, 2014

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting

Number of members in the decision-making body:

21

Number who voted in favor and opposed to the position:

18 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote (absent)

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2014-12_2014-10-22_formatted%20order_FINAL.pdf

Position:

Support



STATE BAR OF MICHIGAN

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

www.michbar.org

OFFICERS

CHAIR

Rebecca Shiemke, Ann Arbor
rshiemke@lsscm.org

CHAIR-ELECT

Carol F. Breitmeyer, Detroit
breitmeyer@bcfamlaw.com

TREASURER

Hon. Richard B. Halloran, Detroit
hewhodreams@comcast.net

CORRESPONDING SECRETARY

Kent Weichmann, Ann Arbor
weichmann@att.net

RECORDING SECRETARY

Robert Charles Treat, Jr., Taylor
bob.treat@qdrexpressllc.com

COUNCIL MEMBERS

Daniel B. Bates, Bloomfield Hills
dan@danbateslaw.com

Elizabeth K. Bransdorfer, Grand Rapids
ebrandsdorfer@mmbjlaw.com

J. Matthew Catchick, Royal Oak
mattca606@gmail.com

Christopher J. Harrington, Novi
cjh@jjharringtonlaw.com

Sahera Housey, Pontiac
houseys@oakgov.com

Mathew Kobliska, Farmington Hills
mkobliska@dpczlaw.com

Peter Kulas, Grand Rapids
pmkulas@lulaslawoffice.com

Colleen Markou, Kalamazoo
colleenmarkou@stancati-assoc.com

Vanessa M. Moss-Wilson
vanmosswilson@hotmail.com

Anthea Papista, Detroit
aep@papistalaw.com

Steven D. Reinheimer, Bloomfield Hills
steven@stevenreinheimer.com

Kristen L. Robinson, Troy
kristen@mellinrobinson.com

Amy M. Spilman
spilman@acsllawfirm.com

Ross F. Stancati, Kalamazoo
rossstancati@stancati-assoc.com

Gail M. Towne, Kalamazoo
gtowne@lennonmiller.com

Randall L. Velzen, Grand Rapids
revelzen@westmichigandivorce.com

Tina M. Yost
tyost@calhouncountymi.gov

EX OFFICIO

James J. Harrington, III
jjh@jjharringtonlaw.com

November 5, 2014

Ms. Anne M. Boomer, Administrative Counsel
Michigan Supreme Court
925 W. Ottawa St.
P.O. Box 30052
Lansing, MI 48909

RE: Comment to ADM File No. 2014-12
Proposed Amendment to MCR 3.211

Dear Ms. Boomer:

A provision in a divorce judgment which provides for postjudgment arbitration of personal property has been a valuable tool for family law practitioners for decades, although more often in the last ten years due to the increase in employment of ADR procedures.

A typical scenario could be described as this: On the eve (or morning) of trial, the parties have reached an agreement on all major issues, which often includes the issues of child custody, parenting time, child support, spousal support, real estate, retirement assets, and spousal support. To finalize the parties' agreement on those major terms, the parties and their attorneys either recite their agreement on the record or sign a written document in accordance with MCR 2.507(G).

The parties in the above situation are almost never in a position to negotiate and decide who will be awarded the toaster, the dining room set, or the DVD collection. They have been consumed with the larger issues for the better part of a year, which crowded the field for consideration of the "stuff." In addition, as any family law practitioner can attest, consuming court and judicial resources to litigate "pots and pans" is inefficient and time-consuming. While the language is not standardized, family law practitioners have commonly used provisions to finally resolve the issue through binding arbitration. For example, such a provision might read as follows: "The division of personal property contained in the marital home and garage, including all furniture and furnishings, is submitted to binding arbitration, with Jane Doe being appointed

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as arbitrator, pursuant to the arbitration provision contained in this judgment.” The judgment would then recite the required provisions of the *Domestic Relations Arbitration Act*.

The Court of Appeals opinion in *Yeo v. Yeo*, 214 Mich App 598 (1995), did not affect the use of these types of postjudgment arbitration provisions in judgments, and as indicated above, these agreements proliferated in the years following the *Yeo* decision. *Yeo* did clearly enunciate two important principles: (1) that the form and required content of divorce judgments are procedural issues, and are therefore controlled by MCR 3.211; and (2) that the court may not bifurcate divorce cases to grant a judgment of divorce while reserving the disposition of property for future consideration by the court. In *Yeo*, the trial court had not resolved even the real estate issues in the case, and the opinion does not indicate when any such future consideration might occur.

The appellate decision in *Bonner v. Bonner*, unpublished opinion of the Michigan Court of Appeals, (Docket Nos. 288733, 291202, Sept. 22, 2009) 2009 WL 3014534, upset the apple cart to some extent, by holding that postjudgment arbitration agreements violated MCR 3.211, referencing the *Yeo* case. The *Bonner* decision came as a surprise to many on the bench and bar, and while the practice still occurs as *Bonner* is not binding precedent, our membership reports that there are some judges who will no longer accept proposed judgments which contain arbitration provisions.

Michigan’s public policy strongly favors arbitration to resolve disputes. *Rembert v. Ryan’s Family Steak Houses, Inc.*, 235 Mich App. 118; 596 NW2d 208 (1999). Arbitration clauses are to be liberally construed, and any doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Omega Constr. Co., Inc. v. Altman*, 147 Mich App 649; 382 NW2d 839 (1985). Courts have repeatedly held that parties in a domestic relations case have the right of self-determination to arbitrate their disputes. *See e.g., Konal v. Forlini*, 235 Mich App 69; 596 NW2d 630 (1999).

Binding arbitration is final and not appealable, except under extremely limited circumstances, such as fraud or corruption. In this sense, they have a greater degree of finality than if the trial court had conducted a hearing and made a disposition of personal property, as the latter would provide a clear right to appeal.

Postjudgment binding arbitration of personal property is cost-effective to divorce litigants. It acknowledges the divorce litigants’ rights to elect binding arbitration through agreement to resolve their issues in the case. Postjudgment arbitration allows judges to use their courtroom time more effectively, and on issues which are more important than pots and pans.

The Family Law Section believes that ADM File No. 2014-12 would authorize a practice which is widely used, and provide savings and efficiencies to litigants and the court.

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Again, thank you for the opportunity for the State Bar of Michigan Family Law Section to comment on ADM File No. 2014-12.

Respectfully submitted on behalf of the Family Law Section:

/s/ Mathew Kobliska

Mathew Kobliska

Co-Chair, Court Rules & Ethics Committee

Family Law Section