STATE OF MICHIGAN

COURT OF APPEALS

AHMED CHAKKOUR, Petitioner-Appellee, v TONYA CHAKKOUR, Respondent-Appellant.	UNPUBLISHED December 20, 2012 No. 309854 Wayne Circuit Court LC No. 11-104461-PP
TONYA CHAKKOUR, Plaintiff-Appellant, v AHMED CHAKKOUR, Defendant-Appellee.	No. 310006 Wayne Circuit Court LC No. 11-103999-DM

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

In Docket No. 309854, Tonya Chakkour appeals as of right from an order finding her in criminal contempt for violating a personal protection order (PPO) held by Ahmed Chakkour. Tonya was sentenced to 10 days' jail time, all but three hours of which was suspended unless she violated the PPO again. In Docket No. 310006, Tonya appeals as of right from a judgment of divorce, which concerns the divorce of Tonya and Ahmed and the custody of their three minor children. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

First, Tonya argues that the court improperly found her in criminal contempt. We disagree.

"This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial." *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). In evaluating the sufficiency of the evidence, this Court views the evidence in the light most favorable to the

prosecution. *Id*. We review for an abuse of discretion a trial court's issuance of a contempt order. *Porter v Porter*, 285 Mich App 450, 454; 776 NW2d 377 (2009). The trial court has abused its discretion when its decision is outside the range of principled outcomes. *Id*. We review the trial court's findings of fact for clear error and questions of law de novo. *Id.* at 455.

When a PPO is violated, a petitioner can file a motion to have the respondent found in contempt of court. MCR 3.708(B)(1). At a criminal contempt hearing, the petitioner has the burden of proving beyond a reasonable doubt that the respondent is in criminal contempt. MCR 3.708(H)(3). This Court "may not weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the [trial court's] findings [of fact]." *Henry*, 282 Mich App at 668.

We note that Tonya was found in contempt for violating the PPO held by Ahmed, not for violating the court's February 10, 2012, oral ruling which provided for "curbside" pick up and drop off of the children when Tonya exercised her parenting time. Consequently, Tonya's arguments that the court's February 10, 2012, oral ruling was a not valid custody modification, that the court erred in not providing her with a written order, and that the order was impermissibly vague, are not properly part of this appeal, as they do not relate to the PPO or the order finding Tonya in criminal contempt. The trial court's provision for curbside pickup was merely to ensure Tonya could exercise her parenting time while still complying with the PPO. Therefore, we only address whether there was sufficient evidence to find Tonya in criminal contempt for violating the PPO. Ahmed testified that Tonya entered his apartment. Therefore, viewing the evidence in the light most favorable to the prosecution, Tonya violated the PPO. See *Henry*, 282 Mich App at 677.

Second, Tonya argues that the trial court abused its discretion in denying her motions for makeup parenting time. We disagree.

This Court reviews an order regarding parenting time de novo. *Borowsky v Borowsky*, 273 Mich App 666, 688; 733 NW2d 71 (2007). However, a parenting time order should be affirmed "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; see also *Borowsky*, 273 Mich App at 688.

The order in effect when Tonya moved for makeup parenting time had actually suspended her parenting time; therefore, she had no parenting time to make up. However, the trial court addressed this issue as if Tonya did have parenting time. Therefore, we will also address the issue in that manner. Tonya argues that the court erred in denying her makeup parenting time, but oddly, does not argue that the court erred in denying her any parenting time in the judgment of divorce. Nonetheless, the trial court's decision denying Tonya's motion for makeup parenting time is closely intertwined with its decision to deny Tonya any parenting time in the judgment of divorce. Thus, we will briefly review the trial court's decision denying Tonya parenting time in the judgment of divorce.

The trial court did not commit a palpable abuse of discretion by denying Tonya makeup parenting time and future parenting time in the judgment of divorce. The Child Custody Act, MCL 722.27a(1), provides:

> 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.

To determine "the frequency, duration, and type of parenting time to be granted," courts should consider the following factors, enumerated in MCL 722.27a(6):

> (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 court's decision to deny Tonya parenting time focused on factor (c) – the reasonable likelihood of abuse or neglect of the child during parenting time. See MCL 722.27a(6)(c). The court concluded that Tonya continues to have anger management problems, even after completing a court-ordered anger management program. The court characterized Tonya's actions in disciplining the children as "wreaking vengeance" on them for their misbehavior and said that Tonya has an "antagonistic approach" to her children. The court also discussed Tonya's lack of stability and self-control and other mental health problems, as evidenced by her filing a false Child Protective Services (CPS) report that Ahmed had sexually abused their oldest daughter.

The trial court's findings are supported by the evidence. Tonya admitted to "spanking" the children on two instances – after the Fairlane Mall incident and when the children went to a swimming pool without permission. Tonya claimed that she uses a belt to spank the children once or twice on their covered bottoms. However, Ahmed testified that Tonya frequently beat the children with a belt. He played an audio recording for the court that their oldest daughter sent him, from when Tonya disciplined the children after the Fairlane Mall incident. The trial court had the opportunity to hear the recording, and described it as follows:

> What I heard in the recording that was played by the Defendant [Ahmed] in his testimony was Plaintiff [Tonya] terrorizing these children. Her need to spank them, and by spanking them she means whipping them with a belt, is hardly in a structure that will promote love, affection and emotional ties, it's called child abuse. And the Plaintiff [Tonya] needs to very much moderate her behavior and learn how to be a caring parent and not come away thinking that beating the children into terror is the way to control them.

In addition, Tonya's testimony about the CPS report she filed reflected potential mental health issues. As the trial court stated, Tonya disregarded the court's order to attend mediation and counseling with the Family Evaluation, Mediation and Counseling Unit. Because she was not evaluated, the court only had its own observations to rely on. Tonya admitted to filing a report with CPS in March 2012 that Ahmed sexually abused their oldest daughter; she suspected that such abuse had been occurring since April 2011. The investigation stopped because Tonya did not have her daughter examined by a doctor; Tonya said she had not had a chance to take her. A reasonable, mentally-sound parent would not have waited almost a year to report suspected sexual abuse, nor allowed the investigation to be closed by failing to take her child to the doctor. Either the allegation was false, and Tonya took the extreme action to hurt Ahmed, without regard to the consequences for their daughter, or Tonya really believed Ahmed was sexually abusing their daughter but waited to report it and failed to have her daughter medically examined. Either way, Tonya's behavior is alarming.

Given that the trial court's findings were supported by the evidence, the court did not abuse its discretion in denying Tonya parenting time. Because the trial court's decision to deny Tonya future parenting time was not an abuse of discretion, it follows that the court did not abuse its discretion in denying her motions for makeup parenting time.

Third, Tonya contends that the trial court abused its discretion by declining to enter a default judgment against Ahmed. We disagree.

"A trial court's ruling on a motion to set aside an entry of default is reviewed by this Court for abuse of discretion." *Kowalski v Fiutowski*, 247 Mich App 156, 159; 635 NW2d 502 (2001). The trial court has abused its discretion when its decision "falls outside the range of principled outcomes." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011).

First, it appears that Tonya did not properly request entry of a default or a default judgment. MCR 2.603(A) governs the entry of defaults. MCR 2.603(A)(1) provides that the court clerk must enter a default against a party if that party has failed to timely plead or

otherwise defend, if "that fact is made to appear by affidavit or otherwise." When a default has been entered, MCR 2.603(A)(2) requires that all parties who have appeared and the defaulted party receive notice of the entry. This notice must be provided by the party who requested entry of the default. MCR 2.603(A)(2)(b). The party requesting entry of the default must then file proof of service and a copy of the notice with the court. MCR 2.603(A)(2)(b).

Tonya filed a complaint for divorce with the court on April 4, 2011. However, she did not serve the complaint on Ahmed until at least April 13, 2011. Generally, a defendant must file an answer within 21 days of being served with the complaint. See MCR 2.108(A)(1). Ahmed did not answer the complaint until May 16, 2011.

Tonya filed an application for an entry of default on May 3, 2011. However, neither the application, nor the Register of Actions, indicate that the court clerk actually entered the default. Given that there was no default entered, Ahmed presumably never received notice of an entry of default. As the party requesting the entry of default, it was Tonya's responsibility to give Ahmed notice of the default entry (if one had been entered) and then to file a copy of that notice and a proof of service with the court. See MCR 2.603(A)(2)(b). There are no such documents in the trial court record and the Register of Actions indicates that none were filed. On March 26, 2012, Ahmed's counsel said that he did not know a default had been entered.

MCR 2.603(B) governs the entry of default judgments. When "the party against whom the default judgment is sought has appeared in the action," the party requesting a default judgment must provide notice of its request. MCR 2.603(B)(1)(a). On March 19, 2012, Tonya filed a motion asking the court to enter a default judgment of divorce. There is no indication from the trial court record that Tonya served this motion on Ahmed. Tonya claimed that she served the motion on Ahmed's counsel by mail on March 19, 2012; however, Ahmed's counsel said that he never received a motion for entry of a default judgment.

Second, this issue has been waived. A waiver is "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284 (2011), citing Black's Law Dictionary (9th ed). To determine if a party has waived a legal right, "a court must determine if a reasonable person would have understood that he or she was waiving the interest in question." *Reed*, 293 Mich App at 176. An implied waiver is "evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive." *Id.* at 177, citing Black's Law Dictionary (9th ed). A waiver can be shown "by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive." *Reed*, 293 Mich App at 177. A party can waive its right to a default or default judgment by not timely raising it. See *Wilhelm v Mustafa*, 243 Mich App 478, 485; 624 NW2d 435 (2000).

Tonya applied for entry of a default on May 3, 2011. However, no default was ever actually entered by the court clerk, and Tonya never served an entry of default on Ahmed as required by MCR 2.603(A)(2). Ahmed answered Tonya's complaint on May 16, 2011. From that point on, Ahmed and Tonya both consistently participated in the trial court proceedings by filing motions and appearing at Friend of the Court (FOC) and court hearings. Tonya did not raise the default issue again until 10 months later when she filed a motion for entry of a default judgment on March 19, 2012.

Tonya's conduct indicates an intent to waive this issue. See *Reed*, 293 Mich App at 177. She did not inquire into whether a default was ever entered or request entry of a default judgment until 10 months after filing the initial application for entry of a default. She participated in the proceedings with Ahmed by responding to his motions in court and questioning him at hearings. She did not object to Ahmed's participation until the bench trial on March 26, 2012, almost a year after she originally filed for divorce.

Third, the court was required to hold a custody hearing to make findings of fact on the best interest factors even if it entered a default judgment against Ahmed. In a child custody determination, the court must consider and evaluate the best interest factors enumerated in MCL 722.23. See *In re AP*, 283 Mich App 574, 605; 770 NW2d 403 (2009). The finder of fact must "state his or her factual findings and conclusion under each best interest factor . . . the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *Id*, quoting *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). If a trial court fails to make the proper findings of fact, then this Court must remand for a child custody hearing. *In re AP*, 283 Mich App at 605. Thus, entering a default against Ahmed would not have affected the court's duty to make factual findings on the best interest factors and award custody of the children based on those findings. See *id*.

Fourth, Tonya claims that the trial court used the wrong legal standards for determining its award of child custody. We disagree.

When reviewing a custody order, this Court applies three standards of review. See MCL 722.28; *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009). First, this Court will not disturb the trial court's findings of fact unless they are against the great weight of the evidence. *Brausch*, 283 Mich App at 347. A trial court's factual findings are against the great weight of the evidence if the facts "clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). Second, this Court reviews the trial court's discretionary rulings for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); *Mogle v Scriver*, 241 Mich App 192, 202; 614 NW2d 696 (2000). In custody cases, an abuse of discretion occurs when "the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705. A trial court's custody decision is entitled to "the utmost level of deference." *Id.* at 705-706. Finally, this Court must determine if the trial court made a clear legal error on a major issue; a clear legal error occurs when the trial court "errs in its choice, interpretation, or application of the existing law." *Shade*, 291 Mich App at 21.

Tonya focuses on the legal test and standards the trial court used to determine child custody. She references a 2004 order from a previous case, Trial Court No. 2004-456181-DS (the 2004 case), which gave her temporary sole physical custody and claims that to modify or amend that order, Ahmed had to demonstrate a proper cause or change of circumstances, as required by MCL 722.27(c). Then he had to show, by clear and convincing evidence, that a change in the children's established custodial environment was in their best interests. Tonya claims that the trial court committed clear legal error by skipping the first step – of determining if there was proper cause or a change of circumstances – and by saying Tonya had the burden of proof for changing custody.

The statutory provision cited by Tonya, MCL 722.27(c), applies when a party is seeking modification or amendment of a *final* custody order. The 2004 order was for temporary custody. The trial court concluded that the children had an established custodial environment with Ahmed despite the earlier order. A custodial environment can be established in violation of a temporary custody order. See *Berger*, 277 Mich App at 707.

The trial court applied the proper legal tests and standards to determine child custody. When making an initial custody determination, the trial court must first make a specific factual finding regarding whether the child has an established custodial environment with either or both parents. *Brausch*, 283 Mich App at 357 n 7. If a parent seeks to change the child's established custodial environment, he must show by clear and convincing evidence that such a change is in the best interest of the child, using the best interest factors enumerated in MCL 722.23. See MCL 722.27(1)(c). The trial court determined that the children had an established custodial environment with Ahmed, but not with Tonya. The court then addressed each of the best interest factors and found that they all weighed in favor of Ahmed. Therefore, Tonya failed to show by clear and convincing evidence that it was in the children's best interests to change their established custodial environment.

Tonya also briefly states that the trial court's findings of fact were against the great weight of the evidence, but does not specify which findings were against the great weight of the evidence or why. Tonya also requests reversal but does not explain how the court's decision was an abuse of discretion.

The evidence supported the trial court's findings of fact and the decision to grant Ahmed sole physical custody was not an abuse of discretion. First, the trial court found that the children had an established custodial environment with Ahmed, but not with Tonya. An established custodial environment "is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger*, 277 Mich App at 706. It is "marked by security, stability, and permanence." *Id*. MCL 722.27(1)(c) provides:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

"A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Id.* at 707, citing *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Whether an established custodial environment exists is a question of fact. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007).

The evidence supports the court's finding that the children had an established custodial environment with Ahmed, but not Tonya. The children began living with Ahmed in October 2010. They continued to live with him throughout the divorce proceedings. Tonya claims, and Ahmed somewhat corroborates, that she lived with Ahmed and the children at various points

between October 2010 and February 2012. The trial court found that Tonya's testimony was not credible, and believed Ahmed's testimony that Tonya only lived with Ahmed and the children for a few weeks during that period.

These circumstances resulted in the children having an established custodial environment with Ahmed. They lived with Ahmed consistently for approximately 18 months, which created security, stability, and permanence in their lives with respect to him. Tonya's actions in frequently moving in and out of this home created instability and inconsistency. Although there was some evidence that the children looked to Tonya for help getting ready for school, doing homework, and going to bed, Ahmed testified that the children often did not want to stay with Tonya. Furthermore, the trial court's conclusions that Tonya abused the children and had an "antagonistic approach" to them weigh against a finding that the children had an established custodial environment with their mother.

The evidence also supported the court's findings that all of the best interest factors, as listed in MCL 722.23, weighed in favor of Ahmed:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

The court found that Tonya terrorized the children by spanking them, or whipping them with a belt, which does not promote love or affection. Her extreme behavior was abuse and not the actions of a caring parent.

> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

The court noted that no evidence had been presented regarding the children's religious training or education, except Ahmed's testimony that they were doing well in school. The capacity of the parties to give the children love, affection, and guidance, was related to factor (a), which it found in favor of Ahmed.

> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

The court found that Tonya's failure to take her daughter for a medical examination when Tonya suspected her daughter had been sexually abused weighed strongly against her on this factor. Also, Tonya was unable to provide for the children financially, although that was a less significant concern.

> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

The court gave a lot of weight to factors (d) and (e), and the stability provided by Ahmed while the children consistently lived with him, as opposed to the instability created by Tonya frequently moving in and out of Ahmed's home. The court also found that Ahmed let the children be children, while Tonya terrorized them. These mixed messages were unhealthy for the children.

> (f) The moral fitness of the parties involved.

For factor (f), the court noted that Tonya had alleged Ahmed was unfaithful but not provided any proof. With respect to Tonya's moral fitness, the court discussed Tonya beating the children "for less than significant reasons," and that she was teaching the children how to be violent.

> (g) The mental and physical health of the parties involved.

For factor (g), the court discussed Tonya's mental health and her failure to abide by the court's order to see a counselor. The court found that Tonya was "out of control" and that she said what she thought was necessary at the moment to win her point, whether it was true or not.

> (h) The home, school, and community record of the child.

The court had no factual findings with respect to this factor.

> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

For factor (i), the court said that it had not interviewed the children. However, the court said that the children's preferences would not change its decision because the other evidence weighed so heavily against giving Tonya custody. Furthermore, the children would have been interviewed by family counseling if Tonya had abided by the court order. Because she did not, the court was going to make all reasonable assumptions in favor of Ahmed for this factor.

> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

For factor (j), the court found that Tonya had made a completely unfounded accusation of Ahmed sexually abusing their daughter, so that factor weighed against her and in favor of Ahmed.

> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

For factor (k), the court said that there was ample evidence that Tonya had committed domestic violence against the children.

> (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The court did not identify or discuss any other factors.

Given that the trial court's findings of fact with respect to the children's established custodial environment and their best interests were not against the great weight of the evidence, the court's decision to grant Ahmed sole physical custody was not an abuse of discretion.

Fifth, Tonya argues that the trial court erred in retroactively abating Ahmed's child support obligations.[1] We agree.

When a party objects to an issue decided in the trial court's adoption of a referee recommendation, he or she must file objections to the referee's recommendation within 21 days, as permitted by MCL 552.507(4) and MCR 3.215(E)(4), in order to preserve the issue for appeal. See *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). Otherwise, the issue is unpreserved and this Court's review "is limited to determining whether a plain error occurred that affected substantial rights." *Id.* Tonya failed to file objections to the referee recommendation or the trial court's adoption of that recommendation, which provided that the child support Ahmed owed Tonya from the 2004 case would be abated, beginning August 1, 2010. Therefore, this issue is unpreserved and this Court's review is limited to plain error affecting substantial rights. Plain error requires that "(1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the trial court proceedings." See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

A child support order is not subject to retroactive modification. See MCL 552.603(2). MCL 552.603(2) provides:

> (2) Except as otherwise provided in this section, a support order that is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date the support amount is due as prescribed in section 5c, with the full force, effect, and attributes of a judgment of this state, and *is not, on and after the date it is due, subject to retroactive modification*. . . . [Emphasis added.]

Because the February 2, 2012, order abated Ahmed's child support beginning August 1, 2010, it clearly retroactively modified the previous support order. This was legally impermissible and the order must be vacated. See MCL 552.603(2).

Sixth, Tonya asserts that the trial court abused its discretion in denying her motion for spousal support. We disagree.

"This Court reviews a trial court's award of spousal support for an abuse of discretion." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). A trial court's findings of fact are reviewed for clear error. *Id.*, citing *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if, after a review of the entire record, the

[1] "A party claiming an appeal of right from a final order is free to raise issues on appeal related to prior orders." *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009).

reviewing court is left with the definite and firm conviction that a mistake was made." *Woodington*, 288 Mich App at 355.

An award of spousal support should be based on what is just and reasonable, with the goal of balancing the parties' incomes and needs so neither will be impoverished. *Berger*, 277 Mich App at 726. A trial court should consider the following factors in determining if spousal support is appropriate:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id*, quoting *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

In this case, the trial court discussed the length of time the parties had been apart, Tonya's level of education and experience, and Ahmed's income. The court noted that Tonya had an MBA in accounting and worked for Wayne County until the end of 2009, when she was laid off. The court suggested that Tonya's mental health issues may have contributed to her inability to find full-time employment even now, two years later. The court also discussed Ahmed's income of only $30,000, and the fact that he solely supports the children, who reside with him. Finally, the court suggested Tonya had supported herself for the past two years primarily with the child support paid by Ahmed, which he paid even though the children were living with him.

Thus, the court considered factors (1), (3), (6), (7), (8), (10), and (14) in denying Tonya spousal support. The evidence supported the findings made by the court with respect to Tonya's education and experience, Ahmed's income and ability to pay spousal support, and Ahmed's role as the children's sole provider. Although the trial court did not consider Ahmed's alleged infidelity and alleged fault in causing the divorce, it later noted that Tonya had not provided the court with any proof of infidelity. Furthermore, the court did not award Ahmed any child support and generally split the parties' property equally. Considering Ahmed's modest income and financial responsibility for three children and Tonya's strong educational background, the trial court did not abuse its discretion in denying Tonya's request for spousal support.

Tonya also discussed Ahmed's sale of property located at 6800 Greenview, which she claims he fraudulently purchased as a "single man." The court heard and rejected this argument. The only proof Tonya provided of the purchase and sale of the property were public records from the Register of Deeds that she acquired online. The documents indicated that Ahmed had a $70,887 mortgage for the property's purchase, and that he sold the property for $108,000, in 2007. However, Tonya did not propound any discovery on Ahmed to determine what the actual cost of the property was or how much he paid as a down payment, in real estate fees for the sale, in interest on the loan, in taxes, in maintenance, in repair costs, or closing costs. The court rejected Tonya's arguments about the property at 6800 Greenview because Tonya did not

provide any evidence that Ahmed actually made money on its sale. This was not an abuse of discretion, as Tonya had the opportunity to propound discovery on Ahmed regarding his assets and failed to do so.

Finally, Tonya argues that the trial judge and hearing referee were biased and acted improperly. We disagree.

A motion to disqualify a judge must be made within 14 days "of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(a). Furthermore, if a motion to disqualify a trial court judge is denied, the moving party must request referral to the chief judge of the trial court in order to preserve this issue for appellate review. *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Tonya requests disqualification of the trial judge for the first time on appeal. Therefore, this issue is unpreserved and reviewed for plain error. See *Duray*, 288 Mich App at 150.

"A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption." *In re MKK*, 286 Mich App at 566. A trial judge is not prejudiced or biased, thus requiring disqualification, merely because he has repeatedly ruled against a party. *Id*.

Tonya argues that the trial judge and hearing referee were incompetent and impartial because they ignored the fact that the divorce case had been defaulted and the 2004 order granting Tonya sole custody of the children. For the reasons discussed above, the trial court did not abuse its discretion in denying Tonya's motion for entry of a default judgment. In addition, the trial court used the proper legal test for determining child custody, as discussed above. Tonya has failed to meet the heavy burden of showing that the trial judge and hearing referee were not impartial. See *In re MKK*, 286 Mich App at 566.

We affirm the trial court's order finding Tonya in criminal contempt and we affirm the judgment of divorce, but remand for the trial court to vacate any orders that retroactively abate Ahmed's child support obligations. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray