Res Ipsa Loquitur

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In This Issue . . .

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Summer Picnic 2019

We had great weather for the annual picnic held jointly with Women Lawyers Association of Michigan, Washtenaw Region at Gallup Park on June 27th.
Much appreciation to our grill masters, Judge Karen Quinlan Valvo, Judge Kirk Tabbey and Judge Charlie Pope.

Photos courtesy of the
Washtenaw County Legal News – Frank Weir, Photographer.
Additional photos are available at www.washbar.org in our photo gallery.

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ASKED & ANSWERED

Rebecca A. Harvey

Rebecca Harvey was born and raised in New York, and moved to Michigan to attend the University of Michigan where she discovered that Michigan is her true home. Needing a break from school, she worked for a few years before attending law school at Michigan State University College of Law. After graduating from law school, she moved to Manchester where her husband grew up and where they are now raising their three wonderful children. She has a solo practice in Manchester where she mainly concentrates on Family Law issues and Estate Planning. She is in her second term as the Secretary of the Manchester Community Schools Board of Education, and can be reached at **law@RebeccaAHarvey.com.**

Did you always know you wanted to be an attorney? Where did you get your law degree? Anything else interesting?
Coming from a family who LOVES to argue, I have always known I wanted to be an attorney. As a child, I was pretty successful at getting what I wanted through a logical and well planned out argument. I attended law school at Detroit College of Law, which became Michigan State University College of Law the month before my graduation. But I am still True Blue!

What jobs did you have before you became an attorney?
My first "official" job was a newspaper delivery girl, where I went up and down my block on my bicycle delivering newspapers every day and collecting payment once a week. Since then, I have been a babysitter, lifeguard, a swim instructor, a CPR and First Aid instructor, a waitress and finally an attorney and best job ever: MOM!

What area of the law do you like the best and why?
Although I don't currently practice it, I love criminal law. I've always been so interested in the process and working with the crime to figure out how to solve the case (legally) and end with practical result (although I know that doesn't happen as often as you think). I also love the juvenile division. It's so hard when young kids get caught in the middle of something that is not their fault, or something they cannot control. But it's so exhilarating when we can settle a case that puts that child back in the best possible situation and on the track for a successful future.

Tell us a little about your family.
My husband is a Michigan native. He was born in Ann Arbor, lived in Saline as a child and moved back to the farm where his mother was raised in Manchester. He graduated from Ferris State University and went back to Manchester to settle down. We were married in 2005 and welcomed our first daughter in 2007. Our son was born in 2009 and we welcomed our youngest (and final) daughter in 2013. There are so many friends whom we consider family, but it would take up too much space to name them all. My kids are all currently involved in numerous activities, including sports, book club and Cub Scouts to name a few. We are constantly on the go!

What is the biggest challenge facing you as an attorney today?
I feel like one of the biggest challenges revolves around our economy. Michigan is still struggling financially, and hiring an attorney is a luxury many cannot afford. Either people don't initially hire an attorney or when they do, they want the very minimal amount of help (to keep the costs down). It makes it hard to adequately represent a client when the information they give you, or allow you to handle, is restricted. The other challenge is being hired to "fix the mess" that results when a client tried to handle the case on their own and was unsuccessful. Fixing a case that has gone down a wrong (and, sometimes, detrimental) path is a much more involved representation and clients can get upset about all the work that has to be done (and the cost of that work) to make things right.

What would your second career choice have been if you had not become a lawyer?
Astronaut. Definitely an astronaut! (Says the 5-year-old in me!)

Any words of wisdom to pass on to new lawyers?
Be confident. Don't doubt yourself. You went through years of a tough education to get your law degree, which isn't easy to do. But you have the knowledge to succeed. Now, know you can!

What is your favorite movie or book?
The Princess Bride. Inconceivable!

Describe a perfect day off.
Laying on a beach, reading a book, listening to the ocean waves and no one yelling, "Mooooooooom!"

What are some of your favorite places that you have visited?
Definitely Israel and Paris. Two completely different places, but so much history and beauty in both. However, my bucket list includes trying to visit all 50 states. I have already been to Hawaii and Alaska (among others), so I'm on my way.

What are your favorite local hangouts?
Any U of M sporting event, usually with my family.

When you have a little extra money, where do you like to spend it?
I have 3 kids, who has extra money?

What do you like to do in your spare time? Hobbies?
Again, 3 kids…what spare time? But on the off chance I have some time, I usually like to take my kids outside for some activity: bike rides, throwing the ball around, walks, or just drawing with chalk on the sidewalk.

Why do you choose to be a member of the WCBA? What is the greatest benefit you have enjoyed as a member?
The best part of the WCBA is the staff. Kyeena and Kelley are always so friendly and upbeat. The other great benefit is the courthouse office. I can't count how many times there has been a last minute change to an order or some surprise that comes up, and running down to the office to download a form, or use the computer to change an order, or make copies has made things so convenient and worthwhile! Thank you!

President's Message

Greetings fellow members of the Washtenaw County Bar Association!

It is such an honor to be writing to you as the President of this amazing organization. I intend my stewardship as President of the WCBA to follow the fine examples all of the past presidents have set for me, including those of Elizabeth Jolliffe (from whom I am taking the gavel this year). I want to expressly thank her for all she has done – not just for all of her hard work with the WCBA, but also for all the advice she has given me as a mentor and as a friend. I cannot wait to continue the terrific programs she spearheaded this past year –not to mention team-up again as two-time defending champions at the 2020 Annual Trivia Night!

This organization means different things to our different members, which is a natural result of all that we do. To some, it is a great outlet for substantive programming. To others, it provides volunteer opportunities to give back to this Washtenaw County community that we love. To others, it provides a terrific opportunity to collaborate and communicate with our tremendous bench. To me, it's all those things, and a little more.

I went to law school in Chicago and decided to come back to Michigan to start my career as an attorney in another county. In hindsight, I wish I would have joined a bar association when I first started practicing. Instead, the only interactions I had with other attorneys was when I would talk to my colleagues or go to court (yes, I litigated some when I first started practice, believe it or not). But I felt like something was missing from my career, because I really did not know anyone (outside of the occasional, brief courthouse or office discussion).

When I had the opportunity later in my career to move to Ann Arbor to work at Butzel Long, my brother Matthew Jane told me the best thing I could do was join the WCBA, because it offers a wonderful opportunity for networking and establishing a practice in the region. He was absolutely right, and not simply because this organization is everything he told me it would be. No, he was right because, of most importance to me, it is a wonderful place for all of us Washtenaw County attorneys to get to know each other. I think it makes the practice of law a little bit easier knowing that we all have each other to talk to, to gain additional knowledge from and perspective on each other, and commiserate about the things we all go through.

In fact, and I don't want to suggest that there should be any sort of expectation of this from WCBA involvement, but I met my wife Heather Garvock at the 2009 Wine Tasting. We talked a lot that night about being newer attorneys, and just haven't really stopped talking about it ever since (minus the "newer" part).

I think everyone has their own unique reason for joining the WCBA – I sure did. It is my goal this coming bar year to remind everyone that we are here to fulfill that reason you joined the bar. Whether that is inviting a client to the annual golf outing as a means to develop a professional business relationship, tapping into your competitive spirit at trivia night, or attending a seminar in order to discuss a hot legal topic of the day, everyone has a reason they joined the WCBA. I am here to listen to your concerns, questions, and requests in order to make your experience with the WCBA the best it can be. Not only do I hope that you end the year with that renewed perspective, but that you also discover there is so much more that we offer. Together, we can all make the bar experience as unique as Washtenaw County.

Mark

Mark W. Jane
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Thank you to our attorneys who volunteered their time for Law Day 2019!
We helped 39 members of the public.
You make a difference!

Samuel Bernstein
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Amanda Murray
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Personal Jurisdiction: New Limitations and the Consent-by-Registration Workaround

Paul T. Stewart

Personal jurisdiction is a big deal. Without it, a court cannot enter a money judgment or injunction against a defendant. In recent years, the United States Supreme Court has narrowed the circumstances under which personal jurisdiction may be exercised, particularly against out-of-state corporate defendants. *See generally* Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 Fla. L. Rev. 499 (2018). Yet these changes are not fully reflected in Michigan decisions addressing personal jurisdiction, leading to a potential trap for a practitioner looking only at Michigan case law. This article provides a brief overview of the recent constitutional constraints imposed on personal jurisdiction, and then considers the potential for a Michigan court to exercise personal jurisdiction under a consent-by-registration theory, where jurisdiction would otherwise be lacking.

Essential Background

A court's exercise of personal jurisdiction must comport with both the jurisdictional statutes in the state where the court sits, and the Fourteenth Amendment's Due Process Clause. *Goodyear Dunlop Tires Operations*, S.A. v. *Brown*, 564 U.S. 915, 918 (2011). The cornerstone of modern personal jurisdiction theory under the Due Process Clause is a defendant's "contacts" with the forum (i.e., the stronger the contacts, the less the Due Process concerns).

Personal jurisdiction comes in two flavors: general ("all-purpose") and specific ("limited"). General jurisdiction is constitutionally permissible when a defendant is "essentially at home" in a state, in which case that state's courts can "hear any and all claims" against the defendant, regardless of whether the claims have any factual connection to the state. See *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). In contrast, specific jurisdiction is permissible only where the suit "arises out of or relates to the defendant's contacts with the forum." *Id*. at 118.

Following the Supreme Court's seminal decision of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), courts recognized that a corporate defendant may be subject to general jurisdiction based on "continuous and systematic" contacts with the forum. But in the decades following *Int'l Shoe Co.*, courts have wrestled with the question of what constitutes "continuous and systematic" contacts. Similarly, for specific jurisdiction, courts have disagreed over the requisite nexus between the claims alleged and the defendant's contacts with the forum.

The Supreme Court's Recent Clamp Down

The discord surrounding "continuous and systematic" contacts was largely put to rest in the Supreme Court's *Daimler AG v. Bauman* decision, issued in 2014, which essentially confined general jurisdiction over a company to its place of incorporation and its principal place of business (albeit leaving the door open for an "exceptional case" where general jurisdiction could exist in the absence of those two conditions). *Daimler*, 571 U.S. at 137-39, 139 n.19. In other words, *Daimler* "eliminate[d] the traditional 'continuous and systematic' contacts test for general jurisdiction." See Charles Rhodes, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 209 (2014). The Court's decision in *Daimler* coincides with increasingly restrictive positions the Court has taken on specific jurisdiction, most recently in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

Consent to Personal Jurisdiction Via Business Registration

In the wake of the new limitations on personal jurisdiction, plaintiffs have increasingly argued that regardless of the extent a defendant does business within a forum, a defendant consents to general jurisdiction the moment it registers under the forum's business registration statute, which invariably requires the appointment of an agent for service of process within the forum. This theory is not without precedent—the Supreme Court accepted it in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co*., 243 U.S. 93 (1917). And in some post-Daimler instances, the consent-by-registration theory has worked. See, e.g., *Senju Pharm. Co., Ltd. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 436-40 (D.N.J. 2015); *see also Genuine Parts Co. v. Cepec*, 137 A.3d 123, 149, n.30 (Del. 2016) (Vaughn, J., dissenting) (surveying cases).

Yet personal jurisdiction law has evolved significantly since *Pennsylvania Fire*, and numerous decisions after *Daimler* have rejected consent-by-registration, including decisions from the highest state appellate courts in Delaware, Illinois, and Missouri. *See Genuine Parts Co. v. Cepec*, 137 A.3d 123, 138-48 (Del. 2016); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc*., 90 N.E.3d 440, 447 (Ill. 2017); *State ex rel. Norfolk S. Ry. v. Dolan*, 512 S.W.3d 41, 51-52 (Mo. 2017). Courts have tended to reject consent-by-registration on statutory interpretation grounds rather than constitutional grounds—holding that there is no actual consent where the statutes do not make personal jurisdiction a condition of registration. But even those decisions have expressed skepticism over whether consent-by-registration could be constitutionally compatible with *Daimler*. And in some cases, that skepticism has been used as a rationale for interpreting the jurisdictional import of the business registration statutes narrowly (under the prudential doctrine of construing statutes to be consistent with the U.S. Constitution, when possible). *See Genuine Parts Co. v. Cepec*, 137 A.3d at 144-48; *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639-41 (2d Cir. 2016). The skepticism over consent-by-registration is understandable, given it would permit the exercise of general jurisdiction far beyond a corporation's place of incorporation and principal place of business, thereby making Daimler a practical nullity for corporations with a national presence.

Consent-by-Registration in Michigan

No published Michigan decisions have addressed consent-by-registration. However, it did arise in federal court in *Magna Powertrain de Mex. S.A. de C.V. v. Momentive Performance Materials USA LLC*, 192 F. Supp. 3d 824 (E.D. Mich. 2016), where the court considered its own exercise of personal jurisdiction from the perspective of a Michigan state court (under the general rule that the boundaries of personal jurisdiction in federal court are equal to the state where the federal court sits). In *Magna Powertrain*, Judge Lawson rejected consent-by-registration on the basis that the language of Michigan's business registration statute does not permit an inference of consent. By deciding the issue on this ground, the court avoided the constitutional question of whether Daimler would permit such an inference—the approach often taken in other jurisdictions, as mentioned above.

Yet shortly after *Magna Powertrain*, Judge Potts (ret.) of the Oakland County Circuit Court reached an entirely different conclusion, holding that business registration—and corresponding appointment of a registered agent—was

Personal Jurisdiction: New Limitations and the Consent-by-Registration Workaround

sufficient for general jurisdiction. *A Plus Painting v. Summit Developers, Inc., et al.*, No. 16-151640-CB (Oakland Co. Cir., Oct. 5, 2016). Although *A Plus Painting* did not provide a detailed basis for its conclusion, it expressly found that *Daimler* posed no constitutional barrier to exercising general jurisdiction based on business registration alone. *Id.* at *3-4.

Take-away for Michigan Practitioners

Michigan practitioners should be aware of the new constitutional limits on the exercise of both general and specific jurisdiction, which are not fully reflected in Michigan case law. For general jurisdiction, practitioners should be mindful that general jurisdiction over a non-consenting corporate defendant will very likely be unconstitutional outside of the defendant's place of incorporation and principal place of business. And for specific jurisdiction, a marginal nexus between a defendant's contacts with a forum and the claims at issue may no longer support jurisdiction where it once did.

But it remains an open question whether registering to do business in Michigan and appointing an agent for service of process supports an inference of consent to general jurisdiction, and if so, whether that consent would be valid under Daimler. Without a binding Michigan decision or a U.S. Supreme Court decision rejecting consent-by-registration, it is an argument worth trying. But given the trend emerging from other jurisdictions, the opportunity to argue it in Michigan might be short-lived.

Paul Stewart is a litigation associate in Dykema's Ann Arbor office. He represents clients on a range of commercial, regulatory, antitrust, environmental, and appellate matters. Mr. Stewart is the Co-Chair of the Trial Practice Section of the WCBA and can be reached at pstewart@dykema.com.

THANK YOU

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The Economics of Contingent Fee Plaintiff Employment Cases

I. Introduction


Jim Fett

This article is written for the attorney thinking about taking a flier on an employment case or attorneys wondering why they receive small or no referral fees on cases they refer to employment law specialists.

Informal, unscientific surveys conducted by me indicate that employment law specialists take but 2-3% of cases on contingent fee. That is because they are labor intensive, hotly contested and, in most cases, highly speculative. Many studies indicate that approximately 70% of the federal employment cases are dismissed on summary judgment. State courts dismiss a high percentage of employment cases, but at a lower rate than the federal courts.[1]

All courts have dockets that are over-crowded, and the court looks for ways to reduce the number of cases it will take to trial. In employment law, there are some doctrines that are applied to limit or cut-off further litigation. Examples of such doctrines include the "stray remarks," "same action inference" and "similarly-situated" doctrines, all of which are beyond the scope of the article. Many cases that appear to the practitioner to have merit can be lost to these doctrines and never reach a jury. Practitioners need to keep this reality in mind when assessing the economics of accepting a case.

The high dismissal rate is also due to the rarity of direct evidence. That is, decision-makers rarely admit to an illegal motive. Thus, most cases must be built on circumstantial evidence, which is usually unavailable except through formal discovery.

II. Case Valuation Formula

Employment law specialists consciously or unconsciously use traditional risk analysis to determine whether to take a case: best case damages scenario x probability of success. So, for example, if the best case damages scenario is $100,000 and the probability of success is 50%, the initial valuation is $50,000.00. That figure then is adjusted up or down to account for such factors as the risk tolerance of the potential client ("PC"), employer's fear of bad publicity, PC's need for money, venue, etc. Except in hostile work environment cases, emotional distress damages usually are not factored into the formula because they are extremely nebulous and therefore difficult to value.

A. Damages

Most cases are ruled out by an early damage assessment. The following situations generally rule out my taking a case:

1. PC in bankruptcy; the claim belongs to the bankruptcy estate and the trustee will settle the case for pennies on the dollar;
2. PC has mitigated damages by finding comparable employment;
3. PC has an obnoxious personality; life is short and a lousy personality is not a disability under disabilities statutes; if it was, I would be a millionaire many times over.
4. PC's employer is either insolvent or on the verge of insolvency; you cannot squeeze blood out of a turnip; and
5. PC is subject to a mandatory arbitration clause; arbitrators are far less likely than a jury to render a fair award.

B. Liability

1. At-Will Employees

Most cases that I review involve "at-will" employees, employees that can be fired for any or no reason, except illegal reasons like race, gender, whistleblowing, etc. The key to representing "at-will" employees is to find the exceptions. At-will employees terminated because of management or personality conflicts have no case.

Many at-will employees claim they are subject to a "hostile work environment" when their employers treat them poorly. While the perception is usually very real, the reality is that poor treatment based on non-protected characteristics is not actionable. For example, poor treatment based on graduation from Notre Dame instead of the University of Michigan does not support a hostile work environment claim. Hostile treatment based on gender, race, age, etc. does.

To be actionable, the adverse action must be based on an illegal action. As indicated above, employers and their managements rarely admit to an illegal motive for an adverse action. Usually, the reason is "we are going in a different direction," "we are reorganizing to improve efficiencies," "unsatisfactory performance," etc. An assessment must be made, without the benefit of discovery, whether the employer explanation is really a pretext to conceal an illegal motive. Sometimes an EEOC investigation is available, but in most cases only limited informal investigations are possible. In such cases, large damages are required to offset the speculative probability of success.

2. Union Employees

In most cases, union employees are limited to the grievance/arbitration process if they wish to contest a *non-discriminatory* adverse employment action. State and federal law provide that the union is their sole and exclusive representative for such purposes. If the union employee is dissatisfied with her union representation, she can sue the union for breach of the duty of fair representation which is rarely successful and, when it is, the reward to the contingent fee attorney is usually less than satisfying. I have never sued a union for this reason.

If the adverse employment action *is discriminatory,* i.e., based on gender, race, etc., the union employee still has little recourse beyond the grievance/arbitration process. That is because unions can and usually do challenge the action through the grievance/arbitration process. If the union is successful, the employee is made whole for economic losses, leaving only emotional distress damages under a discrimination or retaliation theory. As indicated above, emotional distress damages are usually insufficient to justify the effort of litigation.

Consider the case of a union employee discharged based on gender who then grieves and is reinstated with backpay through arbitration. What are her damages? Further, if the arbitrator rules against the employee, the chances of establishing liability in court are dim. For the most part, union employees seldom present viable cases for the plaintiff employment attorney.

If the discriminatory adverse action is not covered by the union contract(say, a denial of promotion), litigation may be viable, but again, only if the adverse action is based on an illegal factor such as age, race, gender, etc. I have

[1] Berger, Vivian; Finkelstein, Michael O.; and Cheung, Kenneth (2005) "Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits," Hofstra Labor and Employment Journal: Vol. 23: Iss. 1, Article 2.

successfully challenged state promotional policies and decisions for union employees when they were based on race and gender. However, recoverable damages for adverse actions short of discharge or severe harassment often are insufficient to support such a claim.

III. Conclusion

I settled my first employment case in 1988 for approximately $250,000.00, which then was a lot of money. I thought employment cases were easy. Oh, was I wrong! But I kept at it because I found the cases interesting and most of the clients worthy. If I had a "do-over", I would still specialize in employment cases. However, I would from the very beginning be mindful of the economic realities of contingent fee employment cases:

1. They are high risk but many times not high reward;
2. Disciplined screening is essential to a prosperous practice;
3. Specialization is essential to effective screening; and
4. Employment cases, because they are hotly contested, are not for the faint of heart.

James (Jim) Fett graduated in 1986 from the University of Michigan with Law and MBA degrees. He initially practiced at a large western Michigan management labor and employment law firm. Since 1988 he has practiced primarily plaintiff employment law. However, 10-15% of his cases continue to be on behalf of management. Jim was also an American Arbitration Association neutral in employment and commercial cases for approximately 15 years. He holds the distinction of successfully trying the first sex harassment case (against Ann Arbor) on Court TV (now TruTV) in 1995. He can be reached at 734-954-0100 or jim@fettlaw.com.

Collaborative Divorce: Here to Stay!

Veronique M. Liem

The collaborative dispute resolution process is voluntary and aims at reaching a settlement outside of litigation. With the recent enactment of the Uniform Collaborative Act, 159 PA 2014; MCL 691.1331 et seq. (UCLA), new court rules and SCAO forms, the collaborative process is gaining significant recognition and validation. It should be part of all family law attorneys' skill set.

The Collaborative Divorce

Legal counsel should carefully assess whether a case is suitable for the collaborative process by, for example, considering whether domestic violence is present and whether full disclosures by both parties can realistically be expected. If the case is suitable, the collaborative process can enhance future co-parenting and communications. It is well-suited to finding creative solutions.

In the collaborative divorce process, the parties agree that they will resolve their legal matters without litigation. They agree that, if they are unable to do so and have to file adversarial pleadings, existing counsel must withdraw and new legal counsel must be retained. This disqualification clause is a "two-edge sword." Generally, the parties will not want to change attorneys, and this will provide added incentives for continuing to seek a settlement. It allows for a "paradigm shift" whereby attorneys can be less focused on litigation outcomes and more focused on creative and informed resolutions.

In a collaborative divorce, significant work takes place through direct communications between parties and attorneys, in four-way meetings and, at times, with other professionals present. Discovery is more informal, using tools such as requests for documents, sworn statements and releases in lieu of subpoenas. Experts are typically joint, neutral experts.

The collaborative process is intended as a multi-disciplinary process whereby professionals from other disciplines can assist the parties. They are trained as collaborative professionals. Decisions as to which professionals to engage are made in a joint, collaborative fashion based on the needs and resources of the case.

Those professionals typically can be (when warranted by the case):

- **A Child Specialist** to help the parties:
  - Understand better their children's needs; possibly meet with the children and report on their concerns and priorities.
  - Help define a parenting plan and schedule.
  - Provide guidance for children with special needs.
  - Provide information on age-specific needs.
- **Financial Coach(es)**:
  - Can be very helpful to the spouse who does not understand taxation and finances and/or has difficulties assessing what his/her financial future will look like.
  - Can help both parties understand tax issues, make projections for the future and assess the parties' options for settlement.
- **Support Coach(es)** help the parties:
  - Hear each other out and communicate more effectively.
  - Address anxieties about the future.
  - Provide support, especially to the party who does not want the divorce or is depressed, anxious or has difficulties reaching resolution. Support coaches guide the spouse who is impatient or concerned with the costs of collaborative professionals.

One Support Coach can guide both parties or each party can have his or her own coach. Coaches are mental health professionals, but they do not act as therapists. They focus on the divorce and related communications and needs.

Once a settlement is reached, or before reaching settlement, the parties can file for divorce (if they have not already done so) and petition the court for entry of judgment.

Legal Changes in Support of Collaborative Divorces

The **Michigan Uniform Collaborative Law Act,** 159 PA 2014; MCL 691.1331 et seq. (UCLA) was enacted on December 8, 2014. Under this statute, the collaborative process can be applied to most areas of family law including divorce, custody, support, adoption, paternity, prenuptial agreements, etc. The UCLA provides the framework for conducting a collaborative process.

New court rules implement the UCLA. They apply to all cases that were resolved outside of court, for example, through mediation.

The cases are filed under "The Matter of," with "Party A" replacing the term "Plaintiff" and "Party B" replacing the term "Defendant." When proceeding to judgment, each party must submit a signed domestic violence screening form.

New rule MCR 3.222 outlines the process of pursuing a divorce collaboratively, obtaining and subsequently lifting a stay, or extending a stay, initiating a petition for divorce and submitting a consent judgment for entry.

New rule MCR 3.223 provides a summary proceeding to initiate a divorce petition when agreement was reached before the case is filed. The petition is filed with an approved consent judgment and is signed by both parties. It serves as a complaint and an answer unless objections are filed. No summons is required. The petition may contain a request to waive the six-month statutory waiting period under MCL 552.9f.

Upon receipt of the petition and request for entry of consent judgment, the court clerk must issue a Notice of Filing to be served by Party A. In the Notice, the clerk is to include a hearing date for entry of judgment. The Notice notifies the parties of their right to object to the summary proceeding before judgment.

At the hearing on entry of judgment, both parties must be present unless they proceeded through MCR 3.222.

MCR 3.201 (D) and MCR 3.210 (A)(2) were amended so the rules of Subchapter 3.200 "Domestic Relations Actions" would apply to petitions filed under new rules MCR 3.222 and 3.223.

SCAO forms were created in support of those new rules. They include petitions, forms for joint motions, requests for stay, status reports, requests for hearing on entry of judgment and abbreviated domestic violence screening.

The Collaborative Practice Institute of Michigan offers training in the collaborative process as well as advanced seminars and resources. Family law practitioners can now become experts in the collaborative process.

Veronique Liem is an attorney in private practice in Ann Arbor. She is also a mediator, collaborative divorce attorney and an arbitrator who assists individuals and parents in their domestic relations matters. Veronique is a Fellow of the American Academy of Matrimonial Lawyers (AAML), a national organization of family law attorneys, and a member of many other professional organizations including the Collaborative Practice Institute of Michigan. She can be reached at veronique@liemlaw.com.

Shared Driveway Agreements

Joseph M. West

If good fences make good neighbors, then what of shared driveways? They seem to bring out the best and worst of us.

A shared driveway is a means of ingress and egress that serves two or more parcels of real property. A shared driveway may be evidenced by a written easement, an easement reserved in a deed, or a shared driveway agreement. Sometimes, there is no documentation at all, and yet the driveway seems to have existed in its current form without issue for ages. Other times, a shared driveway is a perennial source of complaints.

Shared driveways are common in Washtenaw County, and it is only a matter of time before real estate practitioners will be asked about them. The best practice is to memorialize the relationship with a written agreement.

There are three reasons why property owners and prospective purchasers should seek to memorialize shared driveways in a shared driveway agreement recorded with the Register of Deeds. First, for buyers utilizing mortgage financing to purchase property with a shared driveway, lender underwriting guidelines require an enforceable agreement that allocates responsibility for payment for repairs including each party's representative share, provides for default remedies, and includes an effective term.[1] Buyers utilizing financing need to satisfy this requirement of an enforceable agreement to be approved for a mortgage loan and ultimately to purchase the property.

Second, title companies issuing owner's policies of title insurance will include exceptions to coverage for shared driveway issues if there is evidence such a driveway serves the property (such evidence can be in the form of an aerial photograph, a mortgage survey, a Seller's Disclosure[2], or an Owner's Affidavit). With such an exception in place, and without any written agreement delineating the rights and responsibilities of the parties, a buyer is on their own to resolve any issues, without guidance or clear recourse when issues arise.

Third, matters of real estate boundaries and shared usage are always fertile ground for conflict, and shared driveways are no exception. When it comes to shared driveways, it's good agreements that make good neighbors.

There are six elements that every shared driveway agreement should contain, in addition to meeting the general requirements to record a document with the Register of Deeds.[3]

1. Grant of Easement. The party or parties owning the land on which the shared driveway lies must grant an appurtenant, perpetual easement to the owners of all parcels utilizing the shared driveway. Ideally, the agreement would contain a full surveyed legal description for the area of the easement, but the Register of Deeds has, in the past, accepted a less formal diagram, such as a mortgage report diagram with a cross-hatched area marking out the extent of the shared driveway.

2. Scope of Permitted Use. The agreement should recite what uses may be made of the shared driveway, which can include ingress and egress, parking in designated areas, recreation, or the like. This language may exclude certain uses as well, including obstructing others' access, parking inoperable vehicles, etc.

3. Obligation for Maintenance. The agreement should specify who, among the parties served by the shared driveway, has the authority and responsibility to select and hire contractors to provide maintenance, repair, or replacement services. One owner can have sole authority, or these matters can be decided by a majority of owners. For significant matters such as upgrading the surface of the driveway from gravel to asphalt or concrete (or the like), the agreement may require unanimous consent.

4. Obligation for Payment. Each party must be made responsible to pay a particular share of the costs associated with the driveway. The agreement may specify who must pay the contractor in the first instance, and then require the others to reimburse upon presentation of a paid invoice, or provide some other mechanism of payment. Some agreements permit the owners to agree upon a budget and collect assessments in advance to create a reserve to pay service providers. There should be a fixed period for payment or reimbursement for services rendered.

5. Consequences for Non-Payment. The agreement should provide some consequence for non-payment, which can include the accrual of interest, the ability of an aggrieved party to institute a suit at law for a money judgment, permission to record notice of a lien against the delinquent party's property after certain specified procedures are followed, and even authority to institute an action to foreclose such a lien.

6. Indemnity and Insurance. The agreement should address each party's responsibility for accidents, injuries, or claims resulting from the use of the shared driveway by their family members, guests, and invitees. Generally, each party utilizing the shared driveway indemnifies the others against such matters. The agreement should also address insurance obligations with respect to the shared driveway—with the parties typically insuring their own property.

With these matters addressed and careful consideration paid to any unique circumstances of the properties or parties, shared driveway agreements can protect all parties and encourage good neighborly relations.

Joseph West is a transactional real estate and business attorney, handling both residential and commercial property transactions, commercial lease matters, and related business issues. Joe has been co-chair of the WCBA's Real Estate Section for two years, coordinating and presenting at several meetings on various real estate topics. He can be reached at jmwest@josephmwest.com or (734) 975-1300.

[1] See, e.g., Fannie Mae's guidelines for Privately Maintained Streets, located online at https://www.fanniemae.com/content/guide/selling/b4/1.3/04.html#Community-Owned.20or.20Privately.20Maintained.20Streets (last visited 4/17/2019).

[2] See MCL 565.957(1) (including in the standard disclosure form the following inquiry: "Are you aware of any of the following: 1. Features of the property shared in common with the adjoining landowners, such as walls, fences, roads and driveways, ...").

[3] See MCL 565.201 (setting forth recording requirements); see also Washtenaw County's recitation of requirements online at https://www.washtenaw.org/301/Document-Recording-Requirements (last visited 4/17/2019).

New Members & Member Notes

Member Notes

Conlin, McKenney & Philbrick, P.C. is pleased to announce that **Hannah Muller** and **Arminia Duenas** have joined the firm.

Hannah Muller

Hannah Muller is a recent graduate of University of Michigan Law School where she served as a contributing editor of the Michigan Journal of Law Reform and worked as a student attorney in the Veterans Legal Clinic and the Human Trafficking Clinic. Prior to joining CMP, she worked at the Michigan Court of Appeals as a Judicial Fellow. Hannah's practice focuses on Estate Planning and Estate and Trust Administration.

Arminia Duenas is a graduate of Wayne State University Law School. Upon graduation she worked for the Women's Justice Center as the Director of Legal Services handling cases involving domestic violence in family law matters. Arminia has also worked for a variety of insurers in various aspects of coverage disputes, litigation and insurance defense. Before joining the firm, Arminia was the managing defense trial attorney for Pioneer State Mutual Insurance Company. Arminia's practice focuses on Family law, including divorce and custody issues, Civil Litigation, General Tort Liability and Insurance Defense Law. She is also a fully trained and qualified arbitrator.

Welcome to Our New Members!

Attorney Members

Fawn C. Armstrong (P74980) – Washtenaw County Prosecutor's Office

Arminia Duenas (P67090) – Conlin, McKenney & Philbrick, P.C.

Amanda M. Ghannam (P83065) – NachtLaw, P.C.

Angelina (Lina) R. Irvine (P81712) – Dickinson Wright PLLC

Danielle E. Johnson (P83450)

Ashley A. Londy (P78545) – Washtenaw County Prosecutor's Office

Linda K. Rexer (P28571)

Eli N. Savit (P76528)

David D. Sprague (P63722) – Old National

Simone R. Sprague (P82562) – Kline Legal Group, P.L.C.

Andrew L. Stevens (P78299) – Landry, Mazzeo & Dembinski, P.C.

Nastassja A. Thomas (P83409) – Hamilton, Graziano & London, PLC