Keeping Current

Recent court rule changes that impact family law practice

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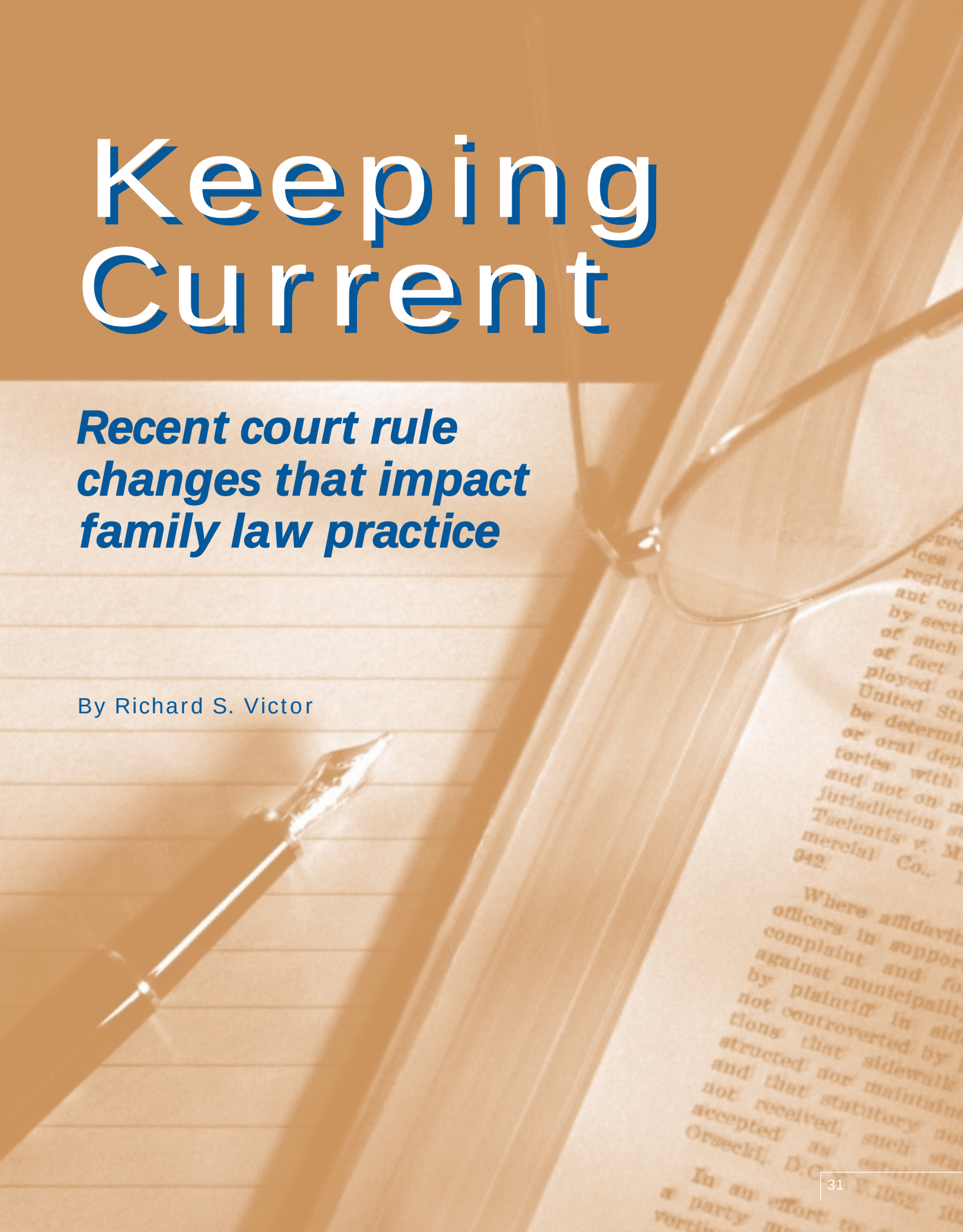

During the past year the Michigan Supreme Court has adopted two court rule modifications and is contemplating a modification in the rules of evidence that will have a significant impact on the practice of family law.

MCR 2.602 Entry of Judgments and Orders

Effective January 1, 2002, MCR 2.602 changed the rule commonly known as the "Seven-Day Rule." Prior to the adoption of this change, orders or judgments were entered by one of the following methods:

1. The court may sign the judgment or order at the time it grants the relief.
2. The court will sign the judgment or order when its form is approved by all of the parties, assuming the court determines that the proposed judgment or order comports with the court's decision.
3. Within seven days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other party with a notice that it will be submitted to the court for signing if no written objections are filed with the court within seven days after service of the notice.

This latter method is the "Seven-Day Rule." In theory, it was designed to expedite the entry of orders that are not brought to court the day a settlement or agreement is placed on the record or, it becomes difficult to receive consent of opposing counsel for the entry of a proposed order. In practice, some attorneys would routinely file objections to the entry of a seven-day order without stating specifically why they were objecting or what in the order was objectionable or inaccurate. This has caused the necessity for additional hearings requesting the entry of orders with the resulting costs and expenses passed on to the client.

With the adoption of the amendment to MCR 2.602, if an order or judgment is submitted under this Seven-Day Rule, any objection regarding the accuracy or completeness of the proposed judgment or order must state with specificity what the inaccuracy or omission is. In addition, the party filing the objection must serve all of the objections on all of the parties together with a notice of hearing and an alternate proposed judgment or order [MCR 2.602 (B)(c)].

This amended court rule will now attempt to eliminate delay and unnecessary work caused by nonspecific and meaningless objections. The amendment shifts the burden of going forward from the proponent of the order or judgment to the objector, as well as clarifying the objection procedures. MCR 2.114 will still govern the request for sanctions, attorney fees, and costs associated with the filing of frivolous motions or objections by either the proponent of the judgment/order or the objector. It remains the best policy to come to court with a proposed order ready for entry following your motion or hearing, or draft one on a court form available to you from your judge before you leave the courthouse. When that is not practical or possible the Seven-Day Rule is a good way to have judgments or orders entered when you are confronted with difficult opposing council who will not consent to an order following a ruling that they do not like; or in cases where attorneys are precluded from approving judgments or orders based on the direction of their clients.

MCR 3.210 Change of Custody Matters

Effective July 1, 2001, MCR 3.210 was amended to add subsection (7) which sets forth:

> *(7) In deciding whether an evidentiary hearing is necessary with regard to a post judgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.*

This changes the practice and procedures involved in filing a request to modify custody following a judgment of divorce being entered. This new rule requires the moving party to make an offer of proof as to what contested factual issue will be involved as alleged by the moving party prior to the court granting an evidentiary hearing on the motion to change custody. Judges are no longer required to automatically grant an evidentiary hearing following the filing of a request to change custody but rather, must make a finding, following an offer of proof, that there are contested factual issues that would impact the court in making an informed decision regarding changing an established custodial environment of a child created by a prior judgment or custody order. This will require attorneys to do discovery prior to the filing of their petition to modify custody in order to be able to make such an offer of

proof and secure the evidentiary hearing for a change of custody, which would be requested by the moving party.

Following the adoption of this amendment, attorneys should not routinely agree to refer petitions for post-judgment modifications of custody to the friend of the court for an investigation or for an evidentiary hearing. This rule requires that the moving party must set forth in their petition that a change of circumstances has occurred, which would enable the moving party to overcome their burden of proof in order to successfully argue that a change in custody is warranted.

Under our present law, if an established custodial environment exists (either jointly with both parties or with one party as the primary caretaker), clear and convincing evidence is required to modify the custody order that is in effect. Before the court will allow an evidentiary hearing on a change of custody petition the court must be convinced that there are factual issues in dispute. If not, the petition may be denied at the time the motion is heard by the court, without the necessity of a hearing.

Proposed Changes to MRE Rule 703 Bases of Opinion Testimony by Experts

Although not adopted as of this date, the Michigan Supreme Court Committee reviewing and drafting proposed rules of evidences has recommended an amendment to MRE 703, which pertains to the bases of opinion testimony by experts. The recommended modification to Rule 703 sets forth that the facts in a case upon which an expert bases their opinion or inference must be in evidence at the time of an evidentiary hearing or trial. This proposed rule would not restrict the discretion of the court to receive expert opinion testimony *subject to the condition that the factual bases of the opinion would be admitted into evidence after the expert testifies.* But the testimony will have to be admitted during the trial or hearing, or the opinion of the expert may be disallowed or at least not be allowed to be based on the information received during their investigation, which was not admitted into evidence during the trial or hearing.

Clearly, due process requires protection against the admissibility of hearsay. However, the Family Law Section of the State Bar of Michigan, joined by the American Academy of Matrimonial Lawyers (Michigan Chapter) and the Michigan Psychological Association has strongly stated, in opposition to this amendment, that family law matters should be excluded from these proposed changes to Rule 703. Without impugning the integrity of the committee's recommendations to the supreme court, the practice of family law, especially child custody cases, requires serious thought and consideration before this amendment is adopted.

If this proposed language is accepted and does not exclude family law/child custody matters, it may exacerbate litigation by making it necessary to bring into court witnesses such as school teachers, day care providers, physicians, and even children, who have been otherwise kept out of having to be called as a witness. Presently, when a child custody matter has been referred to an expert for an independent psychological or friend of the court investigation, the experts are permitted to research the case by talking to people who will help in providing a "full picture" of the established custodial environment of a child. That information is used by the expert in assisting the trial court when there is a recommendation for what is in the child's best interests. If the experts are prohibited from using this information or presenting testimony regarding it, unless the underlying witness is called as part of the case, the result could be devastating to the trial courts and to the parents who have to go through a custody trial and the requisite added expense (in time, emotions, and finances) that will undoubtedly result.

Those who argue that the use of expert witnesses in custody disputes is not necessary ignore the reality and necessity of a complex area of law that deals more with emotions than it does with substantive legislative enactments. Family law practitioners need these experts and their ability to freely investigate cases, with the opportunity to testify regarding the totality of circumstances dealing with the best interests of the child. It is not uncommon when a matter has to proceed to trial that settlements are reached following the direct and cross examination of the court-appointed expert. The parties make these settlements with the assistance of counsel once the reality of their life situation is opened up in court by this neutral evaluator. To restrict the ability to access this testimony will no doubt prolong the litigation and resulting acrimony between the parents involved. This can have no benefit to the children, who are and always have been the innocent victims of these disputes. ✦

Fast Facts:

- **In the last year, two court rule modifications have been adopted that significantly impact family law.**
- **If an order of judgment is submitted under the Seven-Day Rule, any objection regarding the accuracy or completeness of the proposed judgment or order must state with specificity what the inaccuracy or omission is.**
- **If a change in custody is requested, the moving party must show through an offer of proof that there are contested factual issues that would impact the court in making an informed decision on changing a child's established custodial environment created by an earlier judgment or order, before the court will grant an evidentiary hearing on the request.**

Richard S. Victor, a matrimonial law attorney in Bloomfield Hills, founded and serves as executive director of the National Nonprofit Grandparents Rights Organization. He is a former chairperson of the Family Law Section of the State Bar of Michigan and received their Lifetime Achievement Award in 1999. He is the general editor and author of West's three-volume series, Michigan Family Law and Practice.