STATE OF MICHIGAN

COURT OF APPEALS

JOEL C. HENRY, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED June 29, 2010
v	No. 292931 Ingham Circuit Court
JOY L. HENRY, a/k/a JOY L. FRANCIS, Defendant/Counterplaintiff-Appellant.	LC No. 06-002156-DZ

JOEL C. HENRY, Plaintiff/Counterdefendant-Appellee,	
v	No. 293966 Ingham Circuit Court
JOY L. HENRY, a/k/a JOY L. FRANCIS, Defendant/Counterplaintiff-Appellant.	LC No. 06-002156-DZ

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

In this postdivorce custody dispute, defendant Joy L. Francis appeals as of right challenging a June 2009 order denying her motion to modify custody, parenting time and child support, and an August 2009 order awarding plaintiff Joel C. Henry sanctions consisting of attorney fees and costs. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Henry and Francis married on May 27, 1995.[1] The marriage produced five children, who currently range from four to 14 years of age. On December 18, 2007, the circuit court entered a judgment of divorce awarding Henry sole legal and physical custody of the children. The judgment afforded Francis "supervised only parenting time until [she] properly addresses her mental health issues," and specified that she "shall have the right to exercise up to two supervised visits per week, each visit being of up to three … hours in duration," together with monitored nightly telephone contact. The circuit court primarily based the limitation of Francis's parenting time on its finding that she is "severely mentally ill as diagnosed by multiple health professionals, but she has no recognition of that fact." Several provisions of the divorce judgment reflect the circuit court's view that Francis suffers from mental illness. For example, the divorce judgment directed that Francis

> shall, within thirty (30) days of the date of this order, place herself under the care of a psychiatrist licensed in the State of Michigan, and, within sixty (60) days of the date of this order with a psychologist licensed in the State of Michigan, as referred by the treating psychiatrist, for ongoing treatment and therapy. [Francis] shall inform both professionals on the very first visit that she is Court ordered to be in treatment with them and that the Court will be forwarding documents to them for review with regard to her care and treatment. Within three . . . days of her first appointment with each provider, [Francis] shall provide written verification to the Friend of the Court of the name, address and telephone number of the psychiatrist and psychologist she will be seeing . . . . [Francis] shall follow all directions of the psychiatrist for therapy and medication. [Francis] shall engage in reality-based psychotherapy with the psychologist to address her diagnosed mental health problems.

The judgment further envisioned that Francis's failure to abide by its terms would result in an automatic reduction of her parenting time to "supervised visits through the Y supervised parenting time program, as space is available[.]" Francis maintains that her current supervised parenting time occurs one hour a month, supplemented by one phone call each week.

Francis has a degree in music from Michigan State University. Before the birth of JH, the parties' oldest child, Francis taught piano. When JH was born, Francis ceased working outside the home. The parties agreed that Francis would home school the children and bear responsibility for all routine household tasks including cooking, cleaning, shopping, and laundry. Henry worked as a hydrologist and earned approximately $70,000 a year.

The events leading to Francis's diagnosis of mental illness commenced around 2005, during Francis's pregnancy with DH, the parties' fifth child. This pregnancy followed two miscarriages, from which Francis had emerged with a degree of postpartum depression. In November 2005, Henry asked friends from the parties' church to visit Francis to offer her

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[1] After the divorce, Francis resumed the use of her maiden name.

support. Several friends who visited became concerned that Henry was psychologically abusing Francis and that Francis felt "oppressed" and "fearful" in the marriage. Francis's parents and brother also believed that Henry was abusing Francis. On November 13, 2005, Francis's brother, an Indiana physician, drove to the Henry home in Haslett and offered to take Francis to a safe house, while friends of Francis's parents waited nearby to facilitate Francis's departure. When Henry arrived and found people at his home preparing to take his wife and children away, he called the police. The police arrived, and Francis ultimately opted to remain in the family home.[2]

During the same period, Henry became concerned that Francis had decided to limit her calorie intake to 850 calories a day. Henry contacted Francis's obstetrician, Dr. Martin Schoenmaker, and voiced concern about Francis's nutrition. In March 2006, as Francis's pregnancy approached term, she began to express an interest in traveling to Scotland to buy a dog. Francis determined that she needed a passport, completed a passport application, and prepared to travel to Houston, where one of her brothers lived, to obtain a passport there. Although she did not execute her plan to go to Houston, Francis went to the Lansing airport and apparently tried to purchase a ticket to Scotland. Henry, who believed Francis might need emergency hospitalization, signed a petition to authorize Francis's submission to a mental health evaluation. On March 30, 2006, Francis, Henry, their children, and two friends presented at Dr. Schoenmaker's office so that he could evaluate her. When Francis refused to see him, Dr. Schoenmaker signed a petition for Francis's involuntary hospitalization. The hospitalization petition described that

> [p]atient is 38 weeks pregnant. She has not gained appropriate weight because of self-imposed calorie restrictions. Her baby is smaller than it should be at this gestational age. She currently wishes to fly to Scotland to get a dog to allow her to exercise more. She has been told it is unsafe to fly.

The police came to the doctor's office and transported Francis to a community mental health center. A psychologist there concluded that Francis suffered from a "delusional disorder." On April 1, 2006, a psychiatrist certified Francis as mentally ill, and after a hearing she was involuntarily committed at St. Lawrence Hospital. While subject to the commitment order, Francis gave birth to DH.

Francis returned home approximately eight days after DH's birth and immediately resumed all of her regular household duties. Although follow-up psychiatric care had been recommended, Francis instead began seeing a psychologist, Dr. Shelly Smithson. On June 25, 2006, Henry advised Francis that he was leaving on a business trip, and Francis replied that in his absence she and the children planned to stay with friends in Jenison. Instead, Francis took the children first to Indiana, and then traveled with them to Idaho. Francis's parents

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[2] The record reveals that Francis's family repeatedly accused Henry and his mother of sexually abusing Francis and JH. Children's Protective Services performed at least four investigations of these allegations, but substantiated none of them.

accompanied her on this journey. When Henry learned that his family had not embarked on a brief visit to Jenison, he contacted the police.

On June 28, 2006, Henry filed a complaint for separate maintenance and requested an ex parte order granting him sole physical and legal custody of the children. That day, the circuit court signed an ex parte order awarding Henry "the immediate sole legal and physical custody, control and education of the minor children … pending conciliation at the Friend of the Court [FOC]." Francis was not served with the ex parte order and did not attend the conciliation conference. An attorney appearing on Francis's behalf submitted multiple affidavits written by Francis's friends, her brother, and Dr. Smithson. The affidavits attested that Francis had not exhibited any behavior that "would lead the [affiants] to believe she was not mentally stable," and that Henry had exerted "controlling behavior over" Francis. The conciliator concluded that Francis did not pose a danger to the children and recommended that she have physical custody.

On July 25, 2006, Francis filed a complaint for divorce. Two days later, the circuit court conducted a hearing attended by counsel for both parties. Francis's counsel represented, "I've had certain difficulties due to the logistics, communicating with her in rapid fashion," but raised no objection to the circuit court's expressed preference that Francis and the children return to Michigan. At the end of the hearing, the circuit court entered an "interim order" awarding Francis "temporary physical custody" of the children if

> she immediately returns to live in the Lansing area with all the children, she continues to take all prescribed medications under the supervision of her treating psychiatrist and follow all of his or her recommendations, she continues to meet with Dr. Smithson on a weekly basis and follows all recommendations made by Dr. Smithson, and she cooperates and participates in a psychological evaluation by Dr. Leonard VanderJagt as set forth below. If [Francis] fails to comply with any one of the above conditions, then temporary physical custody of all the children shall return to [Henry]. . . .

The order concluded that if Francis failed "to return to Lansing with the minor children by August 1, 2006 at 6:00 p.m.," physical custody would return to Henry on his filing of an affidavit of noncompliance.

Francis did not return to Michigan by the August 1, 2006 deadline, and the next day the circuit court entered an order awarding Henry "the immediate sole legal custody and sole physical custody" of the children. In September 2006, Henry learned of Francis's whereabouts in Idaho. Idaho authorities arrested Francis, and Henry retrieved the children. Back in Michigan, Francis was charged with parental kidnapping under MCL 750.350a(1).

After Francis's return to Michigan, the parties agreed to refer the custody and parenting time issues to the FOC. A referee held nine days of hearings, and on June 26, 2007 issued a 48-page recommendation and report. The referee made the following relevant findings of fact and conclusions of law:

> 1. Defendant mother is severely mentally ill as diagnosed by multiple mental health professionals, but she has no recognition of that fact.

2. Defendant mother failed to return the minor children to the State of Michigan following actual notice of an Order requiring her to do so, provided to her by her therapist Shelly Smithson in telephone conversations in the summer of 2006. Defendant denied receiving any information from any one [sic], including her attorney, of the various Orders of the Court entered in summer of 2006, contrary to representations of her counsel of record to the Court last summer.

3. Defendant believes her prior counsel of record is part of a conspiracy with Plaintiff-father to end her life.

4. Based upon the statutory factors required to be evaluated under the Child Custody Act, the evidence demonstrated clearly and convincingly [as set forth more fully in the Rationale below] that it is in the best interests of the minor children for:

A) Plaintiff father to have *sole physical and sole legal custody* of the minor children;

B) Defendant . . . mother to have only *limited and supervised parenting time contact* with the children;

C) Defendant mother to be required to participate in medical treatment with *fully informed professionals* to attempt to treat her mental health illness, to minimize future risk of harm to the children from inappropriate conduct by Defendant including, but not limited to, risk of further flight; and . . .

D) Defendant mother's supervised parenting time shall be allowed to continue to occur in public places, but it shall be further limited to a more restricted environment/arrangements if she does not participate in ongoing treatment with fully informed mental health professionals, to minimize further risk of harm to the children. [Emphasis in original.]

The referee rendered extensive findings on the best interest factors of MCL 722.23, and recommended that the children's best interests demanded an award of sole legal and physical custody to Henry.

Francis objected to the referee's recommendation, and the circuit court conducted a trial on August 27, 2007 and August 28, 2007. On October 17, 2007, the court issued a bench opinion that largely adopted the referee's findings concerning the best interest factors.[3] The

[3] While the referee had deemed the parties equal with regard to factors (a) and (e), the circuit court found that these factors favored Henry. The referee concluded under factor (*l*) that no other pertinent factors existed, but the circuit court found that "the extreme influence that [Francis's] family has over her and [the] dependent and controlling nature of that relationship" constituted another factor favoring Henry.

circuit court entered a judgment of divorce on December 18, 2007. Francis filed a delayed application for leave to appeal on November 10, 2008, which this Court denied for lack of merit in the grounds presented. *Henry v Henry*, unpublished order of the Court of Appeals, entered December 30, 2008 (Docket No. 288803). The Supreme Court also denied leave to appeal. *Henry v Henry*, 483 Mich 906 (2009).

On November 26, 2008, Francis filed a "motion to modify custody, parenting time, and child support."[4] Francis asserted as grounds warranting a modification of her parenting time that (1) psychological reports, a psychiatrist's affidavit, and a report written by a domestic violence consultant supported that Francis no longer was "severely mentally ill," but suffered from posttraumatic stress syndrome (PTSS), (2) Francis won an acquittal of the kidnapping charges in August 2008, and (3) CH, the parties' second child, had created "disturbing" drawings. Francis also raised a constitutional claim. In February 2009, the circuit court referred the matter to a referee for a determination whether Francis had demonstrated proper cause or a change of circumstances warranting review of its previous parenting time orders. Before an evidentiary hearing scheduled by the referee, Henry filed a response that invoked MCR 2.116 as a ground for dismissal of Francis's request for additional parenting time. At a March 24, 2009 hearing, the circuit court took the matter under advisement and requested that Henry submit a brief addressing "whether or not this should be filed as a summary disposition motion under MCR 2.116" and "the issue of sanctions[.]"

On June 11, 2009, the circuit court issued a written opinion denying Francis's motion to modify her parenting time. The court concluded that Francis had failed to carry her burden of showing proper cause or a change in circumstances to warrant an evidentiary hearing, and also rejected Francis's constitutional argument, finding that a compelling state interest justified supervised parenting time and "appropriate mental health treatment for the mother and children." Lastly, the court declared that it would award Henry attorney fees and costs as sanctions under MCR 2.114(E).

II. ANALYSIS

Francis first contends that her acquittal of parental kidnapping charges, combined with more recent psychological evaluations and CH's "disturbing" drawings, supply grounds justifying an evidentiary hearing concerning her request to modify the parenting time order. According to Francis, the evidence presented to the circuit court preponderated in favor of findings fundamentally different from those that formed the basis of the court's prior parenting time ruling.

This Court must affirm all orders concerning parenting time or custody "unless the trial court's findings of fact 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." *Berger v*

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[4] Although according to its title Francis's motion sought a modification of custody, child support and parenting time, Francis's appeal focuses on that portion of the circuit court's ruling concerning parenting time.

Berger, 277 Mich App. 700, 705; 747 NW2d 336 (2008). "Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings 'clearly preponderate in the opposite direction.'" *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009), quoting *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994).

A. PARENTING TIME

The Child Custody Act, MCL 722.21 *et seq*., governs this Court's analysis of parenting time disputes. Section 27a, MCL 722.27a, sets forth these pertinent guiding principles:

> (1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.
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> * * *
>
> (3) A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.

The act further contemplates that after a court has entered a parenting time order it may,

> [m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. [MCL 722.27(1)(c).]

In *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003), this Court considered the meaning of the phrases "proper cause" and "change of circumstances" in the context of the Child Custody Act. Regarding "proper cause," the Court explained that "proper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511. This Court summarized,

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Id*. at 512.]

A "change of circumstances" occurs if, after the entry of the last custody order, "the conditions surrounding the custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original).

The circuit court opined that none of the grounds alleged by Francis amounted to changed circumstances or proper cause for reconsideration of the prior parenting time orders. Concerning Francis's claim that she suffers from PTSS rather than mental illness, the circuit court noted that it had previously rejected the same claim. The circuit court further observed that the primary evaluation relied on by Francis

> is not a psychological evaluation where the typical battery of recommended psychological tests are given to evaluate someone's mental health. Also, the Domestic Violence Evaluation fails to address how this might impact her ability to parent the children. In fact, there aren't even any recommendations for treatment for [Francis]'s Post-Traumatic Stress Syndrome in the evaluation.

The circuit court reasoned that because Francis's allegation of changed mental status constituted "reargu[ment]" of the claims she had advanced in the divorce trial, Francis had not established changed circumstances in this regard.

The court also found unpersuasive Francis's acquittal of the parental kidnapping charge, explaining that it already had considered in detail the facts surrounding Francis's removal of the children from Michigan. Finally, the circuit court noted that even if true, Francis's allegations about CH's "disturbing" drawings "would be concerning to the Court," but that the drawings "do not amount to such a magnitude to have a significant impact on the child's well-being to possibly require a change in custody. They would indicate perhaps a need for counseling and/or tutoring."

For different reasons than those expressed by the circuit court, the record supports that Francis did not show the existence of either proper cause or a change in circumstances sufficient to warrant consideration of her request for a parenting time modification. The judgment of divorce contemplated that until Francis obtained both psychiatric and psychological care, her parenting time would remain supervised. In support of the motion to modify parenting time, Francis submitted several reports generated *before* the divorce trial and a domestic violence evaluation. Although these submissions demonstrate a possibility that Francis's psychological state could improve over time, no evidence exists that Francis obtained psychiatric or psychological care after the entry of the divorce judgment. Consequently, the circuit court neither abused its discretion nor committed clear legal error when it rejected Francis's insufficiently substantiated claim of improved mental health.

For similar reasons, we cannot conclude that the circuit court abused its discretion in deeming unpersuasive Francis's claim that her acquittal of parental kidnapping charges constituted either proper cause or changed circumstances. The circuit court explained that "[t]he outcome of the criminal case was not a major factor" in its decision. Moreover, the circuit court's prior custody and parenting time decision includes no finding that Francis had violated a criminal statute by "kidnapping" the children. Rather, in its bench opinion, the circuit court repeatedly referenced Francis's deliberate decision to hide the children from Henry and deny him contact with them. The opinions of the referee and the circuit court reflect that the conduct

condemned involved Francis's decisions to remain "on the run" and deprive Henry of any knowledge of his children's whereabouts, not Francis's initial June 2006 departure with the children. Accordingly, Francis's acquittal of the kidnapping charges does not tend to support a conclusion that circumstances have appreciably changed since the circuit court's entry of the prior custody order. We also detect no error in the circuit court's conclusion that CH's drawings, standing alone, do not supply a basis for an evidentiary hearing. Because Francis failed to produce preponderating evidence of proper cause or a change in circumstances, the circuit court correctly dismissed Francis's motion to modify her parenting time.

B. SANCTIONS

Francis next challenges the circuit court's decision to award sanctions against Francis and her attorney under MCR 2.114(E). The circuit court awarded sanctions on the basis of its conclusion that Francis's motion asserted the same issues litigated in the course of the divorce proceedings. We review de novo the circuit court's interpretation and application of the court rules. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "To impose a sanction under MCR 2.114(E), the trial court must first find that an attorney or party has signed a pleading in violation of MCR 2.114(A)-(D)." *In re Stafford*, 200 Mich App 41, 42; 503 NW2d 678 (1993). Such a determination "depends largely on the facts and circumstances of the claim." *Id*. A court's determination that a party violated the court rule "involves a finding of fact by the trial court." *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). Therefore, this Court reviews for clear error "a trial court's decision regarding the imposition of a sanction" under MCR 2.114(E). *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). A finding of fact qualifies as clearly erroneous "if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The record does not support the circuit court's ruling to sanction Francis. Francis's motion for modification of parenting time contended in part that she no longer suffered from the mental problems discerned by the circuit court at the time of the divorce proceedings. Although Francis criticized the circuit court's divorce judgment findings relating to Francis's mental competency, her argument for modification also asserted the existence of information that the circuit court had not previously considered. Stated differently, despite that Francis presented the same argument—that she did not suffer from a mental illness—her motion advanced different evidence. Notably, Francis supplied the circuit court with March 2009 deposition testimony by Dr. VanderJagt, which Francis obtained after entry of the divorce judgment.

In the bench opinion awarding custody to Henry and severely limiting Francis's parenting time, the circuit court observed:

> [T]he most telling regarding the mental illness of the mother is the report from Dr. Vander[J]agt. This Court has a very high regard and respect for Dr. Vander[J]agt. His evaluations are always very thorough and, quite frankly, always spot on. This Court is most familiar with Dr. Vander[J]agt because he does a tremendous amount of evaluations in child protective proceedings regarding abusive and neglectful parents and their ability to parent children.

> Dr. Vander[J]agt portrayed in his report a grim outlook for the future in this matter which, quite frankly, appears to be borne out by what the Court witnessed during the trial.

In his postjudgment deposition, Dr. VanderJagt explained that after his second visit with Francis, he diagnosed a personality disorder, rather than a mental illness:

> *A.* My findings I strongly believe to be accurate during the time period which, again, I did ask to see her, again, a number of months later because I wanted to see would she improve or change. The reason for that being, as I have written . . . in my report, that her functioning seems to fluctuate a great deal.
>
> *Q.* Could that have been—
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> * * *
>
> —possibly because of the stressors she was going through, just as [Henry]'s? If you had seen [Henry] four months later, could he have been in a different place?
>
> *A.* That's—what I'm saying about her is that the fluctuation in her functioning may very well be situational stress related. I have little doubt about that. I do feel—on the basis of my work with her, I feel strongly that there are long-term, enduring problems which need to be addressed, which I have urged that they be addressed. And, if you will look at my recommendations, . . . *what is desperately needed is to have this woman be able to have access to her children and rehabilitate that relationship.*
>
> *Q.* Absolutely.
>
> *A.* And I wrote that. That's my recommendation.
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> * * *
>
> *Q.* Let's just say for a little bit of argument here, Dr. VanderJagt, perhaps [Francis] was totally fearful of you and threatened by you and fearful of the circumstances and wasn't being cooperative because of that fear. Do you think that could have happened and these other people she's being cooperative with and …?
>
> *A.* It's a delicate kind of issue you're raising and a conundrum.
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> * * *
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> She certainly was frightened at the time I saw her, and I addressed that with her and did everything I could to allay those anxieties and fears. And I think I did so to some good effect. *Again, we are now over two years later. She needs to be understood in terms of where she is now, not on the basis of what I saw two and-a-half years ago from her.*

* * *

> And I think . . . that we will see enduring characteristics that are still there, but hopefully she has improved. Hopefully she has improved substantially.
>
> *Q.* Well, if Dr. Hepner [sic] said there is no sign whatsoever and met with her on two separate occasions as well months later and stated that—
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> *A.* There is no sign whatsoever of—
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> *Q.* Mental illness?
>
> *A.* Mm-hmm. *One of my diagnoses the second time I saw her is personality disorder, and that's not a mental illness. And that—she was probably—that's not a hair to split, that's a significant difference. You can be—you can have very significant psychological disorders without being mentally ill. Most people with psychological disorders are not mentally ill.* One thing I would add, to try to be complete in one place on the transcript, is different people react to acute stress in different ways. Some people fall apart, and we see that they have what you might call a fragile floor, and they fall through that floor under very high stress. This could be something that happened to Miss Francis.
>
> *Q.* Oh, kind of like a sort of psychological meltdown for a short period of time or a catastrophic-event type of situation.
>
> *A.* Yeah. [Emphasis added].

This evidence did not show that Francis had satisfied the divorce judgment's psychiatric and psychological care requirements. However, Dr. VanderJagt's testimony constituted highly relevant information that was not merely repetitive of Francis's earlier arguments.

With Francis's motion for modification of parenting time, she also attached for the circuit court an affidavit signed by Dr. Frank Ochberg, a psychiatrist, which she had not submitted during prior proceedings. In the affidavit, Dr. Ochberg opined that Francis "does not appear delusional and does not require any medications. At this time she appears resolutely focused on doing the best thing for her children, and she appears competent to care for her children." Additionally, Francis filed a report written by Dr. Peggy Hefner, a psychologist who evaluated Francis at the Center for Forensic Psychiatry in connection with Francis's competency to stand trial for parental kidnapping. Hefner described Francis as "oriented according to time, person and place," with "good" attention and concentration. Dr. Hefner also estimated Francis's "social judgment" as "good," adding that "not only does she have a good understanding as to what behaviors are socially desirable but she also demonstrated that she has an ability to conform her behaviors to the same."

In light of the fact that Francis's motion for modification of parenting time incorporated information that the circuit court had not previously considered, we find that the circuit court's characterization of the evidence as merely repetitive lacks a factual basis. Furthermore, under the circumstances of this case, if Francis desires additional parenting time she must convince the

circuit court that she no longer suffers from mental or emotional instability that may place her children at risk. Consideration of this issue likely will involve some measure of reargument of the issues presented in the course of the divorce proceedings. Because Francis's arguments for additional parenting time had some merit and were not entirely repetitive, we conclude that the circuit court clearly erred in sanctioning her, and we vacate the sanctions.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Neither party having prevailed in full, we award no costs. MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

STATE OF MICHIGAN

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Plaintiff/Counterdefendant-Appellee,

v

JOY L. HENRY, a/k/a JOY L. FRANCIS,

Defendant/Counterplaintiff-Appellant.

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Defendant/Counterplaintiff-Appellant.

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Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I concur in the results reached by the majority, but write separately to clarify the procedure I believe that the circuit court should follow on remand.

The circuit court correctly characterized this as a "tragic and distressing case." For the vast majority of their lives, the Henry children, other than DH, maintained an extraordinarily close relationship with their mother. According to the evidence presented over the course of many hearings, until Francis's emotional breakdown, she ran the household and home schooled the children, while Henry engaged in far more limited parenting activities. Even after Francis's return from her involuntary commitment at St. Lawrence Hospital, Henry permitted Francis to resume primary responsibility for the children's needs and welfare. And irrespective of Francis's mental problems and the three months she spent with the children outside Michigan, the

evidence suggests that the children made an excellent transition from home schooling to the Haslett public schools.

Unquestionably, Francis's serious mental problems emerged in 2006. The extent of her recovery from her mental illness remains an open question. Francis has presented some evidence that at this point, she does not require psychiatric care. Dr. VanderJagt's 2007 psychological evaluation of Francis specifically contemplated that her condition could improve. But the circuit court record also contains a disturbing "Summary of Proceedings" prepared by a Friend of the Court (FOC) parenting time advocate in August 2009. The report catalogues the difficulties that Francis's supervisors have encountered during her parenting times, and identifies Francis's interaction with JH as one of the foremost problems:

> Of grave concern first and foremost is the relationship of [Francis] with the eldest of the minor children, [JH]. During every visit, there seems to be some disagreement that arises between [Francis] and [JH]. This worker admits this problem may have been exacerbated by the responsibility placed on [JH] in the early stages of the order requiring her to provide much of the youngest child's care during the visits; changing diapers, etc.[1] Responsibilities that would have easily been carried out by [Francis] had she exhibited healthy parenting behaviors during the supervised parenting time sessions. [JH] often directs [Francis] and confronts her regarding her care of and interaction with the other children especially [DH], the youngest child. Due to being "taken," [JH] displays anger, hostility, and mistrust towards her mother. She has searched [Francis]'s purse and turned over items to the parenting time supervisor. At different locations, she has repeatedly looked over her shoulders and out of the windows reporting that she thought she saw different individuals that helped her mother "take" her.
>
> Of late, it is reported that the minor children [CH] and [SH] have begun to display hostility towards [Francis] during supervised parenting time.

Dating back to 2006, Dr. VanderJagt detected significant difficulties in JH's relationship with Francis. Dr. VanderJagt recalled as follows a November 2006 play session he observed involving Francis, JH and CH:

> The play activity with [Francis] proceeded with [CH] allowing her to engage him, while [JH] rather quietly and rather sullenly chose to work alone. [Francis] appropriately tried to re-approach and engage [JH] in play, but [JH] was resistant. [JH] appeared to be waiting for something to occur, around which she could organize expression of unhappiness and dissatisfaction with her mother. It did not take her long to discern an "unfairness" in her mother's behavior in the

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[1] At an early supervised visit, Francis photographed DH's genitalia to support her assertion that DH had a severe and untreated diaper rash. Two physicians examined DH and disagreed. After this event, the circuit court ordered that Francis could not change DH's diapers during parenting time, and that JH would bear this responsibility.

> session, and she politely but emphatically confronted her mother with an expanding notion of dissatisfaction purportedly related to unfairness on the part of her mother towards her, relative to her mother's interactions with her brother. [JH]'s complaints were virtually manufactured, and appeared to be psychologically necessary for her as a vehicle to express broad-based unhappiness and anger towards her mother.
>
> For her part, [Francis] handled this difficult situation gently and adequately, if not particularly effectively. She did not recognize on an empathic level what was going on, but many, if not most parents, would not do so. The play session was completed on an emotionally indeterminate and ambivalent note, although parting behavior was nominally appropriate and reflected underlying emotional attachment on the part of the children.

The evidence supports that the current supervised parenting time schedule, in which Francis visits all five children together for an hour each month at a public location, does not comport with the stated presumption of the Child Custody Act, that a child's best interests are served when the child has "a strong relationship with both of his or her parents." MCL 722.27a(1). The Legislature has determined that in general, parenting time "shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." *Id*. The abbreviated, difficult visits described in the record do not advance this goal.

In my view, it is important to distinguish between modifications of parenting time that do not change a child's established custodial environment, and modifications that may have that effect. If a parent seeks additional parenting time that would alter a child's established custodial environment, MCL 722.27(1)(c) mandates a showing by clear and convincing evidence that the change will serve the child's best interests. However, if the additional parenting time sought does not alter a child's established custodial environment, I submit that the Legislature intended that the presumption in favor of meaningful parenting time designed to enhance parent-child relationships should guide a circuit court's decision making. Pursuant to MCL 722.27(1)(b), "Parenting time of the child by the parents is governed by section 7a." Subsection 7a(1) instructs, "Parenting time shall be granted in accordance with the best interests of the child," and continues, "It is *presumed* to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." (Emphasis added).

In MCL 722.27a(6), the Child Custody Act states that "when determining the frequency, duration, and type of parenting time to be granted," the circuit court may consider:

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

The Michigan FOC Parenting Time Guideline, published by the Supreme Court Administrative Office, recognizes that supervised parenting time may contravene the presumption in favor of strong parent-child bonds:

> Given the presumption in favor of parenting time, supervised parenting time should occur only when other, less restrictive methods of ensuring a child(ren)'s well-being during parenting time cannot be implemented. The primary purpose of supervised parenting time is to provide for the safety of the child(ren). The welfare of the child(ren) is the paramount consideration in determining the manner in which supervision is provided. [*Id*. at 13.]
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> * * *
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> There are two objectives to be achieved by a supervised parenting time order. The primary objective of supervised parenting time is to protect the child(ren). The second objective is to move the supervised parenting time toward an unsupervised plan when appropriate. Therefore, supervised parenting time orders should include specific objectives that must be achieved to allow the parenting time to transition from supervised to unsupervised. Generally, three methods will be used to determine when a plan moves to the next phase: 1) the implementation of an unsupervised plan could occur automatically when the parent accomplishes certain milestones (periods of time or goals set out in the order); 2) a supervised parenting time plan could include time intervals indicating when the plan is to be reviewed to determine whether unsupervised parenting time should occur; or 3) the plan could require that parenting time be reviewed only at the request of a party. [*Id*. at 17.]

In my view, the supervised parenting time arrangement originally devised in this case has failed to achieve the goals of the Child Custody Act.

Should Francis supply the circuit court with a psychiatric or psychological report documenting either improved mental and emotional function, or complete recovery from her prior mental condition, I believe that the circuit court should conduct an evidentiary hearing. Given the statutory presumption in favor of building and nurturing parent-child relationships, current psychiatric or psychological evidence tending to prove that Francis has achieved some recovery mandates rigorous consideration of whether the goals set forth in the Child Custody Act warrant modification of the extraordinarily restrictive parenting time schedule now in effect. At an evidentiary hearing, the circuit court should specifically consider the factors set forth in MCL 722.27a(6) in crafting an appropriate parenting time approach, as well as the parenting time needs of each *individual* child and the objectives identified in the FOC Parenting Time Guideline. In making a determination, the circuit court should seek to maximize the time the children spend with Francis, with appropriate, up-to-date provisions in place to monitor Francis's behavior and any potential risks to the children. The circuit court should also keep in mind the "second objective" of supervised parenting time, "to move the supervised parenting time toward an unsupervised plan when appropriate."

/s/ Elizabeth L. Gleicher