



MICHIGAN FAMILY LAW JOURNAL

ELAINE DARMON
Chairperson
NORMAN N. ROBBINS
Editor
SCOTT BASSETT
Associate Editor

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CHAIRPERSON'S MESSAGE

BY ELAINE DARMON

The creation of the Family Court was the first, and largest, step taken to ease the lives of families who find themselves in the unfortunate position of the court system. For the first time in Michigan's legal history do litigants have a good chance to have their cases heard quickly by judges sensitive to the delicate issues of family matters. We practitioners, theoretically, can depend on concluding trials after consecutive

days, rather than in the old days of having an afternoon here and a morning there, spread over several months. Many counties have implemented docket control measures to improve the pace of cases.

We know that as a brand new system the court is not perfect yet but, all things considered, it is off to a good start.

I am especially pleased to learn that many counties have taken it upon themselves to go the next step. For those who are particularly concerned about families, the creation of the Family Court has inspired them to take advantage of the opportunity to develop new programs to further ease the lives of families who must deal with the courts.

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Chairperson's Message –

(Continued from page 1)

I thought readers might be interested to know what is new in local practices other than their own. Perhaps we can all learn by example how to continue to improve our systems.

Oakland County is again proud to have as its own the Honorable Edward Sosnick and Bloomfield Hills attorney Richard S. Victor. The creators of the S.M.I.L.E. program, now in conjunction with Troy attorney, Scott Bassett, with the assistance of psychologists, have created C.O.P.E. (Co-Parenting Efficiently). This new program is specifically designed for the high conflict custody/parenting time cases. For matters that do not resolve at the conciliation stage, parents have the opportunity of a one time exposure to a therapist, without attorneys present, to settle matters. The hope is that this will result in the reduction of the number of cases that need to go through a full blown psychological evaluation. This would save not only substantial money, but hopefully, families would be spared the damaging effects of drawn out proceedings.

Another exciting program in development in Oakland County is "Forget Me Not." This program is specifically designed for unwed parents, paternity cases, to learn how to co-parent. Usually, these parents have never lived together and can be virtual strangers, but now must learn how to do the most important thing of their lives, which is to raise a child together, but separate. This program helps encourage fathers to get involved with their children's lives as well as teaches mothers the

importance of the presence of the fathers in their children's lives and thus, how to encourage that relationship. Parents are taught the risk factors to children when one parent is absent from the life of a child.

In addition to new programs, the Oakland County Court has implemented procedural methods to quicken the pace of cases including short timelines for the exchange of information. There is the use of the Early Intervention Program which is a mandatory meeting between the parties and the Friend of the Court, in an effort to identify and resolve issues of conflict early on in the case. This helps reduce conflict that often takes on a life of its own during the course of the case.

In the Midland system, a program entitled "Divorce is the Pits – So Let's Stop Digging," was created by Katherine Davis. This is a mandatory program upon the referral by the Friend of the Court also for high-conflict cases. The format is a support group with homework, which runs eight weeks, and is conducted by the Friend of the Court. Its early success has been proven by fewer divorce trials and happier litigants.

Washtenaw County was ahead of its time in that they had created a Family Division of the Circuit Court years before the legislative mandate. Keeping in step with progress, some of the judges permit electronic filings and e-mailing of briefs. The use of requiring the filing of findings of fact and conclusions of law by e-mail allows the judges so inclined to actually "cut and paste" portions of opinions.

Kent County, since the beginning of the Family Court, for the first time is allowing referees to hear motions. There is greater use of alternate dispute resolutions and better docket control. Recently, a Friend of the Court program called "Trouble Shooting" has been implemented, whereby parties meet, without counsel, with a caseworker to resolve custody and parenting time disputes. While the program has met with a lukewarm response from attorneys due to certain procedural aspects, the good news is that there is at least an effort to improve case management.

Macomb County has recently begun to employ the use of local psychological groups which provide educational programs to families going through divorce. One such program uses a five-week course, which has separate sessions for parents and children, which helps educate parents on how not to involve children in their parents' divorce, and helps teach children how to deal with some of the inevitable involvement. As an offshoot, support groups too are being formed.

In addition to some of the more innovative and progressive programs some counties have developed, it appears that at the very least that most counties have employed the use of case management techniques which help streamline cases more quickly and efficiently. It is important that the different counties are given the opportunity to learn how other locales are progressing so that all systems can continue to improve. While the Family Court is still in its infancy, progress is being made.

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COMMENTARY

“A QUICKSAND OF SUBJECT MATERIAL” – ABORTION – INCORRIGIBLE CHILDREN – SEX –

BY NORMAN N. ROBBINS

It has been said that “fools rush in where angels fear to tread.” It has also been said that “weaklings and cowards are out of place in a strong and free community.” (Theodore Roosevelt) Being fully aware of the thoughtful concepts imbedded in this sage advice, I will nevertheless exercise my own prudence as to which course to follow.

The subject of **legal abortion** has never graced the pages of this journal though it is definitely in the realm of family law. The highest courts of our land have wrestled with this subject and thousands upon thousands of legal pleadings, briefs, opinions, essays, editorials, commentaries, seminars, speeches and political discussions have touched upon this divisive issue. Yet, not one article on this matter has appeared in our publication.

Though not attempting to assuage those who may criticize our policy for neglecting this topic, I offer the following. The subject of “abortion” is perhaps one of the most controversial, politicized and emotional issues that has faced our nation in over one hundred years. It is a topic that cannot be easily mediated or compromised. Trials of abortion issues have not only elicited outstanding judicial opinions, majority as well as dissents, but they have created penumbras of heat that emanate from the public discussions of these opinions, a heat so intense at times that personal prejudices overcome sane discussions. An example of such circumstance occurred when I was program chairperson for the Michigan Interprofessional Association of Marriage Divorce and The Family. I scheduled “abortion” as the topic for a highly rated panel which included a well-known author. The panel, as well as the audience of over 100 persons,

were all professionals, doctors, lawyers, mental health experts etc. The program was set for two hours with a question and answer period following the speakers. At the end of one and a half hours I found the program out of control and ended it.

This alone did not dissuade me from writing a commentary on “legal abortion.” There were other factors. One factor was that I needed more study and research before attempting again to walk over those hot coals. My first step was to review the leading cases.

I reviewed the following:

1. **Roe v Wade**, 410 U.S. 113 (1973)

This case is the leading authority for establishing a woman’s right to have an abortion.

2. **Doe v Bolton**, 410 U.S. 179 (1973)

This case overturned medical restrictions and approvals that would have limited abortions.

3. **Planned Parenthood of Central Missouri v Danforth**, 428 U.S. 52 (1976)

This case overturned a law that required consent from the spouse (and parents where minors were involved) before the performance of an abortion. It also banned the use of saline amniocentesis after the first 12 weeks of pregnancy.

4. **Griswold v Connecticut**, 381 U.S. 479 (1965)

This case stated that the right of privacy in a marriage is older than the Bill of Rights and is protected by the Fourteenth Amendment. (Struck down law on condoms).

5. **Beal v Doe**, 432 U.S. 432 (1977)

This case approved denial of funds for non-therapeutic abortions.

6. **Maher v Roe**, 432 U.S. 464 (1977)

This case issued a similar ruling as in the **Beal** case.

7. **Bellotti v Baird**, 443 U.S. 622 (1979)

This case stated parental consent not necessary providing a proper “judicial bypass.”

8. **Colautti v Franklin**, 439 U.S. 379 (1979)

This case ruled on the duty of a doctor to preserve life.

I scanned the following cases:

Harris v McRae, U.S. (1980) – Denial of medical funds.

H.L. v Matheson, 450 U.S. 398 (1981) – Notification of parents of minor approved.

Akron v Akron Center for Reproductive Health, Inc, 462 U.S. 416 (1983) – Struck down six requirements including a waiting period.

Simpolopoulos v Virginia, 462 U.S. 406 (1983) – Required hospital abortion after twelve weeks.

Thornburgh v American College of Obstetricians, 476 U.S. 747 (1986) – Struck down seven required items of information be given before abortion.

Webster v Reproductive Health Services, 492 U.S. 490 (1989) – Upheld law prohibiting use of government facilities for abortion.



Planned Parenthood of Southeastern Pennsylvania v Casey, 112 S.Ct (1992) – Struck down law requiring notification to spouse.

I have yet to read **Meyer v Nebraska**, 202 U.S. 390, **Pierce v Society of Sisters**, 268 U.S. 510, **Skinner v Oklahoma**, 316 U.S. 535, **Loving v Virginia**, 388 U.S. 1, **Eisenstadt v Baird**, 405 U.S. 438, **Stanley v Georgia**, 394 U.S. 557, **Carey**, 431 U.S. 684 and others.

After looking at the above list, it is certainly apparent that the subject of “abortion” is much too intricate and vast for the limited space available in these pages. If you have several free afternoons, I suggest you browse through the above cited cases (and there are more on the subject) including the filed briefs, transcripts and the oral arguments.

There are other “quicksand” subjects such as circumstances for recommending the intentional abandonment of a child. I vividly recall another meeting of the M.I.P.A.M.D.F. where the audience was brought to tears when a renown family psychologist suggested that if you have a child in your home who is incorrigible, on drugs, and by his actions ‘infecting’ the other children in the home, cut him or her loose. Just lock them out. This brought angry shouts from members of the audience, all professionals. However, a few persons tearfully disclosed some of their own experiences and agreed with the lecturer. I have shied away from this subject for a commentary for apparent reasons.

Finally, the subject of “sex with a client” has been avoided (except in the “Quid Pro Quo” column). This is also a “quicksand” subject. I have, however,

written a short article on this subject that will be published in the near future.

There are a number of other matters that affect family law which not only require space in this journal but positive action by our branch of the law. Such matters are affirmative action, Medicare and Medicaid, social security, elder law, indepth discussion of a gender bias (there was a short commentary on the subject in the June-July 1995 issue of the **Journal**). Other subjects are prejudices of the courts, prejudices of lawyers, divorce process unfairness to the non-income earning spouse, divorce unfairness to children, and the list goes on ad infinitum. These issues would be best discussed in a seminar setting or in a special issue of the **Michigan Family Law Journal**. We, in the arena of Family Law have much work to do! What do you think?



QUID PRO QUO

BY NORMAN N. ROBBINS

DID YOU KNOW THAT the imprisonment of a parent who is ordered to pay child support, is not, by itself justification for modification or suspension of the support obligation. (**In re Thermond**, Kan Sup Ct, No. 79,731, 7/10/98.)

DID YOU KNOW THAT a divorced father of a 15 year old child who died, may not proceed under 42 USC 1983 against a hospital and an organ bank for harvesting the son's organs upon containing only the consent of the mother, even though the father had joint custody of the child, (**Mansaw v Midwest Organ Bank**, DCW Mo, No. 97-0271-CV -WG, 7/8/98.)

DID YOU KNOW THAT where certain provisions of a divorce judgment required a father to pay his child's expenses at college, the court ruled these provisions were contractual and the mother was entitled to judgment on her breach of contract claim when the father refused payment. (**Burtch v Burtch**, Texas Ct App 3rd Dist, No. 03-97-00615-CV, 7/2/98.)

DID YOU KNOW THAT a restraining order was denied to a woman who alleged that her husband prior to their separation punished her by hitting her on the buttocks with a belt five times, as this beating was with her consent. The woman considering herself a "slave girl" and the husband her "God" or "Sovereign." (**Bolt v Bolt**, Ore Ct App No. A99286, 7/15/98.)

DID YOU KNOW THAT a North Carolina court in determining an action to modify a child custody order of a foreign state ordered that the custody of the minor children be changed so that the mother be awarded custody due to the fact that the father was living in a homosexual relationship with another man. (**Pulliam v Smith**, NC Sup Ct No. 499PA96, 7/30/98.)

DID YOU KNOW THAT a trial court must include, in its obligation to distribute property in a divorce proceeding, property that no longer exists because it has been wholly dissipated by one of the parties. (**Herron v Johnson**, DC Ct App, No. 96-FM-1417, 7/16/98.)

DID YOU KNOW THAT under the Uniform Interstate Family Support Act, a parent seeking to modify a foreign child support order must petition either the court that issued the original order or file suit in the state where the other parent lives. (**Cepukenas v Cepukenas**, Wis Ct App 2nd Dist. No. 97-1815, 7/29/98.)

DID YOU KNOW THAT a Pennsylvania Court ruled that where a married couple had exercised extensive visitation for over a year with a child they intended to adopt, the couple have standing to seek custody or visitation following the mother's decision not to continue with the adoption as the adoptive parents stood in Locus Parentis (**Silfies v Webster**, PA Super Ct Nos. 3200 & 4358 Phil 1996, 6/1/98.)

DID YOU KNOW THAT even though privately obtained blood tests proved that the husband in an intact marriage was not the father of a child in a pending paternity action, the Court ruled that the blood test evidence may not be used to rebut the presumption of legitimacy where the marriage was intact at the time of the child's conception and birth. (**Amrhein v Cozad**, PA Super, Nos. 2215 Pitt, 1996 & 643 Pitt. 1997, 6/1/98.)

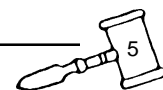
DID YOU KNOW THAT where there was no specific language in the pre-nuptial agreement stating that the survivor waives all rights to the other spouse's property or estate or waives any rights resulting from the other's death, the court concluded that the survivor is entitled to her elective share of the estate. (**Zimmerman v Zimmerman** ND Sup Ct, No. 970271, 6/4/98.)

DID YOU KNOW THAT the constitutional right to autonomy in child rearing was not violated by a state law that gave non-parents visitation rights where such visitation was in the child's best interests. (**Williams v Williams**, VA Sup Ct, No. 971616, 6/5/98.)

DID YOU KNOW THAT a wife may sue her ex-husband for infecting her with a sexually transmitted disease if, at the time the woman was infected, the husband was aware that he had the disease. (**McPherson v McPherson**, Maine Sup Jud Ct, No. 1998, ME 141, 6/5/98.)

DID YOU KNOW THAT the Tennessee Supreme Court held that in a divorce case the usual meaning of "contingent fee" is that the attorney fee will be paid only if the case is won, however an agreement that the fee would be paid regardless of the outcome of the case based on the percentage of the total award pertaining to the upward limit of the award is not considered "contingent" and is therefore valid. (**Alexander v Inman**, Tenn Sup Ct, No. 01-5-01-9705-CH-00103, 6/22/98.)

DID YOU KNOW THAT a man's children do not have standing to challenge his adoption of his wife's child shortly before his death. (**Lewellen v Timmerman**, Ore Ct App, No. A95925, 6/24/98.)



TAX TRENDS AND DEVELOPMENTS

BY JOSEPH W. CUNNINGHAM, J.D., C.P.A.
PLANTE & MORAN, LLP

This Month's Column in a Nutshell:

- "Double Dipping" Revisited: Food for Thought
- Announcing New, Further Expanded "Tax Checklists for Divorce Settlements" – Available January, 1999

"Double Dipping" Revisited: Food for Thought

The following is an outline – "Double Dipping" Revisited: Food for Thought – presented at a recent seminar by the author of this column. "Double dipping" – or "tapping the same dollars twice" – refers to situations where a business or professional practice is valued by capitalizing its income, some or all of which is also treated as income for spousal support purposes.

The outline materials present some "out of the box" views of "double dipping" and are intended to stimulate thought and discussion on this issue. As Norm Robbins would say: "What do you think?"

I. "CONVENTIONAL WISDOM" REGARDING "DOUBLE DIPPING".

A. It is accepted by many that it is improper to "tap the same dollars twice" in divorce settlements involving a personal service business, such as a professional practice.

1. To illustrate, assume the following:

– Total income available to the professional from the practice	\$225,000
– Reasonable allowance or "market value" of professional's services	(150,000)
– Pretax excess earnings	75,000
– Less tax	(25,000)
– After tax excess earnings	50,000
– Capitalization rate/divisor	25%
– Capitalized excess earnings	<u>\$200,000</u>

2. To avoid inappropriate double dipping, many would say that the professional's income for spousal support purposes should be limited to \$150,000 since the excess over that amount was capitalized into value in consideration for which the nonprofessional spouse received property of equivalent value.

B. Some extend this approach to the "double dipping" issue beyond personal service companies to all closely held businesses.

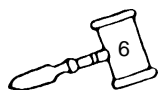
1. The claim is that the same principle applies whenever part of the owner's actual compensation is "added back to income" in the process of valuing the business.
2. Some maintain this approach applies to other types of income producing property as well, such as rental real estate.

II. QUESTIONING CONVENTIONAL WISDOM

A. While the above approach to avoid "tapping the same dollars twice" appears fair on its face, **questions have arisen regarding its evenhandedness** in application under many circumstances.

B. To illustrate:

1. In the above example, the wife, Jane, is the professional with the ownership interest in the practice.
2. Assume a companion case in which the husband, John, owns a small manufacturing company, ABC Industries (ABC), with the following characteristics:
 - a. ABC also has after tax excess earnings of \$50,000 which have also been capitalized at a rate of 25%, taking into account certain risks associated with the operations of ABC.
 - b. There has been no adjustment in the valuation to John's \$225,000 annual compensation, which has been deemed reasonable.
 - c. Rather, the excess or goodwill earnings are attributable to an excellent, experienced work force, a patented process which gives ABC a competitive advantage and long term, excellent



relationships with ABC's three largest customers.

3. In the divorce settlement process, Jane is awarded the \$200,000 goodwill value of her practice and John the \$200,000 goodwill value of ABC.
4. Assume that Jane and John are both married to spouses with little income and unquestionable need for spousal support.
5. With respect to this example, note the following:
 - a. The goodwill values of Jane's and John's respective enterprises are equal in value.
 - b. Applying the frequently used approach to avoid "double dipping", however, John's income for spousal support purposes is \$225,000 while Jane's is \$150,000.
 - c. This difference results because the goodwill of Jane's practice is attributable to "personal goodwill" – that is, excess earnings attributable to her patient base, recurring referral sources, etc., while John's is attributable to factors other than personal goodwill.
 - d. Is this significant disparity in treatment of income for spousal support purposes reasonable in view of the equal goodwill values of John's and Jane's respective enterprises?
6. Assume also a third case wherein the principal family breadwinner, Jennie, (1) owns and is awarded a \$200,000 portfolio of marketable securities with a 10% average yield, (2) earns \$225,000 as an executive of a large corporation and (3) is also married to a spouse in need.
 - a. Applying the customary "double dipping" approach, the following would result.

	<u>Jane</u>	<u>John</u>	<u>Jennie</u>
• Total earnings	\$225,000	\$225,000	\$225,000
• Value of property award	\$200,000	\$200,000	\$200,000
• Value of goodwill in property settlement award	\$200,000	\$200,000	\$ - 0 -
• Earnings for purposes of spousal support	\$150,000	\$225,000	\$225,000

- b. Comments regarding the above?

C. In her comprehensive article – "Identifying and Valuing Goodwill at Divorce," (Law and Contemporary Problems, Vol 56: No. 2, Spring, 1993), Professor Grace Ganz Blumberg challenges conventional wisdom on "double dipping" as follows, in pertinent part.

1. Starting from the other position:

"To most observers it seems self-evident that the same asset is tapped twice when goodwill is "purchased" by the originator-spouse at a divorce "sale," and all future earnings are then included in the spouse's income for the purpose of determining his support obligation. Nevertheless, it may be argued that this is an erroneous perception, that the present value of future excess earnings should, for this purpose, be treated as different from the excess earnings when and if received . . . I initially had difficulty with this argument . . . It seemed to me that the only way that a business or professional spouse who persists in his business or practice will realize the value of his marital goodwill – whether or not that goodwill is marketable – is in the receipt of postdivorce business earnings. To say that he owns two different assets, the present value of his goodwill and the excess earnings as they are realized, seemed to misdescribe reality. Yet as I worked my way through the issues, this argument began to seem more plausible."

2. Treating all assets alike:

"The value of any asset is its capacity to produce future income. In determining spousal support claims and obligations, all income from any source is credited to the support obligor or support obligee. When the wife is awarded a bank account and the family home, and the husband is awarded his professional goodwill, we should expect that the income from all assets will be available for the support calculus. The wife cannot shelter her income from the home (imputed rent) or her interest from the bank account on the theory that they were awarded to her in the distribution and hence their income should be excluded from the support analysis."

3. Effect of high cap rates:

" . . . as a practical matter, the capitalization rates we apply to excess earnings, twenty to one hundred percent, are unavailable to the spouse who receives a compensating award in cash or other property. She will therefore not experience an economic equivalent to the stream of excess earnings enjoyed by her former spouse. She is



not being paid twice (at least not fully) because of the spread between the capitalization rates applied at divorce and the rate of return she is able to secure in the market. Similarly, the business or professional spouse has not, as it turns out, paid fully because his future earnings were heavily discounted for risks that did not in fact materialize.”

D. Another criticism of the common approach to avoid “double dipping” is that it **eliminates from income for alimony purposes post-divorce increases** in the owner-spouse’s income from the business or practice.

1. There is usually little question that some of the increase in post-divorce income is attributable to post-divorce efforts and events.
2. Limiting income for alimony purposes to the reasonable allowance for compensation of the owner excludes 100% of post-divorce increases in income from the business or practice.
3. Increasing the reasonable allowance used for alimony income purposes by a “cost of living” factor would provide a partial remedy to this problem.

III. POSSIBLE REMEDIES FOR THE PERCEIVED UNFAIRNESS RESULTING FROM THE COMMON APPROACH TO PREVENT “DOUBLE DIPPING.”

A. Include All Income for Both Spouses Coupled with Modifiable Support

1. The support for this position is that it results in an even playing field – that is, the parties each received his/her fair share of property from the marital estate and should be treated for alimony purposes as receiving the income such property actually puts in their respective pockets.
2. The fact that the return on the practice or business is higher than that which the non-owner spouse can generally obtain on his or her property award reflects, at least in part, the higher risk associated with the practice or business earnings.
3. That same risk was, of course, taken into account in valuing the business by using a capitalization rate (or a rate of return on investment) of, commonly, 20% or higher.
4. And, if some of the risks that the practice or business cannot sustain the same level of

earnings achieved at the time of the divorce actually materialize, a support obligation can be adjusted accordingly provided that it is modifiable.

5. Thus, the combination of including all income and modifiable spousal support appears to some a more fair way to deal with the double dipping issue.

B. “Return on Investment” Approach

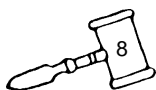
1. Under this approach, the professional or business owner is allowed, in effect, to recoup his or her goodwill income, as illustrated by the following example:

- | | |
|------------------------------|---------------------------|
| a. After tax excess earnings | \$50,000 |
| b. Earnings Multiple | <u> </u> x 4 |
| c. Value of Goodwill | <u> </u> \$200,000 |
- d. The professional/business owner’s total annual income – would be reduced by \$50,000 (perhaps inflation adjusted) in each of the next four years for spousal support purposes.
 - e. Except for this four year annual “credit,” all other earnings are included.

2. This approach is rather simple to apply and can be used in situations where alimony is either modifiable or non-modifiable.

C. Equalizing the Excluded Income

1. Assume, once again, that the goodwill value of a practice or business is \$200,000 for which the non-owner spouse receives an equivalent amount in other property.
 - Also, assume the non-owner spouse can earn 8% on the \$200,000 offset award (including an imputed 8% if such award consists of non-income producing property – such as a residence).
 - Then, allow both spouses to exclude from income for spousal support purposes \$16,000 – that is, 8% of \$200,000.
 - This will result in the above average yield income of the professional spouse being included for marital property purposes.
 - Part of the theory in support of this approach is that the non-owner spouse is not able to achieve the same high yield on his or her



\$200,000 award offsetting the professional's goodwill.

- Since that above average yield is subject to above average risks, it may be appropriate to combine this approach with modifiable spousal support.
- This approach is also relatively simple in application, requiring only the selection of an appropriate rate of return.

- Attorney Fees
- Dependency Exemptions
- Miscellaneous Tax Matters

The new 1999 edition includes the recently revised rules on sales of principal residences and a new section on Innocent Spouse Relief (as revised in 1998).

The price for the new edition, as set by the Michigan Family Law Section Family Law Council:

- First-time "Tax Checklists" purchasers \$65
- Those who purchased since Jan. 1, 1998 \$15
- Those who purchased before Jan. 1, 1998 \$20

Announcing New, Further Expanded "Tax Checklists for Divorce Settlements" – Available January, 1999

"Tax Checklists for Divorce Settlements" was first published in 1994 and then revised in 1995. Subjects covered include the following:

- Alimony
- Property Settlement
- Marital Residence
- Closely-Held Corporations
- QDROs/EDROs

Checks should be payable to – "State Bar of Michigan" and mailed with a request for the new "Tax Checklists" to:

Joseph W. Cunningham
Plante & Moran, LLP
27400 Northwestern Hwy.
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NOTICE RE: THIRD EDITION OF TAX CHECKLISTS FOR DIVORCE SETTLEMENTS

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TAX CHECKLISTS FOR DIVORCE SETTLEMENTS

BY: JOSEPH W. CUNNINGHAM, JD, CPA
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**NOTICE OF SUSPENSION
AND RESTITUTION**

**(Pending Appeal)
Case No. 97-278-GA**

Detroit, Michigan, by Attorney Discipline Board Tri-County Hearing Panel #16.

- (1) Suspension – Three (3) Years;
- (2) Effective April 17, 1998.

The first complainant paid respondent \$500 to represent her in post-judgment divorce proceedings. The panel found, by default, that respondent neglected the matter; failed to refund the unearned fee; and failed to answer the Request for Investigation.

The second complainant paid respondent \$750 to represent her incarcerated brother in a paternity action. The panel found that respondent neglected the matter; failed to refund the unearned fee; and failed to answer the Request for Investigation.

The third complainants retained respondent to represent them in a bankruptcy matter. The panel found that respondent neglected the matter; filed bankruptcy schedules which were false, incomplete and misleading; failed to comply with two court orders sanctioning her; failed to release the client file upon her termination; and failed to respond to successor counsel's motion for turnover of property, appear at the hearing on that motion, or release the client file, despite being ordered to do so by the court. Respondent also failed to answer the Request for Investigation; failed to answer the Formal Complaint; and failed to appear at one of the disciplinary hearings.

Respondent's conduct was found to be in violation of MCR 9.103(C); MCR 9.104(1)-(4) and (7); MCR 9.113(A) and (B) (2); and Michigan Rules of Professional Conduct 1.1(a)-(c); 1.2(a); 1.3; 1.4; 1.5(a); 1.16(d); 3.2; 3.3(a)(1)-(3); 3.4(c); 8.1(b); and 8.4(a)-(c).

The panel ordered that respondent be suspended from the practice of law for three years, and make restitution to two complainants in the total amount of \$1,250. Costs were assessed in the amount of \$555.24.

Respondent filed a petition for review and stay of discipline. The petition for stay was denied, and the suspension is deemed to be effective April 17, 1998.

**NOTICE OF REVOCATION
AND RESTITUTION**

Case Nos. 98-72-GA; 98-94-FA

Livonia, Michigan, by Attorney Discipline Board Tri-County Hearing Panel #24.

- (1) Revocation;
- (2) Effective August 18, 1998.

Respondent was suspended from January 21, 1994 through July 24, 1994, for failure to pay his bar dues. The panel found, by default, that during the period of suspension, respondent prepared, signed, and filed a Motion to Remove Cause of Action on behalf of the defendant in an intrastate transfer of post judgment divorce action in Lenawee County Circuit Court; appeared on behalf of the defendant in Lanawee County Circuit Court; and represented her at the hearing on the Motion to Remove Cause of Action. Respondent also failed to answer the Request for Investigation.

Respondent was retained by another complainant to challenge the authenticity of a Quit-Claim Deed in a decedent's estate, and requested and received \$900 for costs and attorney fees. The panel found that respondent neglected the matter; made statements to the complainant which were false and were known by him to be false at the time they were made; failed to refund the balance of the unearned costs and fees paid, totaling \$557; and failed to answer the Request for Investigation.

Respondent was retained to represent another complainant in a landlord/tenant matter, and requested and received a \$390 fee. The panel found that respondent neglected the matter; failed to notify the complainant of his suspension and subsequent revocation of his license to practice law, both effective November 15, 1996; failed to make arrangements for the complainant to pick up her client file; failed to refund the unearned balance of the attorney fee in the amount of \$275; and failed to answer the Request for Investigation. Respondent also failed to answer the Formal Complaints and failed to appear at the disciplinary hearing. Respondent's conduct was found to be in violation of MCR 9.103(C); MCR 9.104(1)-(4), (7) and (9); MCR 9.113(A) and (B)(2); MCR 9.119(E); MCL 600.916; MSA 27A.916; and Michigan Rules of Professional Conduct

1.1(c); 1.2(a); 1.3; 1.4; 1/5(a); 1.6(d); 3.2; 5.5(a); 8.1(b); and 8.4(a)-(c).

The panel ordered that respondent's license to practice law be revoked for the third time, and that he make restitution to the complainants in the total amount of \$4,729.00, and reimburse the State Bar of Michigan Client Protection Fund for any and all monies which it pays to any of the complainants in the matter. Costs were assessed in the amount of \$306.98.

**NOTICE OF REVOCATION
Case No. 98-71-GA; 98-96-FA**

Detroit, Michigan, by Attorney Discipline Board Tri-County hearing Panel #9.

- (1) Revocation;
- (2) Effective August 22, 1998.

Respondent was suspended from the practice of law in Michigan for a period of 37 months effective June 13, 1996. In July 1996, she was retained to represent the complainant in a divorce action. In August 1996, she filed a complaint for divorce on the complainant's behalf in Oakland County Circuit Court. The panel found, by default, that respondent accepted the matter after the effective date of her suspension; filed or caused to be filed a verified complaint for divorce on the complainant's behalf and appeared as attorney of record in the matter while suspended from the practice of law; neglected the matter; failed to answer the Request for Investigation; and failed to answer the Formal Complaints. Respondent also failed to appear at the disciplinary hearing.

Respondent's conduct was found to be in violation of MCR 9.103(C); MCR 9.104(1)-(4), (7) and (9); MCR 9.113(A) and (B)(2); MCL 600.916; MSA 27A. 916; and Michigan Rules of Professional Conduct 1.1(c); 1.2(a); 1.3; 1.4(a) and (b); 1.6(a); 5.5(a); 8.1(b); and 8.4(a)-(c).

The panel ordered that respondent's license to practice law be revoked. Costs were assessed in the amount of \$150.25.



LETTERS TO THE EDITOR

November 30, 1998

Norman N. Robbins
5543 Tadworth Place
W. Bloomfield, MI 48322

Dear Mr. Robbins:

It was with a sense of dismay that I read our Chairperson's message in the November, 1998, **Michigan Family Law Journal**. Once again we see gender stereotypes and gender bias rearing its ugly head. It is especially disturbing coming from the newly elected Chairperson of our State Bar of Michigan Family Law Section.

Stereotypes such as fathers who "nickel and dime the mother to death" have no place in the Michigan Family Law Journal. Ms. Darmon states that the world of divorce is not a pretty place for the majority of women. I can only assume the natural conclusion that fathers and men are quite appropriate warriors and well suited for the divorce arena. Ms. Darmon's solution to these problems was her promise to revisit the child support guidelines.

The Chairperson's message begins with what she wishes to accomplish, and concludes with her personal and professional goals. Any Chairperson for our State Bar of Michigan Family Law Section must focus on the goals of the entire section over individual, personal or professional goals. Sweeping statements propagating stereotypical "nickel and diming fathers" have no place in our **Family Law Journal**.

Very truly yours,

BATOR & BERLIN, P.C.

/s/ William E. Berlin

Dear Norm:

I appreciate the opportunity to respond to Mr. Wm. Berlin's letter regarding my November, 1998 Chairperson's Message. I further appreciate the opportunity to respond to any reader who may have shared Mr. Berlin's sentiments but did not so communicate it.

I am not afraid to boldly assume that all right-minded people share the goal to improve the lives of children who suffer, whether from starvation, divorce or any other tragedy. I am saddened that Mr. Berlin did not find those goals, as discussed in my article, worthy goals.

One can only assume that he who responds with language such as "fathers and men are quite appropriate warriors and well suited for the divorce arena" are the very people to whom I referred – those being the litigants who stop at nothing for the "win of the warrior," even at the expense of their children.

Those who truly are concerned about the effects of litigation on children, and on the parents, fathers and mothers who must go on to raise them, are not threatened by my stating an unfortunate truth. While my comments clearly provide for exceptions to the rule, perhaps what was characterized as bias might actually be a too uncomfortable look at reality. We all tend to squirm when truth is publicly verbalized.

The purpose of my article was to provoke thought and reflection. As reiterated throughout, the "needs of the children" was the focus. I ask, what better concern should the Chair of the Family Law Section have?

Very truly yours,

Elaine P. Darmon

Mr. Norman N. Robbins
Editor
Michigan Family Law Journal

Please find enclosed an opinion, **Ackerman v Ackerman**, 97-752154 DS, submitted for publication in your journal.

It is a case of first impression explaining how Michigan's version of the Uniform Interstate Family Support Act ("UIFSA") can override Michigan case law on equitable jurisdiction. The case law had stated that when both parties and the child move to Michigan and become Michigan residents, Michigan could simply assume "equitable jurisdiction" over their child support order issued in another state. This is no longer always so under Michigan's UIFSA, and attorneys are going to have to study its mechanics carefully.

Ackerman is a primer on all relevant bodies of law, including Michigan's version of UIFSA, its interplay with Michigan's Uniform Enforcement of Foreign Judgments Act ("UEFJA"), the federal child support jurisdiction statute, the Full Faith and Credit Clause of the U.S. Constitution, and persuasive case law from other states. Crucially, **Ackerman** pinpoints what Michigan did and did not adopt from UIFSA, and reviews the equitable jurisdiction cases the statute overrides.

Very truly yours,

/s/ Jan Dejnozka,
law clerk to
Hon. Bill Callahan



RECENT DECISIONS

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

VICKIE E. ACKERMAN,

Plaintiff

v

Case No. 97-752154 DS

JOSEPH C. ACKERMAN,

Defendant

DENNIS H. MILLER (P35237)
Attorney for Plaintiff
20300 Superior Road, Suite 220
Taylor, MI 48180-8429
(313) 374-8960

MIHELICH & KAVANAUGH, P.L.C.
MICHAEL P. KAVANAUGH (P47282)
Attorney for Defendant
23801 Gratiot Avenue
Eastpointe, MI 48021
(810) 776-1700

OFFICE OF THE FRIEND OF THE COURT
CLIFFORD A. LEVIN (P16601)
Penobscot Building, Suite 650
Detroit, MI 48226-4005
(313) 224-2990

FINAL OPINION AND ORDER

At a session of said Court held in
the courthouse, Detroit, Michigan on
March 11, 1998

PRESENT: HONORABLE J. W. CALLAHAN
Wayne County Circuit Judge

INTRODUCTION

This Court is presented with a child support modification issue involving three residents of this state, where those issuers are covered by an appropriate support order entered previously by a Florida state court

which expressly retained jurisdiction. At first blush, it would appear that a Michigan Circuit Court should exercise jurisdiction to determine child support where both parents and child are Michigan residents. However, the Florida divorce judgment between the

parties, taken together with the failure of both parents to file a written consent with the Florida court for this Court to exercise jurisdiction, indicates that this Court is without jurisdiction either to issue a new support order or to modify the Florida order.



FACTS

Plaintiff has brought an action for support pursuant to the provisions of the Family Support Act [MCLA 552.451b].¹

Both parents, being Plaintiff and Defendant, are permanent residents of the State of Michigan today. The only minor child of the parties resides in Michigan with the Plaintiff-mother.

The parties were divorced in Florida in 1991. Their divorce judgment [the "Florida Judgment"] was issued by the Circuit Court for Pinellas County, Florida, and it states,

1. That the Court has jurisdiction of the parties hereto and the subject matter hereof
5. Child Support. That Husband [Defendant-father here] shall pay child support directly to Wife [Plaintiff-mother here] in the amount of FIFTY (\$50.00) DOLLARS per week
6. JURISDICTION. That the Court retains jurisdiction of the subject matter hereof and the parties hereto.

None of the attorneys has disputed the scope, validity, or effectiveness of the provision retaining jurisdiction.

The Florida Judgment states that at the time of its entry, Defendant was not employed and was no longer receiving unemployment compensation. See Par. 3 of the findings on the Florida Judgment. Plaintiff, who earned approximately \$10,000 in 1997, suggests that Defendant is now employed and is earning approximately five items as much as Plaintiff is.

At the time the complaint at issue was filed in Michigan, the only child support order in existence was the

order contained in the Florida judgment. The Complaint filed in Michigan was for support independent of the judgment issued in Florida. This is not an action for enforcement of the Florida judgment.

Plaintiff acting **in pro per** presented and obtained an Ex-Parte Interim Support Order on September 12, 1997. It required child support in the amount of \$167.00 per week in accordance with the guidelines and the information provided by Plaintiff to the Friend of the Court. Plaintiff did disclose the existence of the Florida Judgment to employees of the Friend of the Court, and chose her method of proceeding after discussions with them.

Defendant has presented and argued on Motion To Set Aside Interim Support Order And Income Withholding Order Dated September 12, 1997. The Wayne County Friend of the Court was also represented at the hearing on Defendant's motion. It was also suggested by the Friend of the Court that the Florida Judgment could be registered in Michigan and then modified by this Court. This Court disagrees with the position of Plaintiff and Friend of the Court for the reasons set forth below.

JURISDICTION, PART ONE: THE STATUTE

Defendant's arguments concerning subject matter jurisdiction will be addressed together. Subject matter jurisdiction is an issue which the Court must find before any order is entered, as subject matter jurisdiction is a court's right to exercise judicial power over a class of cases. **Joy v Two-Bit Corp**, 287 Mich. 2444 (1938); **Adams v Adams**, 100 Mich App 1 (1980). A judgment entered by a court without subject matter jurisdiction is void and may be vacated at any time on the court's own motion or on the motion of any party, including the party who originally invoked the court's jurisdiction. **Banner v Banner's Estate**, 45 Mich App 148 (1973). This Court finds that it is denied subject matter juris-

diction to establish support pursuant to sec. 223 of Uniform Interstate Family Support Act ("UIFSA"), i.e., MCLA 552.1223(1), which provides,

This state's tribunal may exercise jurisdiction to establish a support order if a petition or comparable pleading is filed in this state after a petition or comparable pleading is filed in another state only if all of the following are true: (a) The petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state [emphasis added]

It is not necessary to analyze the remaining subsections of MCLA 552.1223(1) because subsection (a) is a requirement which cannot be met. The Florida Court found jurisdiction. In fact, it has **expressly retained jurisdiction**. Therefore, this Court cannot assume jurisdiction. "This state's tribunal shall recognize the continuing, exclusive jurisdiction of a tribunal of another state that issues a child support order under a law substantially similar to this act." MCLA 552.1224. Florida has adopted UIFSA under the title "Uniform Interstate Family Support Act" [Title VI (Civil Practice and Procedure), Chapter 88]. The parties and the Friend of the Court have made no argument that this Court would have the authority to second-guess the Florida court as to when the Florida court's jurisdiction ends. Therefore this Court has the obligation to honor the decision of the Florida court on this question pursuant to the Full Faith and Credit Clause of the U.S. Constitution.²

A thorough reading of the entire UIFSA is consistent with this result. In addition to MCLA 552.1603(2), MCLA 552.1633 states, ". . . the registered order may be modified only if the requirements of section 635 [MCLA 552.1635] are met." MCLA 552.1235 cannot be satisfied by Plaintiff



because she is a resident of Michigan and the parties have not filed a written consent in Florida providing that a Michigan court may modify the Florida order and assume continuing, exclusive jurisdiction.

Under UIFSA as adopted in both Michigan and Florida, Florida has continuing, exclusive jurisdiction over a child support order if either (a) one of the parents or the child still resides in Florida, or if (b) both parties have not yet filed written consent with Florida for Michigan to modify the order and assume exclusive, continuing jurisdiction. MCLA 552.1224(1)(a) and (b) and 552.1635(1); FLA STAT ANN §88.2051(1)(a) and (b) and 88.6111(1) (West 1997). Therefore, Florida retains continuing, exclusive jurisdiction over its child support order.³

The treatise, **Michigan Family Law**, agrees. “[E]xclusive jurisdiction requires other states with the ability to exercise jurisdiction to defer to the state with the continuing, exclusive jurisdiction. Under this statutory scheme, only one state retains the power to modify a child support award.” **2 Michigan Family Law** (4th ed.) (ICLE) 12.35(a)(4) (1997).⁴

JURISDICTION, PART TWO: UIFSA §613 NOT ADOPTED BY MICHIGAN

The failure of the Michigan legislature to adopt Sec. 613 of UIFSA also indicates that this Court should not take subject matter jurisdiction over this matter. Section 613 says:

§613. Jurisdiction to Modify Child-Support Order of Another State when Individual Parties Reside in this State.

If all of the parties who are individuals reside in this State and the child does not reside in the issuing state, a tribunal of this State has jurisdiction to enforce and to modify the issuing state’s child-support order in a proceeding to register that order.

However, the Comment to Section 613 clarifies:

This section is designated to make it clear that when the issuing state no longer has continuing, exclusive jurisdiction and the obligor and obligee reside in the same state, a tribunal of that state has jurisdiction to modify the child support order and assume continuing, exclusive jurisdiction [emphasis supplied].

This Court has found that Florida retains continuing, exclusive jurisdiction. Therefore Section 613 of UIFSA would not apply to the present case even if it had been adopted in Michigan. More importantly, Michigan did not enact Section 613 of UIFSA. This omission indicates that Michigan has rejected Section 613.⁵

JURISDICTION, PART THREE: THE INAPPLICABILITY OF UEFJA

Plaintiff and the representative of the Friend of the Court argue that the Uniform Enforcement of Foreign Judgments Act (“UEFJA”) would allow entry of an order for enforcement and modification of the Florida Judgment if Plaintiff would seek to register her support order in Michigan and then to seek modification here. Under this proposal, there would be two acts, UIFSA and UEFJA, which were made effective simultaneously on June 1, 1997 which would seem to be in conflict. UEFJA [MCLA 691.1171 **et seq.**] does not provide this Court with the **express** authority to modify a support order from another state. MCLA 691.1173 does permit “reopening, vacating or staying,” but it does not expressly allow for modification. On the other hand, the express language of MCLA 552.1603(2) prohibits modification of the Florida Judgment. “[This] state’s tribunal shall recognize and enforce, but **shall not modify**, a conflict and one is specific to the subject matter while the other is only generally applicable, the specific statute

prevails [citation omitted].” **Walterhouse v Ackley**, 226 Mich App 67, 73 (1997). Therefore, the argument of the Plaintiff and the Friend of the Court that Plaintiff should simply be allowed to amend her complaint to request a modification of the Florida Judgment cannot succeed. To repeat, this Court has no subject matter jurisdiction to modify the Florida Judgment. MCLA 691.1603(2).

JURISDICTION, PART FOUR: THE MICHIGAN ORDER WAS ENTERED WITHOUT JURISDICTION, AND SO IS NOT A “CONFLICTING ORDER” UNDER UIFSA §207

Plaintiff and the Friend of the Court argue that the ex-parte order issued on September 12, 1997 constitutes an order within the terms of MCLA 552.1231 [UIFSA §207, U.L.A. (1996)]. Pursuant to subsection 1 of that UIFSA section, it is asserted that this court should exercise jurisdiction because there are now two conflicting support orders and Michigan is the current home state of the child. The ex-parte order entered in Michigan on Plaintiff’s complaint was entered without jurisdiction. An order entered without jurisdiction cannot be used to create it. **Joy, supra; Adams, supra; Banner, supra.**⁶

THE FLORIDA ORDER IMPLIES A PETITION TO ESTABLISH SUPPORT

Plaintiff and the representative of the Friend of the Court argue that there has not been a “petition or comparable pleading [to establish a support order]” filed in Florida, which would require application of MCLA 552.1223 [UIFSA §204, U.L.A. (1996)]. This Court finds that the issuance of a Final Judgment For Dissolution of Marriage in a Florida state court (which judgment includes provisions for custody, visitation, child support, and intent to recalculate child support in the future) shows conclusively that a petition to establish support was filed in Florida. The parties presented no argument that would

convince this court that the Michigan legislature or the National Conference of Commissioners on Uniform State Law would want to distinguish between support established pursuant to divorce from other types of child support. Such a distinction might also be constitutionally suspect as discriminating without a rational basis against children of divorced parents as contrasted to children whose support is determined under other scenarios.

THE UIFSA MODIFICATION OPTION

Even though only Florida has continuing and exclusive jurisdiction, Michigan can serve as initiating tribunal and request Florida as a responding tribunal to modify its order. MCLA 552.1221 and .1225(1); FLA STAT ANN §§88.2031 and .2061(1) (West 1997); UIFSA §§203 and 206(a), U.L.A. (1996). Florida can receive evidence and obtain discovery through Michigan. MCLA 552.1225(2); FLA STAT ANN §88.2061(2) (West 1997); UIFSA §206(b), U.L.A. (1996).

UIFSA does indicate the manner in which this court may acknowledge the jurisdiction of the Florida court and protect Michigan domiciliaries. There is statutory authority in UIFSA for this Court to act as an initiating tribunal to request the Florida court to modify its support order. MCLA 552.1225. Plaintiff's argument would nullify this section of UIFSA.

NOW THEREFORE, IT IS HEREBY ORDERED THAT Plaintiff has LEAVE to amend her complaint to request this court act as an initiating court to request a referral to the Florida state court to modify its support order pursuant to MCLA 552.1225(1). Plaintiff's attorney is to prepare an appropriate order: (1) for amendment of the petitioner's complaint for a request to this court that it issue a request to the Florida court for a modification of the Florida Judgment; (2) to be forwarded to the Florida court having jurisdiction; (3) to inform the Florida court of all relevant facts in

Michigan, including that under the Michigan Guidelines the child support amount that would be determined in Michigan, if we had jurisdiction, would be \$167/week; and (4) containing a finding as to the basis of all of the foregoing as well as referencing the allegation concerning, but not containing a finding on, the amount and basis for Plaintiff's claim for attorney's fees. This Court has no authority to request or direct any other activity. It should be noted in passing, though, that if the Florida Judgment were modified to terminate its continuance of jurisdiction or its child support provisions, then this Court could proceed to establish child support unrestricted by UIFSA. MCLA 552.1631 [UIFSA Sec. 635] restricts this court to acting on its own under any other scenario, as Michigan has not adopted UIFSA Sec. 613.

/s/ J. W. CALLAHAN
J. W. CALLAHAN
Circuit Court Judge

ENDNOTES

1. After discussions off the record with counsel for all parties, it is clear that Plaintiff, who is not a lawyer and who prepared the Complaint For Support, Family Support Act, was not intending to proceed under MCLA 552.451(B) [sic], but rather under MCLA 552.451(a). Only the Director of Social Services may proceed under MCLA 552.451(b).
2. Constitutional full faith and credit supports this Court's decision. A Louisiana court said concerning UIFSA that "a Louisiana court cannot deny a foreign judgment full faith and credit unless the foreign court lacked jurisdiction over the parties or the subject matter in the controversy. 669 So.2d at 556." State of **Louisiana v Batiste**, 97-0823 (La App 4 Cir 11/19/97, 1997 WL 720944 (La App 4 Cir). The Court of Appeals of Oregon expressly described the need for conforming actions under the Act to the "Full Faith and Credit Clause of the United States Constitution." In **the Matter of the Marriage of Carol Ann Cooney, now known as Carol Busby Cricow, Appellant – Cross-**

Respondent, and Ronald Francis Cooney, Respondent – Cross Appellant, 150 Or App 323, 946 P.2d 305 (1997).

In support of full faith and credit, the General Notes to UIFSA state,

II. Proposed Changes

3. **RECIPROCITY NOT REQUIRED.** The hallmark of URESA and RURESAs, reciprocity of laws between states, is not required under UIFSA. Prior to the promulgation of UIFSA, all states had quite similar laws. But, UIFSA takes the position that a responding state should enforce a child support obligation irrespective of another state's law. Further, to avoid conflict between state laws UIFSA declares that URESA, RURESAs and all substantially similar state laws should be recognized and enforced for purposes of interstate actions (Sections 101(7), (16)). **Tolerance for the laws of other states and nations in order to facilitate child support enforcement is a prime goal of the Act**, which also contains provisions to help ease the transition to the new system [emphasis supplied].

UIFSA (General Notes), U.L.A. (1996).

The Appeals Court of Massachusetts held that UIFSA is consistent with the objectives of the federal Full Faith and Credit for Child Support Orders Act. **Peddar v Peddar**, 43 Mass App Ct 192 (1997). Concerning this federal act, the Comment to UIFSA §207, U.L.A. (1996), explains:

As originally promulgated, UIFSA did not come to grips with whether existing multiple orders issued by different states might be entitled to full faith and credit with regard for the determination of the controlling order under the Act. The drafters took the position that state law, however uniform, could not interfere with the ultimate interpretation of a constitutional directive. Fortunately, this question has almost certainly been mooted by the 1996 amendment to 28 U.S.C.



§1738B, Full Faith and Credit for Child Support Orders. Congress adopted the terms of Section 207 of UIFSA virtually word for word in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Pub. L 104-193, Aug. 22, 1996 110 Stat. 2221. UIFSA §207 (Comment), U.L.A. (1996).

3. No argument has been made that Florida jurisdiction has terminated pursuant to UIFSA §205, FLA STAT ANN §88.2051 (West 1997). The Florida Judgment on its face expressly denies that Florida jurisdiction would be terminated.
4. UIFSA applies to the 1991 Florida child support order even though that order was entered before UIFSA was adopted. The questions UIFSA asks are: (i) if under UIFSA, the 1991 order would give only Florida continuing and exclusive jurisdiction (MCLA 552.1231), or even more simply (ii) if a child support order was issued in Florida (MCLA 552.1223).

UIFSA's intent to honor pre-UIFSA child support orders issued in other states evidently would extend to the 1991 Florida Judgment. The General Notes state:

- I. **Background Information**
[I]n 1988 the National Conference of Commissioners on Uniform State Laws (hereafter Conference) established a Drafting Committee to review the Uniform Reciprocal Enforcement of Support Act (URESAs) and its revised version (RURESAs), some formulation of which had been adopted in all states, and to add appropriate revisions to the uniform act
- II. **Proposed Changes**
3. **RECIPROCITY NOT REQUIRED** Further, to avoid conflict between state laws

UIFSA declares that URESA, RURESAs and all substantially similar state laws should be recognized and enforced for purposes of interstate actions (Sections 101(7), (16)), UIFSA (General Notes), U.L.A. (1996).

Florida repealed the Uniform Reciprocal Enforcement of Support Act as Revised in 1968, which had been made effective in LAWS 1979, c. 79-383, only when it enacted in lieu thereof UIFSA effective July 1, 1997. FLA STAT ANN §88 (**Revision to Former Provisions; Former Provisions, Historical and Statutory Notes**) (West 1997); **See UIFSA General Notes, U.L.A.** (1992) (Westlaw 1998). Therefore the intent of UIFSA would be to uphold the 1991 Florida Judgment, since it was issued while Florida had URESA-type law.

5. Michigan's adoption of UIFSA overrides two Michigan cases which stood for the proposition in equity that Michigan will take jurisdiction over child support for its domiciles.

The first case is **Amato v Sanborn**, 47 Mich App 244 (1973), a case which coincidentally involves another prior order in Florida. The Court of Appeals said,

The Florida courts may retain continuing jurisdiction over the parties to this action. However, we are aware that equitably, the courts of Michigan also have an interest in the parties and have jurisdiction over the defendant, even though such jurisdiction was not in effect at the time the divorce decree was entered in Florida. Jurisdiction and venue over the defendant in the Michigan circuit court were properly laid." **Amato** at 248.

As in the instant case, both parties had become residents of Michigan and one had custody of the child.

The second case is **Scott v Scott**, 182 Mich App 363 (1990). **Scott** cites **Amato** for the key point. **Scott** says:

We recognize that the Texas court may retain continuing jurisdiction. The Michigan court nonetheless has an equitable interest in the parties and in the issue of child support, as the mother and three of the children reside in this state. **Amato v Sanborn**, 47 Mich App 244, 248 . . . (1973). It is incontestably within the jurisdiction of Michigan courts to award child support. **Scott** at 366.

Although the concept of equitable jurisdiction is intuitively very appealing, this Court is constrained to apply the recently enacted statute.

6. Federal statute 28 USC 1738B, Full Faith and Credit for Child Support Orders, might seem to suggest that this Court has subject matter jurisdiction to modify the Florida order. However, 28 USC 1738B(e)(1) requires that prior to modifying a foreign child support order, this Court already have jurisdiction to establish a child support order of its own. This Court has personal jurisdiction over the parties, but lacks subject matter jurisdiction to establish support because of the restriction stated in MCLA 552.1223(1)(a).

CERTIFICATION OF SERVICE.

I certify that a copy of the foregoing was served by first class mail on this date upon the parties record at the addresses of their attorneys of record.

Date: March 11, 1998

/s/ Jan Dejnozka
Jan Dejnozka, law clerk to
Hon. J. W. Callahan



STATE OF MICHIGAN
COURT OF APPEALS

SUSAN M. CZAJKOWSKI,

Plaintiff-Appellant,

v

NORBERT P. CZAJKOWSKI,

Defendant-Appellee.

UNPUBLISHED
September 4, 1998

No. 195960
St. Clair Circuit Court
LC No. 93-001962-DO

Before: Sawyer, P.J., and Bandstra and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. Plaintiff challenges the trial court's ruling that neither party was at fault for the breakdown of the marital relationship, its award of spousal support, the distribution of the marital estate, and the refusal to award attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff first claims that the trial judge exhibited bias toward plaintiff and should be disqualified from any further proceedings. However, plaintiff failed to file a motion in the trial court requesting disqualification of the trial judge. Thus, this issue has not been preserved for appeal. **Homestead Development Co v Holly Twp**, 178 Mich App 239, 248; 443 NW2d 385 (1989); MCR 2.003(C). Even were this issue preserved, plaintiff has failed to overcome a presumption of impartiality by showing actual and personal prejudice or bias on the part of the trial judge so as to justify disqualification. **Cain v Dep't of Corrections**, 451 Mich 470, 495; 548 NW2d 210 (1996). The trial court's opinion does not demonstrate any favoritism toward defendant or any antagonism toward plaintiff. **Id.** We find that the trial judge's opinion exhibited careful consideration

of plaintiff's testimony and did not exhibit any signs of personal or gender bias against plaintiff. We therefore decline to disqualify the trial judge.

Plaintiff next argues that the trial court clearly erred when, after reviewing the testimony of both parties, it ruled that neither party should be attributed a greater percentage of the fault for the breakdown of the marital relationship. Although fault is a legitimate consideration for purposes of alimony and property distribution, **Demman v Demman**, 195 Mich App 109, 110; 489 NW2d 161 (1992), we give special deference to factual findings regarding fault when they are based on the credibility of the parties. **Thames v Thames**, 191 Mich App 299, 311; 477 NW2d 496 (1991). Here, the trial court was in the best position to review the conflicting testimony of the parties, and we find no clear error in its determinations. Further, since fault generally should not be attributed to conduct that occurred after the breakdown of the marital relationship, **Knowles v Knowles**, 185 Mich App 497, 500-501; 462 NW2d 777 (1990), the trial court did not err in declining to consider a relationship that apparently commenced after the parties' separation.

Plaintiff also argues that the trial court erred in its disposition of the marital estate. Specifically, plaintiff claims that the trial court failed to protect the equity interest of the marital home when it granted several motions filed by defendant seeking the court's permission to acquire certain loans which encumbered the marital home. Plaintiff also claims that the court erred in deducting several ongoing expenses, primarily property taxes, from the marital estate, severely reducing its value prior to disposition. Finally, plaintiff claims that there was sufficient evidence of fault to justify a sixty/forty distribution of the marital estate in plaintiff's favor and, therefore, that the trial court erred in granting the parties a fifty/fifty distribution. We find no merit in these arguments.

Plaintiff's concerns regarding the deduction of property tax expenses and the encumbrances on the marital home were dealt with in the trial court's valuation of the marital estate. We review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard. **Draggoo v Draggoo**, 223 Mich App 415, 429; 566 NW2d 642 (1997). In its opinion, the trial court recognized that it had

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.



promised to protect plaintiff's equity interest in the marital home. The court reviewed contradictory testimony regarding the change in value of the marital estate and conclude that \$127,000 should be added back into the estate. This determination is not clearly erroneous.

Plaintiff's request for a sixty/forty distribution of the marital estate in her favor has not been preserved for appeal. The trial court record reflects that plaintiff specifically requested a fifty/fifty distribution. Moreover, plaintiff's only argument for such a distribution is that defendant was at fault in the breakup of the marriage. As noted above, the trial court properly concluded that there was no fault on the part of either party. Thus, we affirm the trial court's division of property.

Next, plaintiff argues that the trial court's factual findings supporting the alimony award were clearly erroneous, and that the award was unfair and inequitable given the circumstances of this case. The purpose of alimony is to balance the needs and incomes of the parties in such a manner that neither party will be impoverished. **Ackerman v Ackerman**, 197 Mich App 300, 302; 495 NW2d 173 (1992). Generally, such an award should be based upon what is just and reasonable given the circumstances. **Maake v Maake**, 200 Mich App 184, 187; 503 NW2d 664 (1993).

Here, the trial court awarded plaintiff spousal support of \$1,200 per week for eight years. The trial court recognized that there are a number of relevant factors to be considered when making a determination regarding alimony. Those factors, as set forth in **Parrish v Parrish**, 138 Mich App 546; 361 NW2d 366 (1984), are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the ability of the parties to work; (4) the source of and amount of property awarded to the parties; (5) the age of the parties; (6) the ability of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the

parties; (9) the health of the parties; (10) the prior standard of living of the parties and whether either is responsible for the support of others; and (11) general principles of equity. *Id.* at 553-554. Plaintiff now challenges the trial court's analysis regarding several of these factors.

First, plaintiff argues that the trial court clearly erred in concluding that she would be able to work in the future. We disagree. In fact, the trial court acknowledged that plaintiff's work prospects were limited by her health problems. While the trial court concluded that plaintiff would be able to perform some work in the future, the court also appeared to acknowledge that plaintiff's future work might not provide income.¹ The trial court's findings on this issue are not clearly erroneous.

The rest of plaintiff's arguments regarding the award of spousal support challenge the trial court's balancing of the **Parrish** factors. Essentially, plaintiff argues that the amount of alimony was not equitable in light of all the facts and circumstances. After a thorough review of the record, we agree. In determining the amount of alimony to award, the trial court essentially focused on plaintiff's reasonable needs. We conclude that the court gave insufficient weight to other factors, such as defendant's ability to pay alimony, the prior standard of living of the parties, and general principles of equity.

The trial court indicated that it often relies on the Washtenaw County Alimony Guideline. However, the court commented that it found the guideline inapplicable in cases involving higher incomes. The guideline formula makes a direct link between income and alimony. Where the payor spouse has all the income, the guideline recommendation for alimony doubles when the payor's income doubles.² Whatever the value of such a guideline,³ the trial court's comment evidences a belief that recipient spouses in high income homes are not entitled to the same

percentage of a payor's income as spouses in lower income homes. If alimony were only intended to meet the basic needs of the recipient spouse, the trial court's approach in this case would be eminently logical, because parties' needs do not depend on their wealth. Put differently, spouses in wealthy households do not necessarily have any greater needs than spouses in poor households. However, alimony represents more than provision for the recipient's basic needs. This issue was addressed in the December 1989 Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts:

[A]limony should be based upon the amount of money available, not merely on the basic needs of the recipient. There is no justification for limiting one spouse to essential needs while the other enjoys a significantly higher standard of living. Where both have contributed to the whole, each should enjoy equally the benefits of their contributions. [*Id.* at 55.]

Thus, to the extent that a recipient spouse has contributed to the payor's earning potential, he or she is entitled to a share of that potential. This is true even if the recipient's share provides income far beyond the recipient's basic needs.

The logic behind the division of one spouse's earning potential has not always been widely recognized:

[C]ourts do not regularly take into account the career of the wage-earning spouse (the husband in most instances) as the single most valuable asset of the marriage. College degrees, apprenticeship training, skilled trade status, business acumen and career longevity and success are all contributors to the marketability and long term solvency of the husband. If this asset

is factored out of the property decision, the wife is often left in a position where she is required to utilize her property distribution as a source on ongoing support. The husband, however, can continue to utilize his career for his further advancement and to live on the wages it generates. To the extent that a wife has postponed her own career in order to provide a home and family for her spouse while he develops his career, she is further denied an equitable share of the very asset she has helped create. Women contribute to the overall value of the marital estate as partners in a joint venture. [*Id.* at 56.]

We agree with this reasoning, and we conclude that general principles of equity require recognition of divorcing parties' status as former partners in a "joint venture." See **Hanaway v Hanaway**, 208 Mich App 278, 293-294; 527 NW2d 792 (1995).

In this case, the evidence at trial suggested that, during their first year of marriage, the parties lived on a joint income of approximately \$100,000.⁴ Ten years later, they had an annual income of over \$700,000.⁵ While these numbers do not give a complete picture of the parties' very complex financial situation, they do reflect the fact that defendant's earnings increased dramatically during the marriage. The trial court apparently concluded that defendant's earnings were a result of his own efforts, and, therefore, that plaintiff was not entitled to any credit for those earnings, or for the increase in those earnings over the period of the marriage.⁶ As noted above, marriage is a joint venture, as we believe that it was inequitable to ignore the dramatic increase in defendant's earnings when determining the appropriate amount of alimony. Even if there had not been an increase in defendant earnings, the trial court's alimony award should have taken into consideration the parties'

standard of living during their fourteen years of marriage. Here, it appears that the trial court gave little or no weight to these factors. Under these circumstances, we conclude that the trial court erred, and that the alimony award of \$62,400 per year for eight years was inequitable. Thus, we vacate the award of alimony and remand for reconsideration. On remand, the trial court should consider all of the **Parrish** factors, including the parties standard of living during the marriage, defendant's ability to pay alimony, and general principles of equity.

Finally, plaintiff argues that the trial court erred in failing to award her reasonable attorney fees to cover the cost of her litigation. The trial court awarded plaintiff \$10,000 for attorney fees during the pendency of the litigation. The trial court also used the property division to effectively award plaintiff one-half of the \$50,000 she incurred in accounting fees. Plaintiff apparently incurred attorney fees in excess of \$100,000. A trial court may award attorney fees when it is necessary to enable to a party to carry on or defend the action. MCR 3.206(C)(2); **Maake, supra** at 189. We will not reverse the grant or denial of attorney fees absent a manifest abuse of discretion. *Id.*

Here, although plaintiff was awarded a substantial amount of property, she should not have been required to invade principal to pay attorney fees, given defendant's considerable property and earnings, and given the fact that defendant apparently used marital assets to pay his attorney fees.⁷ See **Hanaway, supra** at 299. Under these circumstances, we believe that attorney fees are appropriately considered living expenses. See **Rapaport v Rapaport**, 158 Mich App 741, 752; 405 NW2d 165 (1987), modified on other grounds 429 Mich 876 (1987). Here, because plaintiff has a limited ability to work, her potential income consists primarily of alimony. Factoring in attorney fees of over \$100,000, the trial court's alimony award of \$62,400 per year for

eight years appears to be insufficient to allow plaintiff to meet all of her living expenses. Under these circumstances, the trial court's failure to award attorney fees may have been an abuse of discretion. *Id.* at 752-753. However, because we are already remanding this case to the trial court for reconsideration of the alimony award, we decline to order an award of attorney fees. Instead, we order the trial court to reconsider this issue in light of its alimony award on remand.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan

ENDNOTES

1. The court suggested that plaintiff had the ability to work "in some form or fashion." The court also suggested that plaintiff could "generat[e] some monies for herself or do good or charity for others or do something."
2. Washtenaw County Guideline uses a weighted point scale to calculate the strength of an alimony claim. The point system attempts to quantify some of the **Parrish** factors noted above. The total point score (T) is then used to determine a recommended alimony amount using the following formula: Alimony per year = T/100 x E. E is simply the difference between the payor's gross income and the recipient's gross income divided by two. Thus, where the payor has all the income, E = payor's income/2. An illustration may be helpful. Assume a weighted point score of 50. If the payor has a gross income of \$100,000 per year (50/100 x \$100,000/2 = \$25,000). If all other circumstances remain the same, but the payor has an income of \$200,000, the guideline recommends an award of \$50,000 per year (50/100 x \$200,000/2 = \$50,000).
3. The guideline does not carry the force of law, but is used informally by many courts and attorneys.
4. This figure represents the parties' total income for that year as reported on their joint income tax return



(\$121,000), minus alimony that was apparently being paid to defendant's first wife (\$22,000).

5. Again, this figure is taken from the parties' joint income tax return.
6. The trial court commented briefly on this point: "I just at least want the record to reflect, and [plaintiff] acknowledged it, that p[defendant]

has to himself that individual capacity to make money." Indeed, plaintiff did acknowledge that defendant had a unique ability, and that she could not take credit for his medical skill. However, we do not believe that plaintiff was disclaiming any contribution to defendant's earning ability. In fact, she testified that she played an important part in helping defendant open an eye

clinic. The clinic apparently provided defendant with most of his income.

7. Defendant was apparently able to pay his attorney fees as the action progressed. Because his fees were paid before the judgment of divorce was entered, we conclude that those payments must have come from marital assets.



STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

NANCY M. STANCO,
f/k/a NANCY M. RUNELS,

Plaintiff

v

FRANCIS V. STANCO,

Defendant

Case No. 86-612555 DM
J. William Callahan (P24391)

Julie L. Gatti (P54848)
Attorney for Plaintiff
17735 Jefferson Ave.
St. Clair Shores, MI 48081
(810) 445-1540

Harold R. Goldberg (P24982)
Attorney for Defendant
333 West Fort St., Ste. 1400
Detroit, MI 48226
(313) 962-7977

OPINION AND ORDER re CHILD SUPPORT

At a session of said Court held in
the courthouse, Detroit, Michigan
on June 23, 1998

PRESENT: HONORABLE J. WILLIAM CALLAHAN
Circuit Judge

INTRODUCTION AND RULING

Plaintiff has received child support pursuant to automatic payroll deduction for 50 weeks of child support after the 18th birthday of the parties' son on June 26, 1996. Defendant has requested a refund of all amounts paid since the 18th birthday because the child took up full time employment before his 18th birthday when he could have been attending school. However, the young man did return to high school in the September following his 18th birthday. For the reasons set forth below, it is the decision of this Court that Plaintiff is entitled to child support for all time prior and up to the child's

18th birthday, though he was not attending school, and to child support after the child returned to high school in September, 1996. This second period of support is due, though he failed to attend school on a regular basis for several school months before and after his 18th birthday.

FACTS

The parties were granted a default Judgment of Divorce on December 12, 1986, providing that Defendant pay child support for two minor children until each "attained the age of 18 years or graduate[sic] from high school, whichever occurs later, or until further

order of the Court." Their son, Jason Stanco, was severely injured in an auto accident on August 6, 1995, when he was 17 years old and had not yet begun his senior year in high school. He underwent extensive surgeries and rehabilitation, including skin grafts, amputation of a finger, and daily therapy at first. He suffered emotional turmoil and depression. As a result of these circumstances, Jason did not attend school during the 1995-96 school year, although his surgeon opined that school would be good for him. Instead of attending school, he worked part-time, first at Meijer, then at a restaurant. He resumed school in the 1996-97 school year, after having turned 18



on June 26, 1996. He was graduated in June 1997, just before his 19th birthday. Friend of the Court withheld Defendant's child support payments continuously until Jason graduated. Defendant seeks reimbursement for approximately 50 weeks of child support beyond Jason's 18th birthday, or \$1875.00 at the rate of \$37.50 per week. Referee Nancy H. Donohue, who stated in her Report that Jason testified that he had feared being behind his peers due to the accident, and that he had feared being "targeted" at his new high school because of the disfigurement to his hand, recommended denial of Defendant's motion. The standard of review is de novo.

Plaintiff argues that the applicable statute, MCLA 552.451c, should be tolled for the period of time Jason did not attend school between the ages of 18 and 19-1/2, because he was unable to attend school solely due to his injuries and the resultant factors such as depression, which were not his fault. Plaintiff notes that Jason had not previously been a chronically poor attendee of school, nor an academic failure. Plaintiff's argument appears to be essentially one from fairness and equity. Plaintiff also states that Defendant's claim that Jason could have completed his senior year before his 18th birthday is speculative, and adds that the statute does not require this Court to determine whether the student has applied himself to his fullest potential. Plaintiff argues that there is no evidence that prior to the accident, Jason had not expected to complete high school on schedule. Plaintiff notes that Jason did complete high school and graduate in the 1996-97 year. Plaintiff argues hypothetically that if the accident had occurred before Jason entered the sixth grade, his status as a high school student or graduate would be exactly the same as it actually was, yet there could be no dispute about post-majority child support.

Defendant argues that if Jason was able to work, he was able to attend school, and since he did work, he was in fact able to attend school. Defendant notes that Jason's surgeon thought it would be good for Jason to go back to school. Defendant also argues that under the statute, a

requirement of child support is that the child be attending school full time, and that it would defeat the purpose of the statute to require Defendant to pay for the period of time during which Jason deliberately chose not to attend school.

LAW

The applicable statute provision is MCLA 552.451(c)(3):

(3) A provision contained in a judgment or an order entered under this act before the effective date of this section that provides for the support of a child **after the child reaches 18 years of age, without an agreement of the parties as described in subsection (4), is valid and enforceable to the extent the provision provides support for the child for the time the child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the payee of support or at an institution, but in no case after the child reaches 19 years and 6 months of age.** P.A. 1966, No. 138 § 1c, added by P.A. 1990, No. 237, § 1, Imd. Eff. Oct. 10, 1990 (boldface emphasis supplied).

ANALYSIS

The heart of the statute is simple. It permits post majority payment of child support if, and only if, the child is regularly attending high school on a full time basis.

On August 7, 1995 the day after the accident, it might be argued that the child discontinued regular attendance at high school. But this Court would be hard-pressed to agree with such an argument as long as appropriate medical health professionals indicate that a return to full time attendance is unwise. The legislature could hardly have intended such a result. On the other hand, this Court agrees that full time attendance as indicated in the

statute has been interrupted as soon as competent medical health professionals indicate that full time attendance is appropriate. Here, the regular attendance of high school ceased when a medical health professional stated that return was appropriate. Therefore, this court agrees that such an interruption has occurred. When the child reached his 18th birthday, child support was no longer appropriate until the child resumed full time attendance in September 1996.

There is no argument of any other reasons for discontinuance of attendance other than the medical reasons, which discontinued prior to the child's 18th birthday when the child was advised by the medical doctor that he could return to school. Therefore, this Court's opinion is limited to the issue of whether post-majority child support should continue when school attendance is discontinued for medical reasons only.

ORDER

IT IS HEREBY ORDERED THAT Defendant PAY child support for the period of time beyond the child's 18th birthday during which the child actually attended school, until the child attained the age of 19-1/2 years. Defendant is not liable for child support for the period of time beyond the child's 18th birthday during which the child did not actually attend school, i.e., from the 18th birthday until the day before the child returned to school on a regular full-time basis.

/s/ J. W. Callahan
J. William Callahan
Circuit Court Judge

CERTIFICATION OF SERVICE.

I certify that a copy of the foregoing was served by first class mail on this date upon the parties of record at the addresses of their attorneys of record, or at their own addresses if no attorney appears on the court record as indicated in the court file.

Date: June 23, 1998

/s/ Jan Dejnozka
Jan Dejnozka, law clerk to
Hon. J. W. Callahan



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY JESSUP-MORGAN,

Plaintiff,

v

Case No. 98-70676

Honorable John Feikens

AMERICA ONLINE, INC.,

Defendant.

OPINION AND ORDER

I. BACKGROUND

In June, 1995 Phillip Morgan filed a suit for divorce from Barbara Smith-Morgan (now Barbara Smith) in Oakland County Circuit Court in Michigan. That court granted the divorce in May 1996. Within weeks of the divorce judgment, Terry Jessup (Jessup) (now Terry Jessup-Morgan, plaintiff in this case), married Phillip Morgan.

Jessup and Phillip Morgan began a relationship some time prior to January 1996, while Phillip Morgan and Barbara Smith were still married. On January 11, 1996 Jessup (then an America Online (AOL) member) used her AOL account to post publicly on the Internet a message meant to harass and injure Barbara Smith. Jessup posted the message under the "screen name" (*i.e.*, alias) of "Barbeedol." The message read as follows:

Subject: ***** CALL ME *****
From: barbeedol@aol.com
(Barbeedol)
Date: 11 Jan 1996 15:01:36 -0500
Message-ID:
<4d3qb0\$bb7@newsbf02.news.aol.com.>

Call me I'm single, lonely, horny and would love to have either phone sex or a [sic] in person sexual relationship

My name is Barbara and I'm a single white female looking for just about any kind of sex I can have with someone other than myself . . .

If you can help, call me at (810) 977-9476

The listed telephone number was the phone number of Barbara Smith's parents' home, with whom Barbara Smith and her two children were residing pending resolution of the divorce suit. Jessup posted the message in an Internet usenet newsgroup entitled "alt.amazon-women.admirers," a public electronic bulletin board containing messages accessible to, and read by, a potential 40 million persons worldwide.

As intended by Jessup, posting this message resulted in persons Barbara Smith did not know calling her parents' home to request sexual liaisons with "Barbara." This gravely disturbed and distressed Barbara Smith and her parents. From the nature of the calls, and from the information callers supplied about how they obtained her parents' home phone number, Barbara Smith concluded that she was the intended target of the person(s) who posted a message on the Internet. Barbara Smith enlisted the aid of her brother, Kenton Smith, an experienced interactive computer services and Internet user. Kenton Smith was himself an AOL member at

that time. He used a computer "search engine" to locate the posting of the offensive message on the Internet. He deduced from the posting's screen name and the "Message-ID" line that it was posted by another AOL member.

On January 12, 1996 Kenton Smith sent an e-mail message to AOL describing the posting and the calls to his parents' home. He asked AOL for information as to the identity of the person who posted the message. AOL reviewed Kenton Smith's complaint and the "Barbeedol" message, and determined that the posting originated from Jessup's AOL account, which constituted an egregious breach of the AOL Member Agreement signed by Jessup. AOL, therefore, terminated its contract with Jessup on February 2, 1996, and closed her AOL account. AOL's records list the grounds for this termination as "excessive USENET abuse." The same day, AOL sent Kenton Smith two messages. The first message explained that, for confidentiality reasons, AOL could not disclose information about actions it took against other AOL members. The second message explained that as a matter of AOL policy, information identifying the AOL member who posted the offensive message could only be released in response to a subpoena.

On February 16, 1996 Barbara Smith's divorce attorney, Kathleen M.



Dilger, served AOL with a civil subpoena for information which would identify the AOL member who authored the injurious message. On February 23, 1996, in compliance with the subpoena, AOL sent to Dilger a two-page summary containing basic identity information on the AOL account from which the "Barbeedol" message originated. The summary revealed that Jessup was the holder of the account.

Terry Jessup-Morgan now brings suit against AOL, claiming the AOL's compliance with the subpoena was unlawful, tortuous, and a breach of contract. Specifically, Jessup alleges (1) that AOL's release of stored electronic information violated the Electronic Communication Privacy Act, 18 U.S.C. § 2707; (2) that AOL breached its contract with her, and its implied and express warranties; (3) that AOL's release of the information was negligent; (4) that AOL engaged in fraud and misrepresentation in its contract with her; (5) that AOL invaded her privacy and disclosed private facts about her; (6) that AOL violated the Michigan Consumer Protection Act; and (7) that AOL violated the Michigan Pricing and Advertising of Consumer Items Act. Jessup does not deny that she perpetrated the offense against Barbara Smith (by posting the fraudulent Internet message). However, she complains that AOL's disclosure that she committed the offense affected her child custody hearings, "her future husband's [Phillip Morgan's] divorce hearing, and other personal matters." Jessup also complains that AOL's disclosure affected her "reputation in the community . . . and her reputation among her friends."

She requests various damages in excess of \$47 million.

Defendant AOL moves that I (1) grant AOL judgment on the pleadings pursuant to **FED R CIV P 12(c)** on Jessup's claim that AOL violated the Electronic Communication Privacy Act; (2) grant AOL summary judgment on Jessup's breach of contract and implied and express warranties claim; (3) grant AOL judgment on the pleadings on Jessup's negligence claim; (4) dismiss Jessup's fraud and

misrepresentation claim pursuant to **FED R CIV P 9(b)**; (5) grant AOL judgment on the pleadings or summary judgment on Jessup's invasion of privacy/disclosure of private facts claim; (6) dismiss Jessup's Michigan Consumer Protection Act claim; and (7) dismiss Jessup's Michigan Pricing and Advertising of Consumer Items Act claim.

II. JURISDICTION

Jessup's claim raises a federal question issue under 18 U.S.C. § 2707. Thus, I have federal question jurisdiction pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

III. AOL MEMBER AGREEMENT

To obtain her AOL service, Jessup executed a Member Agreement (Agreement) with AOL. The Agreement is governed by the AOL Terms of Service (TOS) and the AOL Rules of the Road (ROR). The TOS provides for AOL or Member termination of their contract at any time. Terms of Service, §9. The TOS provides that it is governed by the laws of the Commonwealth of Virginia, and by executing the Agreement Jessup and AOL agreed to submit to these laws. Terms of Service, §10.1

The ROR provides that:

AOL Inc. does not disclose to private persons or companies information that identifies a Member's AOL screen name(s) with Member's actual name or other identity information, *unless required to do so by law or legal process served on AOL Inc. AOL Inc. reserves the right to make exceptions to this policy of non-disclosure in exceptional circumstances (such as a suicide threat, or instances of suspected fraud) on a case by case basis and at AOL's sole discretion.*

Rules of the Road, §2.B(iv) (emphasis added).

By executing the Agreement Jessup agreed to use her AOL account only for lawful purposes. The ROR specifically prohibits using AOL services to:

(1) harass, threaten, embarrass, or cause distress, unwanted attention or discomfort upon another member or user of AOL or other person or entity,

(2) post or transmit sexually explicit images or other content which is deemed by AOL Inc. to be offensive,

(3) transmit any unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, ethnically or otherwise objectionable Content, . . .

(5) impersonate any person . . . or communicate under a false name or a name that you are not entitled or authorized to use, . . .

(10) intentionally or unintentionally violate any applicable local, state, national or international law, including but not limited to any regulations having the force of law.

Rules of the Road, §2.C(a).

IV. DISCUSSION

1. Violation of Electronic Communication Privacy Act claim.

The prohibitions of the Electronic Communication Privacy Act (ECPA), 18 U.S.C. §§ 2701 **et seq.**, are inapplicable. The ECPA prohibits disclosure of the contents of an electronic communication to any person or entity (18 U.S.C. § 2702) or to the government (18 U.S.C. § 2703) without first meeting certain restrictions. 18 U.S.C. § 2711 states that the definitions in 18 U.S.C. § 2510 apply to the ECPA's provisions. 18 U.S.C. § 2510 states that

“contents”, when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication,” [not information concerning the identity of the author of the communication]. 18 U.S.C. § 2510(8). The “content” of a communication is not an issue in this case. Disclosure of information identifying an AOL electronic communication account customer is at issue. In 18 U.S.C. § 2503(c)(1)(C) this identifying information is specifically acknowledged as separate from the “content” of electronic communications. The ECPA actually authorizes AOL’s disclosure:

Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service **may** disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to any person other **than a governmental entity**.

18 U.S.C. § 2703(c)(1)(A) (emphasis added) (subsections (a) and (b) do not apply to the AOL disclosure). AOL made the disclosure, not to the public, but to a private individual, Barbara Smith’s attorney, pursuant to a properly executed subpoena. Because the prohibitions of the ECPA do not apply to the AOL disclosure in this case, Jessup’s claim that AOL violated the Electronic communication Privacy Act fails, and AOL is entitled to dismissal of this claim because her failure to state a claim upon which relief can be granted. **Fed R Civ P 12(b)(6)**.

2. Breach of contract and implied and express warranties claim.

Jessup breached her contract with AOL, particularly section 2.C(a), by posting the message which invited third persons to seek sexual liaisons with Barbara Smith. Jessup’s breach of the Agreement prior to any alleged breach of the same contract by AOL bars her claim against AOL for breach of contract and implied and express warranties. Under Virginia law, when the initial breach is substantial, the party who breaches a contract first is

barred from maintaining an action against another contracting party for its subsequent breach of, or failure to perform under, the contract. **Horton v Horton** 487 S.E.2d 200, 203-04 (Va. 1997); **Federal Ins Co v Starr Elec Co**, 242 Va. 459, 467-68, 410 SE2d 684, 688-89 (Va 1991). Here, Jessup’s impersonation of Barbara Smith, and her posting of the message to harass and cause distress to Barbara, is certainly as substantial and material breach of the Agreement.

AOL did not breach the Agreement. According to the terms of the Agreement, AOL, at its discretion, could terminate a Member’s account because the Member committed the acts Jessup did. AOL did so in this instance. In providing identifying information to Barbara Smith’s lawyer pursuant to a civil subpoena, AOL complied with applicable law. The Agreement clearly provides for this compliance with proper legal process.

Jessup committed an egregious and intentionally harmful (to a third party) breach of the contract, and AOL acted responsibly in terminating her account and in providing information identifying her as the account holder that posted the harassing message on the Internet. Jessup provides no evidence that AOL breached any implied or express warranties. AOL is thus entitled to summary judgment on Jessup’s breach of contract and implied and express warranties claim.

3. Negligence claim.

Under Virginia law, in a contract case a tort claim must rest on a breach of duty distinct from the breach of contract. **Foreign Mission Bd of the S Baptist Convention v Wade**, 242 Va 234, 240-41 409 SE2d 14, 148 (Va 1991). The duty Jessup claims AOL breached – not to release information identifying her as the author of the injurious message – is a contractual one. Therefore, Jessup’s negligence claim must fail, and AOL is entitled to dismissal of this claim because she failed to state a claim upon which relief can be granted. **Fed R Civ P 12(b)(6)**.

4. Fraud, misrepresentation claim.

AOL is entitled to dismissal of this claim because Jessup failed to plead fraud and misrepresentation with

particularity, as required by **Fed R Civ P 9(b)**. “[A] plaintiff must at a minimum allege the time, place and contents of the misrepresentation(s) upon which he relied.” **Bender v Southland Corp**, 749 F2d 1205, 1216 (6th Cir 1984). Jessup did not meet these minimum requirements in stating her fraud/misrepresentation claim against AOL.

5. Invasion of privacy and disclosure of private facts claim.

Virginia law does not recognize the tort of invasion of privacy as alleged by Jessup (whether intrusion upon seclusion or disclosure of private facts). **Brown v American Broad Co, Inc**, 704 F2d 1296, 1302-03 (4th Cir 1983). Jessup’s claim of invasion of privacy and disclosure of private facts fails, and AOL is entitled to dismissal of this claim because she failed to state a claim upon which relief can be granted. **Fed R Civ P 12(b)(6)**.

6. Violation of Michigan Consumer Protection Act claim, and

7. Violation of Michigan Pricing and Advertising of Consumer Items Act claim.

Because Michigan law is inapplicable, Jessup’s claims under the Michigan Consumer Protection Act and the Michigan Pricing and Advertising of Consumer Items Act are moot. AOL is entitled to dismissal of these claims because of Jessup’s failure to state a claim upon which relief can be granted. **Fed R Civ P 12(b)(6)**.

CONCLUSION

For the reasons stated herein all of the above cited AOL motions are hereby GRANTED.

IT IS SO ORDERED.

/s/ Jon Feikens
Jon Feikens
United State District Judge

Dated: July 23, 1998

ENDNOTE

1. Because of federal question and supplemental jurisdiction, I apply either federal law or Virginia law as appropriate. Under the terms of the Agreement, Jessup’s Michigan state law claims are moot.



STATE OF MICHIGAN
COURT OF APPEALS

MICHELE AURORA MICHALSKI,
Plaintiff-Appellant,

v

RONALD JOSEPH MICHALSKI,
Defendant-Appellee.

UNPUBLISHED
August 25, 1998

No. 200207
Tuscola Circuit Court
LC No. 96-014988-DO

Before: Doctoroff, P.J. and Reilly and G.S. Allen, Jr.*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a consent judgment of divorce. In particular, plaintiff challenges the trial court's order denying her motion to set aside the consent judgment of divorce. We affirm.

On August 19, 1996, the date set for the pretrial conference in this case, plaintiff's counsel negotiated a divorce settlement with defendant. The terms of the settlement were read into the record in open court. Plaintiff testified that the terms were correct. The consent judgment of divorce was entered on October 11, 1996. Subsequently, plaintiff moved to set aside the consent judgment of divorce, asserting that "she did not knowingly and freely and without duress approve the consent judgment." At the hearing on plaintiff's motion, plaintiff testified that she was told by a staff member at her attorney's office that she did not need to attend the August 19, 1996, pretrial settlement conference. Thirty minutes after she arrived at work that morning, plaintiff received a telephone call from defendant informing her that she needed to be at the conference. After rushing to the courthouse, and arriving late, plaintiff was rushed to the witness stand where she agreed to the terms of the consent judgment negotiated by her attorney without having any

chance to contemplate those terms. In denying plaintiff's motion to set aside the consent judgment of divorce, the trial court explained that it would not set aside the agreed upon settlement because there was no showing of fraud, mistake, coercion, duress, or undue influence.

On appeal, plaintiff first argues that the trial court erred in refusing to set aside the consent judgment of divorce on the ground that plaintiff did not knowingly, consensually, and freely enter into the terms of the consent judgment. We disagree. A trial court's decision on a motion to set aside a judgment should not be disturbed on appeal absent a clear showing of an abuse of discretion. **Kowatch v Kowatch**, 179 Mich App 163, 167; 445 NW2d 808 (1989). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. **Dacon v Transue**, 441 Mich 315, 329; 490 NW2d 369 (1992).

For a consent judgment to become effective, the parties must in fact consent. **Howard v Howard**, 134 Mich App 391, 397; 352 NW2d 280 (1984). "Settlements, duly arrived at by the

parties and placed on the record in open court in the presence of counsel, are entitled to a high degree of finality." **Tinkle v Tinkle**, 106 Mich App 423, 428; 308 NW2d 241 (1981). Thus, as a general rule, in the absence of fraud, duress or mutual mistake, courts are bound by property settlements reached through negotiations and agreement by the parties to a divorce action. **Keyser v Keyser**, 182 Mich App 268, 269-270; 451 NW2d 587 (1990); **Calo v Calo**, 143 Mich App 749, 753; 373 NW2d 207 (1985); **Howard, supra**, at 396. However, when a party to a consent judgment argues that his consent was achieved through duress or coercion practiced by his own attorney, the judgment will not be set aside absent a showing that the other party participated in the duress or coercion. **Grand Rapids Growers, Inc v Old Kent Bank & Trust Co**, 99 Mich App 128, 129-130; 297 NW2d 633 (1980); see also **Howard, supra** at 397. Moreover, when a party argues that his consent, while actually given, was influenced by circumstances of severe stress, the standard to be applied is that of mental capacity to contract. **Howard, supra** at 396. The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature and

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.



effect of the act in which he is engaged. To avoid a contract, it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that he had no reasonable perception of the nature or terms of the contract. *Id.*, citing **Star Realty, Inc v Bower**, 17 Mich App 248, 250; 169 NW2d 194 (1969). Finally, a party's apparent consent to a divorce settlement is not valid when it is apparent from the record that the party was not aware of all of the provisions of the settlement. See **Howard, supra** at 397-400.

In this case, plaintiff argues that her expression of "consent" to the consent judgment in open court did not, in fact, signify actual consent to the terms of the settlement because (1) plaintiff did not know the extent of the marital assets or of her husband's income,¹ (2) as a result of her "mad dash" to the courtroom before testifying, plaintiff was upset, unnerved, and had no time to collect herself when she gave her "consent," (3) immediately before testifying, and after plaintiff informed her attorney that she was not in agreement with the settlement, plaintiff's attorney advised her that "she had better be careful because the trial judge was upset with her because

her tardiness had caused the court to be running late and if she pushed too hard that morning she could get nothing at all," and (4) plaintiff was not advised by her attorney or the trial court that she could walk away from the pretrial hearing and proceed to trial. These asserted grounds were not sufficient to merit setting aside the judgment of divorce.² First, plaintiff's alleged lack of knowledge regarding the size of the marital estate and her husband's income does not demonstrate any lack of awareness regarding the agreed upon terms of the settlement. Cf. **Howard, supra** at 399-400. Second, plaintiff's unnerved state of mind during the pretrial hearing did not rise to the level necessary to invalidate a settlement for lack of capacity to contract. See **Howard, supra** at 396. Third, there was no showing that defendant participated in the coercive nature of the advice plaintiff received from her attorney. See **Grand Rapids Growers, supra** at 130. Finally, the fact that plaintiff was not specifically advised by her attorney or by the court that she did not have to consent, does not demonstrate that her expression of consent was something other than an actual expression of consent. For these reasons, we hold that the trial court did not abuse its discretion when it refused to set aside

the parties' consent judgment of divorce.

Plaintiff next argues that no consent judgment of divorce can be effectively entered into without an express admonition from the bench that instead of accepting the terms of the settlement, the parties may elect to proceed to trial where they may get the same amount, more, less or nothing. We are not persuaded by the legal authority offered by plaintiff that such a requirement is currently in effect, and we decline this opportunity to bring such a requirement into being.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Glenn S. Allen, Jr.

ENDNOTES

1. Plaintiff admits in her brief on appeal that she knew that no discovery had taken place and that her husband had lied to her in the past regarding his acquisition of certain assets.
2. Because it is axiomatic that plaintiff lacks standing to assert defendant's rights in this action, we need not address plaintiff's argument that defendant too failed to effectively consent to the settlement agreement.



STATE OF MICHIGAN
COURT OF APPEALS

MICHELE AURORA MICHALSKI,

Plaintiff-Appellant,

v

RONALD JOSEPH MICHALSKI,

Defendant-Appellee.

UNPUBLISHED

No. 200207
Tuscola County
LC No. 96-014988

Before: Doctoroff, P.J. and Reilly and G.S. Allen, Jr.*, JJ.

DOCTOROFF, P.J. (DISSENTING)

I respectfully dissent.

Although plaintiff stated on the record that she understood and accepted the consent judgment, the circumstances surrounding plaintiff's appearance at the pretrial conference support her contention that she did not knowingly and voluntarily agree to the terms of the settlement. Nevertheless, because it appears that plaintiff's own counsel coerced her into accepting the judgment, and there was no evidence that defendant participated in the coercion, the decisions of previous panels of this court in **Howard v Howard** 134 Mich App 391, 397; 352 NW2d 280 (1984), and **Grand Rapids Growers, Inc v Old Kent Bank & Trust Co**, 99 Mich App 128, 130; 297 NW2d 633 (1980) support the majority's opinion affirming the trial court's refusal to set aside the consent judgment of divorce. However, because these decisions were issued before November 1, 1990, they are not binding precedent under MCR 7.215(H)(1), and I would decline to follow them. Under the circumstances

of this case, in the interest of fairness, I would reverse the trial court's denial of plaintiff's motion to set aside the consent judgment of divorce.

Plaintiff's attorney's office initially informed plaintiff that she did not have to attend the pretrial conference scheduled for August 19, 1996 because a settlement had not been reached. On August 19, plaintiff received a telephone call at her place of work from defendant telling her that "everybody is upset that you're not here." Plaintiff rushed to court, where her attorney informed her that he had been working on a settlement. When plaintiff told her attorney that she did not agree with the settlement, her attorney replied that she had better be very careful because the judge was upset that she was late, and that, if she pushed too hard, she might not get anything at all. She was never informed that she could reject the settlement and proceed to trial. On these facts, I do not believe that plaintiff knowingly agreed to the terms of the consent judgment.

During a stressful and confusing time such as a divorce proceeding, particularly at the stage when a final settlement is reached and cool heads should prevail, a party must be confident that her own attorney will protect her interests and that the court will reach its decisions in a fair and thoughtful manner. Here, the complaint was filed fewer than ninety days before the pretrial conference, and no discovery had taken place. Plaintiff learned for the first time that a settlement had been reached minutes before she was asked to testify on the record. She had only a few minutes to consider the terms of the settlement, and did not have any real opportunity to consult with her attorney, who apparently pressured her into accepting the agreement on the spot. While I am sensitive to the need for efficiency in the courts, it cannot be achieved at the expense of fundamental fairness. This Court must not condone the sort of treatment plaintiff experienced in this case. Therefore, I would reverse.

/s/ Martin M. Doctoroff

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.



STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KAYTIE SOURS, SEAN SOURS,
AMANDA SOURS, STEPHEN SOURS, CHANCE
SOURS and SAMMUAL SOURS, Minors.

FAMILY INDEPENDENCE AGENCY

Petitioner-Appellee,

v

JAMES EDWARD SOURS and
ZELMA LOUISE DECAIRE,

Respondent-Appellant.

UNPUBLISHED
August 25, 1998

No. 208203
Hillsdale Juvenile Court
LC No. 96-031419 NA

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Respondent appeals as of right a trial court order terminating her parental rights to her six minor children pursuant to MCL 712A.19b(3)(b)(i) and (ii), (3)(c)(i) and (ii); MSA 27.3178 (598.19b)(3)(b)(i) and (ii), (3)(c)(i) and (ii). We reverse and remand.

A trial court's termination order must be supported by clear and convincing evidence that at least one of the statutory grounds for termination exists. MCR 5.974(F)(3). We review the trial court's findings in support of a termination order for clear error. MCR 5.974(I). Clear error exists when, although evidence exists to support a finding, we are left with the definite and firm conviction that a mistake has been made. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

This tragic series of events began with a mother responding appropriately to physical abuse from her husband. The only evidence remotely supporting involvement of the Family Independence Agency (FIA) in this case was the evidence regarding the incident leading up to this proceeding, that, while attempting to strike his wife, the

father accidentally hit Sean causing his black eye. The accidental and solitary nature of this event was uncontradicted. The mother filed criminal charges. Thereafter, she was submerged into a whirlpool of events that culminated in the loss of her six children. The children were initially removed because she allowed her husband to return to the marital home, failed to appear and testify against him in court and moved the family to a different city.

The testimony offered at trial established that the father had struck the mother on several prior occasions. The evidence however does not support the conclusion that the mother failed to protect the children. Further, no evidence whatsoever supports a conclusion that the children were in jeopardy when the mother ultimately allowed the father to come back into the home, nor was there any evidence that the mother ultimately allowed the father to come back into the home, nor was there any evidence that the mother fled because she knew the FIA was planning to take her children. The mother did go to court and to the FIA

office as requested by the worker, but arrived only to find that the hearing had been canceled. It was at that point in time that the children, the mother and father moved to Coldwater where the children were enrolled in school. When the mother returned to Hillsdale County in November, 1996 and enrolled her children in school, the FIA took her children from her and she was incarcerated for 20 days. The incarceration and the loss of her children is a heavy penalty to pay for failure to appear in court.

Although the trial judge did not specifically cite the various probate code sections that are applicable in the matter before us, we do so in order to address the evidence that was brought before the court. Sections 19b(3)(b)(i) and (ii) authorize termination where a parent's act or failure to take possible preventative measures caused physical injury or abuse and the court finds a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parents' home. The record contains no evidence whatsoever that the mother or father ever physically injured or



abused any of the children. Witness testimony established that the father and mother had been complete and loving parents, and never demonstrated any sign of physical abuse or otherwise placed their children in any form of jeopardy, except for the accidental injury previously mentioned. Because the prosecutor did not present any evidence to the contrary, the court lacked clear and convincing evidence that it was likely that the children would ever suffer any injury or abuse in the foreseeable future at either parent's hands. Sections 19b(3)(b)(i) and (ii).

Section 19b(3)(c)(i) authorizes termination when the conditions that led to an adjudication in a prior child protective proceeding continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child. With respect to the mother, the condition which led to the adjudication was her alleged failure to protect the children from their father and her involvement with him after the original incident. However, the evidence showed that at the time of the termination hearing, the mother was no longer involved with the father and that both parents had moved on to other relationships. In fact, the father had remarried and was incarcerated at the time. The prosecutor offered evidence that the mother is now engaged to a man who assaulted her at one time. However, un rebutted testimony regarding this incident clarified that her fiancé had pulled her hair when she intervened in an argument between he and his stepfather, and that she had given a false statement to police because she was angry at her fiancé. This was an isolated incident deriving from the original event – a fight between her fiancé and his stepfather. The prosecutor produced no evidence that her boyfriend has a tendency to abuse anyone, including children.

With regard to Section 19b(3)(c)(ii), this provision authorizes termination when

[o]ther conditions exist that cause the child to come within the jurisdiction of the court, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice, a hearing, and been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

With respect to the mother, she was ordered to seek employment, to participate in programs and to find housing, and to provide proof that she had done so. She accomplished each and every one of these tasks, including proving that she had applied for numerous jobs on a regular basis. In his findings, the trial judge alluded to the fact that the mother failed to make a commitment for employment. He failed to consider the only evidence in that regard, which established that she tried to get a job seven or eight times every week and finally acquired one immediately prior to this hearing. Although her parenting course attendance may have been inconsistent or tardy, she attended all substantive sessions and completed the course, and on many occasions participated quite actively. The only session she missed was the good-bye session at the conclusion of the program. She also attended on a weekly basis since September, 1996 the required domestic harmony course for battered wives, completing the course prior to the hearing. For a short period of time, after her newborn was taken from her, she became extremely depressed and turned to alcohol for relief. Her other five children had also already been removed. However, after this short period of time, and absent the necessity of any FIA, court or counselor recommendation, the mother solved the problem on her own. There is no suggestion in the record that she

ever had a previous or subsequent alcohol problem, and there were no problem conditions about which she received recommendations that she failed to rectify by the time of the hearing.

With respect to the father, he continued to be incarcerated at the time of the hearing and there was some evidence that he continued to be incarcerated beyond even that time. His present status is unknown.

With regard to the newborn child, Sammuah, we would note that the trial court refers to the baby as being severely malnourished and a failure to thrive child. However, the record reveals that the physician never testified at this hearing, and therefore there was no opportunity to cross-examine his conclusions, which were presented by the way of unobjected to hearsay testimony. This child, along with the mother's other babies, was premature and very small. The mother testified that all her babies were like that for a variety of reasons, including the genetic factor that she and her husband are both very small. In addition, the children did in fact increase their weight as they got older. No live testimony suggested that any of the children were at risk healthwise.

Further, it became apparent in reviewing the record that there was a personality conflict between the mother and the FIA workers involved in this case. There is no question that the mother probably had what one might consider an "attitude" problem in her initial dealings with both the FIA workers. However, her hostility is understandable in light of her treatment in this situation. Here, she follows the recommended course of action for a battered woman and presses charges and as a result therefrom, a series of events which can only be characterized as a mother's nightmare led to the loss of her six children. FIA worker Yoder's testimony amply demonstrates that there was no objectivity left by August, 1996 when he recommended termination. From that time on, he

never really considered the reunification of the parents with the children.¹ He did absolutely no investigation of the mother's present situation, including her relationship with her fiancé. Her fiancé has attended counseling classes and unrebutted testimony indicated that he was a loving and supportive mate for the mother.

Even the court in rendering its opinion recognized that this personality conflict existed between Mr. Yoder and the mother. The judge, in his findings, recognized this hostility:

The mother is dealing with the department, and the Court will make several notes. She felt nothing she did was right. Up until September, nothing she did was right. She was told to go to these things. What can we do to help you. What can be done. What can Mr. Yoder do. Yes, he's a demanding task master. We're not dealing with school here. We're not dealing with car payments. We're not dealing with a creditor. We're not dealing with a probation officer. We're dealing with somebody who had five, now six children under his care and he's gotta try to get a ship back on course. A ship that has gone on this trip for ten years. That's what he has to do. And, if he didn't enforce those orders, I would've come after him. These order, and they were made well our standard orders. These were critical to Ms. Decaire to get her life back in order. They weren't there for my health. They weren't there because George was bored. They weren't there to make your life miserable. They were there because we have six children that I do not want, and I explained to Ms. Decaire in the first hearing and the second hearing. I do not want them in foster care. I

want them out. Cooperate. There was some talk in some of the testimony that she needed counseling. There's no question about it. It was all available. There's no question that the children need to be a parent – or need to have a parent. There's no doubt in this Court's mind. But, they've got to have a decent parent. A parent that is stable. A parent that makes a commitment. She has had numerous support services over this period of time, up until she left. Did they require her to make effort. Did they require her to provide some transportation. They require her to do this that and the other thing, yes. It was not a complete hand out, but, there was support there for her. She had to make the initial step. There'd been comments made, well how can you get a job if you don't have a car. How can you get a car if you don't have a job. In this Court's eyes, both those problems are minuscule, are very minor compared to raising six children. Six children are much more difficult than trying to maintain a forty hour a week job. Or maintain a car. Tryin' to feed, clothe, educate, counsel, support, take care of on a twenty-four hour a day basis, is far more difficult than maintaining a forty hour a week job. Than attempting to find housing. Than attempting to find a car. Than attempting to go to counseling, once a week. Go to s-batters group, once a week. Go to visitation, once a week. It's a twenty-four hour a day commitment.

In its conclusions, the court found, "Therefore there's been a long term neglect and abuse, of the minor children, and has continued for ten years. And, that there's been no

showing of the possibility it (sic) stopping."² The trial judge made some findings relative to the children's insecurity and their constant need to be reassured. There is no question that the abrupt removal of the children by the FIA after a year of their attending school on a regular basis and without any showing of their being at risk or in jeopardy most certainly could have led to such insecurity.

The trial court did clearly err in finding that the statutory grounds for termination in this case were established by clear and convincing evidence. The record does not support such a finding. "The fundamental liberty interest of natural parents in the care, custody, and management of their child[ren] does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the state." **Santosky v Kramer**, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599 (1982).

We reverse and remand for the entry of an order of disposition placing the children in the custody of their natural mother. This shall be accomplished with due diligence and every effort shall be made to minimize the emotional impact of the children's transfer employing all necessary resources of the court.

/s/ William B. Murphy
/s/ Hilda R. Gage

ENDNOTES

1. His attitude contravenes the clear and unmistakable intent of the legislature to affirm the ancient policy of law and society of keeping children with their natural parents and, if a child is temporarily removed from such custody, to return it to its family whenever feasible. **In re Mathers**, 371 Mich 516, 534; 124 NW2d 878 (1963).
2. We note that the ten years is an inappropriate calculation in light of the fact that the oldest minor child was barely nine at the time of the hearing.



STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KAYTIE SOURS, SEAN SOURS,
AMANDA SOURS, STEPHEN SOURS, CHANCE
SOURS and SAMMUAL SOURS, Minors.

FAMILY INDEPENDENCE AGENCY

Petitioner-Appellee,

v

JAMES EDWARD SOURS and
ZELMA LOUISE DECAIRE,

Respondents-Appellants.

UNPUBLISHED

No. 208203
Hillsdale Juvenile Court
LC No. 96-031419 NA

Before: Murphy, P.J., and Gribbs and Gage, JJ.

GRIBBS, J. (dissenting).

I respectfully dissent.

After reviewing the record, I conclude that the juvenile court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. **In re Hall-Smith**, 222 Mich App 470,472; 564 NW2d 156 (1997); **In re Conley**, 216 Mich App 41, 42; 549 NW2d 353 (1996). As the trial court noted, the court first became involved in this case because of a "classic" situation involving an alcoholic, abusive father and a submissive mother. Petitioner became involved after respondent-father James Sours was arrested. Sours had attempted to hit respondent-mother Zellma DeCaire, and one of the children was injured when the child tried to intervene.

Sours, an admitted alcoholic, had a record of at least three incidents of violence against respondent-mother Zellma DeCaire along with other unrelated incidents of assaultive behavior and stalking. After DeCaire allowed Sours to move back into the house, a petition was filed seeking removal of the children. However, when

authorities went to remove the children, the family had fled.

The children were finally found and removed from the home approximately one year later. When the children were removed, protective services workers asked DeCaire to pack a bag for each child. DeCaire packed inadequate clothing for the weather and age-inappropriate food treats for the children, such as a Tootsie pop sucker to the eight-month old child and hard candy for the two-year old.

After being removed from the home, one of the children reported that Sours was "mean when he drinks beer and meaner when he drinks whiskey" and that she was always afraid of him. The child talked about times when Sours hit DeCaire "with his fists." The child also recollected one incident in which Sours "picked [her brother] up by his hair." One of the younger children was diagnosed by a physician as severely malnourished and as a "failure to thrive" child.

Both respondents were ordered to participate in a number of support

programs, including substance abuse, parenting, and batterers'/domestic violence groups. Neither parent consistently or successfully participated in any of the required services. DeCaire was ordered to seek employment and housing and to provide proof that she had done so. DeCaire never provided proof of either a job or housing search and, at the time of the termination hearing, had still not found employment despite an extremely favorable local job market.

Meanwhile, after hiding her pregnancy from her relatives and the authorities, DeCaire gave birth to a high-risk, premature baby. Before DeCaire's release from the hospital, she was provided an apnea monitor for the newborn child, which was to be used at all times, along with medication for the child. After leaving the hospital, DeCaire failed to keep a scheduled doctor's appointment or accept the services of a home care nurse.

DeCaire did not report the birth of her child to protective services. When protective services workers visited DeCaire's home, she hid the baby, who

suffered from breathing and heart problems, for fifteen minutes under a heavy quilt. The child was not wearing the apnea monitor and had not been given his medication for several days. The child was removed from the home by the protective services workers.

For the next four months, DeCaire did not visit any of the children or contact the authorities. She resurfaced when she was involved in a domestic dispute with her new boyfriend. Just as she had done during the relationship with Sours, she made excuses for the boyfriend's violent behavior and insisted that the children were not at risk.

Sours was in jail during this time, where he remained at the time of the

termination hearing. However, he had done nothing to comply with the court's orders prior to his imprisonment. He did not visit regularly when he was able to do so and provided no support for the children.

As the trial court stated in making its decision, there is ample evidence here that the children have been victim to long-term neglect and abuse. Both parents made numerous promises to change and were provided support services to aid them. Neither parent cooperated with the court's orders or showed evidence of a mature commitment to the children. Further, since being removed from the home, all the children are again healthy and have made educational and social advancements. One of the older children has

indicated his wish to be adopted by a foster parent.

The trial court did not clearly err in finding that the statutory grounds for termination in this case were established by clear and convincing evidence, and respondents have failed to rebut the mandatory presumption that termination is clearly in the best interests of the children. **In re Miller**, 433 Mich 331, 337; 445 NW2d 161 (1989); **In re Hamlet (After Remand)** 225 Mich App 505, 515; 571 NW2d 750 (1998); **In re Hall-Smith, supra** at 471-474.

I would affirm.

/s/ Roman S. Gibbs



STATE OF MICHIGAN
COURT OF APPEALS

KELLY REILLY FRANK,
Plaintiff-Appellee,

v

JOHN R. FRANK,
Defendant-Appellant.

UNPUBLISHED
September 4, 1998

No. 207971
Oakland Circuit Court
LC No. 95-504595 DM

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm in part and remand for further proceedings with regard to parenting time.

Defendant first argues that the trial court failed to make a finding regarding the existence of an established custodial environment, failed to make factual findings on the best interest factors, and failed to make findings regarding parenting time, and that these failures require reversal. Plaintiff frames defendant's argument as a challenge to the great weight of the evidence, which plaintiff contends must fail because defendant did not bring a motion for a new trial before the trial court. We note that it was not necessary for defendant to move for a new trial in order to challenge the trial court's failure to make findings of fact on custody or parenting time issues. No exception need to be taken to a finding or decision in an action tried without a jury. MCR 2.517(A)(7). However, because defendant consented to the award to plaintiff of physical custody of the two children of the marriage and he does not challenge the award on appeal, we hold that a remand for further proceedings on the issue of physical custody is not required. See **Koron v Melendy**, 207 Mich App 188, 192; 523 NW2d 870 (1994) (where parties agree on custody and present the trial court with the agreement, the trial court need not

expressly articulate findings on each best interest factor).

Because defendant's parenting time was disputed and the trial court made no findings on the best interest factors, we remand to the trial court for further proceedings and findings of fact with regard to parenting time. The controlling factor in determining parenting time (formerly called visitation) is the best interests of the children. **Deal v Deal**, 197 Mich App 739, 742; 496 NW2d 403 (1993). Although this Court has reached different conclusions on the degree of specificity required for a trial court's order concerning parenting time, see, e.g., **Snyder v Snyder**, 170 Mich App 801, 806; 429 NW2d 234 (1988) and **Hoffman v Hoffman**, 119 Mich App 79, 83; 326 NW2d 136 (1982),

that issue is not dispositive of this appeal because the trial court made no findings on the statutory best interest factors. In the interest of reaching a prompt and final adjudication of this matter consistent with MCL 722.28; MSA 25.312(8), we direct the trial court on remand to make findings of fact on each best interest factor set forth in MCL 722.23; MSA 25.312(3). The trial court shall also address defendant's argument regarding the existence of an established custodial environment. However, because it appears that circumstances may have changed (e.g., one child may now be old enough

to attend school), the trial court shall consider updated information, including any changes in circumstances since the original custody order, and make a redetermination on parenting time consistent with MCL 722.27a; MSA 25.312(7a). See **Fletcher v Fletcher**, 447 Mich 871, 889; 526 NW2d 889 (1994).

The other two issues raised by defendant warrant no relief. Fault remains one of the relevant factors a trial court is permitted to consider in a property settlement. **Sparks v Sparks**, 440 Mich 141, 158-160; 485 NW2d 893 (1992). We are not persuaded that the trial court in the present case overemphasized fault when dividing the property, or that its dispositional ruling was otherwise inequitable or an abuse of the trial court's discretion. **Id.** at 159; **Draggool v Draggool**, 223 Mich App 415, 429-430; 566 NW2d 642 (1997). Furthermore, the trial court did not abuse its discretion by refusing to award attorney fees to defendant. **Hawkins v Murphy**, 222 Mich App 664, 669; 565 NW2d 674 (1997).

Affirmed in part and remanded for further proceedings. We do not retain jurisdiction. No costs are awarded under MCR 7.219, neither party having prevailed in full.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.



STATE OF MICHIGAN
COURT OF APPEALS

GLORIA WARREN COUGHLIN,

Plaintiff-Appellee,

v

ROBERT DAVID COUGHLIN,

Defendant-Appellant.

UNPUBLISHED
September 11, 1998

No. 207204
Kent Circuit Court
LC No. 96-004122-DM

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce which awarded plaintiff physical custody and both parties joint legal custody of the parties' two minor children. We reverse and remand for further proceedings.

Defendant first contends that the trial court erred because it failed to find whether an established custodial environment existed.

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; MSA 25.312(8), **Fletcher v Fletcher**, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

In this case temporary custody orders had been entered before the judgment of divorce was entered. On April 9, 1996, the trial court entered a stipulated temporary order that the parties had joint legal custody of the children, that plaintiff had "primary physical care, custody and control of the minor children," and that defendant had parenting time with the children at such times as the parties mutually agree. Subsequent temporary orders modified parenting time, but did not address custody. In such a situation, the trial court must first determine whether an established custodial environment existed. **Bowers v Bowers**, 190 Mich App 51, 53; 475 NW2d 394 (1991).

After a one-day trial, the court issued an opinion with the following finding on custody:

The parties are awarded joint legal custody with the physical custody with the Plaintiff. Defendant sought joint physical custody and one overnight Wednesday. The Court finds that joint physical custody and a mid-week overnight are not in the children's best interest. The Friend of the Court evaluator did not take into account Plaintiff's concerns when she made the overnight recommendation at Defendant's request. The children need a stable environment without being bounced back and forth between parents.

The judgment of divorce does not contain any additional findings on custody.

The trial court made a clear error of law because it failed to make a finding regarding whether a custodial environment was established. Although the stipulated temporary order granted plaintiff primary physical custody of the children that order did not, by itself, establish the custodial environment. **Baker v Baker**, 411 Mich 567, 579; 309 NW2d 532 (1981); **Bowers v Bowers**, 198 Mich App 320, 325; 497 NW2d 602 (1993). Accordingly, we hold that the trial court erred because it failed to find whether an established custodial environment existed and we remand

this matter to the trial court to make an appropriate finding.

Defendant also argues that the trial court erred because it failed to make findings on the statutory factors as set forth in MCL 722.23; MSA 25.312(3).

Custody disputes are to be resolved in the child's best interest, as measured by the factors set forth in MCL 722.23; MSA 25.312(3). **Treutle v Treutle**, 197 Mich App 690, 694; 495 NW2d 836 (1992). The trial court must consider and explicitly state its findings and conclusions with regard to each factor. *Id.*; **Schubring v Schubring**, 190 Mich App 468, 470; 476 NW2d 434 (1991). Here, the trial court committed clear legal error because it did not make any findings on the statutory factors regarding the children's best interests as listed in MCL 722.23; MSA 25.312(3).

Accordingly, the trial court committed clear legal error where it first failed to determine whether an established custodial environment existed and where it failed to consider and state its findings and conclusions with regard to each of the statutory best interest factors. Such error cannot be deemed harmless and we remand to the trial court for reevaluation of the issues of custody and parenting time. **Fletcher, supra**, p 889.

Reversed and remanded. Jurisdiction is not retained.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra



STATE OF MICHIGAN
COURT OF APPEALS

AGNES M. BAWOL,
Plaintiff-Appellant,

v

PAUL G. BAWOL,
Defendant-Appellee.

UNPUBLISHED
September 11, 1998

No. 197937
Oakland Circuit Court
LC No. 93-449680 DO

Before: Holbrook, Jr., P.J., and Gribbs and R.J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce entered by the trial court pursuant to an arbitration award. We reverse in part, affirm in part and remand.

Plaintiff filed a complaint for divorce in 1993, and the case was submitted to arbitration in January 1994. In July 1994, three creditors, Robert Mabarak, Michael Moore, and Thomas Nowakowski, filed suit against plaintiff and defendant in Wayne County Circuit Court to collect payment on debts owed to them. Prior to the final judgments in the creditors' case, the arbitrator rendered an award, making each party responsible for one-half of the debts owed to the creditors. Plaintiff petitioned the arbitrator to revise the award to reflect the consent judgments in the creditors' suit. In his second arbitration award, the arbitrator denied plaintiff's request, stating in pertinent part, that he was not required to follow the consent judgments because he was applying a fair and equitable standard in the divorce case, which was different than the standard applied in the creditors' case.

Next, plaintiff petitioned the arbitrator to revise his second award to reflect \$6,500 that was taken to pay defendant's attorney from the proceeds

of the sale of property awarded solely to plaintiff, and \$2,500 that was taken to pay the arbitrator's fee. The arbitrator issued a third award denying plaintiff's petition. Plaintiff subsequently filed a motion in the trial court to modify or vacate that part of the arbitrator's award that was in conflict with the consent judgments entered between plaintiff, defendant and the three creditors. At the motion hearing, plaintiff also raised the issue of the \$6,500 in attorney's fees. The trial court denied plaintiff's motion.

Under MCR 3.602(J) and (K), a "court's power to modify, correct, or vacate an arbitration award . . . is very limited. By narrowing the grounds upon which an arbitration decision may be invaded, the court rules preserve the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution." **Gordon Sel-Way, Inc v Spence Bros, Inc**, 438 Mich 488, 495; 475 NW2d 704 (1991) (citation omitted).

Plaintiff first argues that the trial court erred in refusing to revise the portion of the mediation award mandating that plaintiff and defendant each pay half of the debt owed to Mabarak, Moore and Nowakowski.¹ We agree. MCR 3.602(J)(1)(c) states that

an arbitrator's award shall be vacated if "the arbitrator exceeded his or her powers." We believe that in the case at hand the arbitrator exceeded his powers by refusing to adhere to the consent judgments. It is well established in Michigan jurisprudence that "courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged." **Keyser v Keyser**, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). Accord **Calo v Calo**, 143 Mich App 749, 753-754; 373 NW2d 207 (1985). Although plaintiff and defendant were both named defendants in the creditors' lawsuits, their respective responsibilities for those debts were addressed and disposed of in those judgments.

The September 12, 1995 judgment indicates that both plaintiff and defendant accepted they would be liable to Mabarak for \$15,000 and \$3,237.50, respectively. Furthermore, the consent judgment indicates that plaintiff "shall not be liable for any of the debt of" defendant. The September 14, 1995 consent judgment indicates

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.



that defendant was liable to Moore for \$9,000, and to Nowakowski for \$42,000. This consent judgment also orders that "the case as to Agnes Bawol regarding all plaintiffs shall be dismissed with prejudice." Both judgments were signed by plaintiff's attorney on her behalf, and by defendant himself. There is no evidence that defendant was under stress so severe at the time of signing the judgment. Furthermore, we note that defendant consented to the division of debt after the arbitrator had issued his first award, in which the monies owed these three creditors was divided equally between he and plaintiff. By ignoring the division of debt expressly agreed to by plaintiff and defendant, the arbitrator acted in contravention of controlling principles of law.

Plaintiff also argues that the arbitrator and trial court should have amended the award to reflect that she receive the entire amount of proceeds from the sale of the Greenfield Road property. Because the arbitrator deducted \$6,500 to pay for defendant's

attorney fees and \$2,500 to pay his fees, plaintiff claims that the award should have been modified pursuant to MCR 3.602(K)(1)(a) and (c), on the basis that: (1) there was an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award; and (2) the award was imperfect in a matter of form, not affecting the merits of the controversy. We disagree. The arbitrator specifically responded to plaintiff's assertion that the award should be modified to require defendant to return \$6,500 that was withdrawn from the proceeds of the sale of the Greenfield Road property and half of the \$2,500 taken to pay the arbitrator's fee. Thus, it cannot be said that there was an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award, or, that the award was imperfect in a matter of form, not affecting the merits of the controversy. The arbitrator explicitly intended that plaintiff receive the proceeds from the sale of the property less the amount to pay the

attorney and arbitrator fees. Therefore, we find that the trial court properly refused to modify the arbitration award to reflect the withdrawal of the arbitrator and attorney fees.

Reversed in part and affirmed in part. The portion of the judgment of divorce addressing the Mabarak, Moore, and Nowakowski debts is hereby vacated. We remand for the modification of the judgment of divorce pursuant to the terms of the September 12 and 14, 1995 consent judgments.

/s/ Donald E. Holbrook, Jr.
/s/ Roman S. Gribbs
/s/ Robert J. Danhof

ENDNOTE

1. Although plaintiff does not explicitly state that the arbitrator exceeded his authority by refusing to amend the arbitration award after he learned of the consent judgment, this is the only basis under MCR 3.602 upon which the trial court could have vacated the award. Therefore, we address whether the arbitrator exceeded his authority.



STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL J. CLARK,
Plaintiff-Appellee,

v

LAURA (CLARK) WILSON,
Defendant-Appellant.

UNPUBLISHED
September 8, 1998

No. 208123
Ionia Circuit Court
LC No. 94-016345 DM

Before: Holbrook, Jr., P.J., and Wahls and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right the order dismissing her petition for de novo review of a referee's order changing child custody. We affirm.

The parties were divorced pursuant to a judgment entered January 5, 1996. The judgment provided for joint physical and legal custody of the parties' two minor children. Plaintiff moved for a change of custody, and a referee hearing was held on August 15, 1997. The referee recommended that physical custody be granted solely to plaintiff. A recommended order dated August 15, 1997 (hereinafter the "August 15 order") was signed by the circuit court and mailed to the parties on August 20, 1997. The order stated that it "was subject to de novo review before the Circuit Court Judge by filing [a] Request for De novo Review and scheduling a hearing on same within 21 days of the date" of the order. Defendant's objection to the recommended order and request for a de novo hearing was filed on September 2, 1997. A notice of hearing was prepared by defendant on September 24, 1997 indicating that a hearing on the matter was scheduled for November 14, 1997. Subsequently, plaintiff moved to dismiss the de novo hearing due to defendant's failure to obtain timely review. The court granted plaintiff's

motion, finding that defendant had failed to comply with the requirements for obtaining de novo review set forth in the August 15 order.

Defendant argues that because the scheduling requirement found in the August 15 order is not mentioned in the statutes that deals with de novo review of referee hearings, the circuit court's granting of plaintiff's motion was in error. While it is true that MCL 552.507(5); MSA 25.176(7)(5) does not include such a requirement, this fact is not dispositive given the language of MCR 3.215. MCR 3.215(F)(1) provides that "[t]he judicial hearing must be held within 21 days after the written objection is filed, unless the time is extended by the court for good cause." The hearing in this matter was initially scheduled for November 14, 1997, which is in excess of the 21-day limit. Defendant has failed to establish that the extended time was either sanctioned by the circuit court, or that she had good cause for not satisfying the 21-day requirement. Furthermore, MCR 3.215(E)(3) provides that "[a] party may obtain a judicial hearing" on a referee's disposal of a child custody dispute "by filing...a written objection and **notice of hearing** within 21 days after the referee's recommendation for an order is served on the attorney's for

the parties, or the parties if they are not represented by counsel." (Emphasis added.). The notice of hearing in this matter was dated September 24, 1997, also well in excess of the 21-day time limit.

A statutory rule of practice not in conflict with the Michigan Court Rules is no longer effective once it has been "superseded by rules adopted by the Supreme Court." MCR 1.104. See also **Neal v Oakwood Hosp Corp**, 226 Mich App 701, 722; 575 NW2d 68 (1997). "In determining whether there is a real conflict between a statute and a court rule, both should be read according to their plain meaning." **Id**. Because we find that a conflict does exist between MCL 552.507(5); MSA 25.176(7)(5), the court rule supersedes the statutory provision. **McDougall v Eliuk**, 218 Mich App 501, 506; 554 NW2d 56 (1996). Accordingly, we conclude that the circuit court did not err in dismissing defendant's petition. **Constantini v Constantini**, 171 Mich App 466; 460 NW2d 748 (1988).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Myron H. Wahls
/s/ Mark J. Cavanagh

FAMILY LAW SECTION POLITICAL ACTION COMMITTEE

The Family Law Section of the Michigan State Bar Association began a voluntary Political Action Committee (PAC) in 1997. The PAC is used by the Section to advocate for or against legislation that directly affects family law practitioners. The PAC helps the Section and its lobbyist gain access to legislators involved in family law issues. Contribution to the PAC is a way for you to help the Section influence the legislation that directly affects your law practice as a family lawyer. Your assistance is especially needed in this election year as the Section continues its friendships with the legislators who have helped us in the past and make new friends among the new legislators entering the state senate and house due to term limits. Please help us with a contribution!

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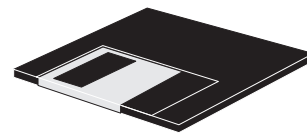
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**GUIDELINES FOR REQUESTING APPEARANCE OF
THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN
AS AMICUS CURIAE**

1. Requests from litigants should be directed to the Amicus Committee, and may be submitted to any Council member.
2. Absent exceptional circumstances, no amicus request will be considered until the Supreme Court has granted leave to appeal.
3. Amicus requests must be in writing, accompanied by:
 - a. A short and concise memorandum setting out the legal issue(s) addressed by the appeal;
 - b. Previously submitted briefs (from both parties) and opinions in the case, together with the Supreme Court order granting leave to appeal, and a list of the filing deadlines;
 - c. A list of significant cases that an amicus brief should consider;
 - d. A brief statement explaining why the Family Law Council should grant the request, with specific reference to the Case Selection Criteria, addressing the impact of the case on the domestic relations bar as a whole, and addressing, insofar as possible, the potential expenditure of Council time and resources.
 - e. For amicus requests prior to the Supreme Court granting leave to appeal, a statement setting out "exceptional circumstances" to justify Family Law Council involvement.
4. The requesting party may be required to meet with the Amicus Committee to discuss Family Law Council involvement. A meeting of the Amicus Committee will be convened for this purpose at which the requesting party should be prepared to discuss the importance of the issue(s) presented; how Council support will benefit the party, the bench and the bar at the present state of litigation; the likelihood of the case eventually progressing to the Supreme Court (for cases on which the Supreme Court has not yet granted leave); and practical considerations, such as the level of commitment of the requesting attorney and his/her client to pursuing the case.
5. The requesting party shall furnish any additional material or information required by the Amicus Committee.

**CASE SELECTION CRITERIA FOR REQUESTS FOR APPEARANCE OF
THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN
AS AMICUS CURIAE**

In passing on a request for appearance as Amicus Curiae, the Amicus Committee of the Family Law Section shall consider the following criteria:

1. Whether the legal issue involved is of substantial interest to the domestic relations bar.
2. Whether the legal issue involves a conflict in case law, or a case of first impression, or a novel or previously unresolved question, or whether there is a need for clarification of a legal issue, the disposition of which is likely to have broad-range effects beyond the particular case.
3. Whether the legal issue involved affects fundamental rights of individuals or involves a constitutional question.
4. Whether the case presents an opportunity to ameliorate or reverse prior judicial decisions or legislative enactments which adversely impact on domestic relations law.
5. Whether the issue or case impacts on the practice of family law from the view of practitioners.
6. Whether the briefs of the parties before the court, or briefs of other amicus curiae, adequately address the legal issues presented.
7. Whether the facts presented are strong enough, and the record sufficiently developed, to support the position to be asserted.
8. Whether the position to be asserted is appropriate in view of the recent pronouncements of the appellate courts and consistent with the Family Law Council's principles and philosophy.
9. Whether there exists sufficient time to request amicus status and properly prepare a brief.
10. Whether sufficient resources are available, given the Council's amicus caseload, to grant the particular request.
11. Whether the Court has requested the submission of briefs.
12. Whether the case should be referred to another Section of the State Bar.



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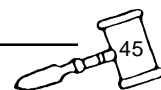
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The Family Law Section Web page address is:

<http://www.icle.org/sections/family/index.htm>

Another interesting site is sponsored by the Washtenaw County Trial Court Demonstration project. There is a sub-page at this site from which the State Court Administrative Office (SCAO) Child Support Guideline Software and Craig Ross' Alimony Guideline Software may be downloaded to your computer. Please note that the formula contained in Craig Ross' Alimony Guideline software has been formally endorsed by the State Bar Family Law Section. The address for that site is:

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