

## X. MCR 5.131 DISCOVERY GENERALLY

### 1. TEXT OF AMENDMENT

- (A) Civil Actions. ~~The general discovery rules apply in probate proceedings.~~
- (B) Scope of Discovery in Probate Proceedings. ~~Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court. Discovery for civil actions in probate court is governed by subchapter 2.300.~~

(B) Proceedings.

- (1) Discovery in General. With the exception of mandatory initial disclosures under MCR 2.302(A), the discovery rules in subchapter 2.300 apply in probate proceedings, and, except as otherwise ordered by the court, any interested person in a probate proceeding is considered a party for the purpose of applying discovery rules.

(2) Mandatory Initial Disclosure.

- (a) Demand or Objection. Mandatory disclosures under MCR 2.302(A) are required in probate proceedings if, by the time of the first hearing on the petition initiating the proceeding:

- (i) an interested person other than the petitioner files a demand for mandatory initial disclosure and properly serves the demand on all interested persons or
- (ii) an interested person objects to or otherwise contests the petition, in writing or orally, properly serves any written objection or response on all interested persons, and the judge determines mandatory initial disclosure is appropriate.

When mandatory initial disclosures are required through demand or objection, and except as otherwise ordered by the court, such disclosures must be made by the petitioner and any demandant or objecting interested person.

- (b) Court Order. At any time, on its own motion or on a motion filed by an interested person, the court may require:

- (i) mandatory disclosures and designate those interested persons who must make disclosures or
- (ii) in a proceeding with some parties already making disclosures, an additional interested person or persons to make disclosures.

- (c) Time for Initial Disclosures.
  - (i) The petitioner must serve initial disclosures within 14 days after the first hearing on the petition subject to a demand or objection.
  - (ii) The demandant or objecting interested person must serve initial disclosures within the later of 14 days after the petitioner's disclosures are due or 28 days after the demand or objection is filed.
  - (iii) When mandatory disclosures are ordered pursuant to MCR 5.131(B)(2)(b)(ii), an interested person's disclosures are due within 21 days after the court's order.
- (3) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.

## 2. ANALYSIS

As in the case of juvenile proceedings, there is no federal counterpart for this rule which applies to probate proceedings. Nor did the SBM Committee refer to any source material behind the development of this rule.

The SBM provided a thorough explanation of the design and purpose of MCR 5.131:

In addition to civil suits, which involve a plaintiff and a defendant and are clearly governed under Chapter 2 of the Michigan Court Rules, the Probate Court hears several types of petition proceedings that involve a petitioner, a respondent, and typically multiple other interested persons. Some Probate Court proceedings are highly litigated, involve two and potentially more represented interested persons, and are exactly like other highly litigated civil suits that would benefit from the initial disclosure provisions in the recommended revision to MCR 2.302. That being said, most actions in Probate Court involve in pro per litigants and are not in general suitable to initial disclosure.

The challenges posed to our Committee and to the additional probate specialists aiding this Committee's work were to fashion probate court rule amendments in Chapter 5 of the Michigan Court Rules which would (1) carve out the right proceedings and the right interested persons for purposes of initial disclosure and (2) make whatever other changes were necessary to make the use of discovery clearer and more efficient.

Given that MCR 5.131 is the lone court rule in Chapter 5 devoted to discovery in probate matters, and given that our charge was to make the minimal amount of alterations to court rules in order to effectuate needed changes, we focused our efforts on amending that rule. Several versions of a refashioned MCR 5.131 were considered, and provisions discussed included, among others, those that identified specific types of probate proceedings that

were by default “contested,” required contested proceedings to be subject to initial disclosure, and allowed for a “declaration of contest” to make a case subject to initial disclosure.

Comments on an earlier version of an amended MCR 5.131 were received, and some concerns were raised. The idea of a list of probate proceedings that were by default “contested” was objected to on the grounds that not all (or even most) of the proceedings listed are typically in fact contested, let alone proper for initial disclosure; it was also pointed out that it would not always be apparent to any given probate court that filed pleadings, given the various ways they may be captioned, did or did not fit within one of the listed proceeding types. Some suggested that a proceeding should be contested, or at least ripe for initial disclosure, only on some kind of triggering event.

Comments were also received on the earlier version of MCR 5.131 suggesting, among other things, that enough time was not being provided to allow for responses by interested persons to trigger initial disclosures, a “declaration of contest” would be duplicative and likely result in more contested matters, and initial disclosures should only be something the judge orders. The final version of recommended changes to MCR 5.131 is proposed to meet the aforementioned challenges as well as properly address comments.

Proposed MCR 5.131(A) [currently the second sentence in MCR 5.131(B)] makes clear that discovery in civil suits filed in probate court are governed completely by subchapter 2.300 of the court rules. As such, each would be subject to the initial disclosure rules proposed at MCR 2.302.

Proposed MCR 5.131(B)(1) clarifies that discovery rules in subchapter 2.300, apart from those mandating initial disclosure, apply in general to probate proceedings. Any interested person has the rights of a “party” under subchapter 2.300.

The basic procedure for invoking mandatory initial disclosure in probate proceedings is laid out in proposed MCR 5.131(B)(2)(a). This subrule identifies the two types of “triggering events” for mandatory initial disclosure: the filing of a demand for mandatory initial disclosure, and the making of an objection with the concurrence from the judge that mandatory initial disclosure is appropriate. The intermediary concept of “contested” is no longer part of the recommended changes; instead, the interested person (through an attorney, we would expect) directly makes a demand for mandatory disclosure. In other cases of contest where the judge feels the parties can use and benefit from mandatory disclosure (mainly those with represented interested persons, we would expect) it can also be ordered. Either triggering event must occur by the time of the first hearing on the relevant petition.

These two triggering events thread the needle between the extremes of the judge controlling all uses of mandatory initial disclosure and any objecting interested person (represented or in proper) triggering such disclosure. Here, attorneys who want mandatory disclosure will know what to demand in their pleadings, but the judge will be able to weed out the potentially numerous contested matters without a demand (many with unrepresented interested persons) where mandatory disclosure is not necessary.

When mandatory disclosure is required through MCR 5.131(B)(2)(a), not all interested persons are required to make disclosures, but rather, only the petitioner and anyone who demands mandatory initial disclosure or objects to the petition. While this process will typically result in two interested persons having to make initial disclosures (i.e., petitioner and person either demanding or objecting), it is possible that there may be more if there are two or more demandants or objecting interested persons.

Proposed MCR 5.131(B)(2)(b) makes clear that, at any time, the court can, on its own or in response to a request, require mandatory initial disclosure in a proceeding or require such disclosure of an interested person.

Proposed MCR 5.131(B)(2)(c) prescribes that a petitioner's initial disclosures are due within 14 days of the first hearing on the petition, and disclosures from any demandant or objecting interested person follows from this deadline. This gives all relevant interested persons notice of what is required of them and enough time to accomplish it. Interested persons who are later required to make disclosures have 21 days from the order. [(Committee Report, pp. 79-81).