Order

Michigan Supreme Court
Lansing, Michigan

June 11, 2021

Bridget M. McCormack,
Chief Justice

161335

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

THOMAS J. O'BRIEN, JR.,
Plaintiff-Appellee,

v

SC: 161335
COA: 347830
Oakland CC Family Division: 2004-693882-DC

ANN MARIE D'ANNUNZIO,
Defendant-Appellant.

_____/

On May 5, 2021, the Court heard oral argument on the application for leave to appeal the February 27, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE the February 19, 2019 order of the Oakland Circuit Court and REMAND this case to that court for further proceedings. We DIRECT the Oakland Circuit Court to assign a different judge to preside over further proceedings in this case.

The trial court erred by modifying the children's established custodial environment in its November 16, 2017 temporary order without first conducting an evidentiary hearing. That order suspended the appellant's parenting time, precluded her from initiating contact with the children, and continued granting the appellee full-time parenting time. By doing so, the order had the effect of modifying the children's established custodial environment. Therefore, MCL 722.27(1)(c) applied,[1] and the trial court should have first conducted an evidentiary hearing. *Grew v Knox*, 265 Mich App 333, 336 (2005) ("An evidentiary hearing is mandated before custody can be modified, even on a temporary basis."). Despite this Court's admonishment in *Daly v Ward*, 501 Mich 897, 898 (2017), that it is "critical . . . that trial courts fully comply with MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment," the trial court failed to do so. In *Daly*, we explained that full compliance with MCL 722.27(1)(c) is necessary because "[i]n many instances, it is difficult—if not altogether impossible—to effectively remedy [an error] on appeal, and to restore the *status quo ante*, . . . without causing undue harm to the child." *Daly*, 501 Mich at 898. To be sure, it is impossible to effectively remedy the error in entering the November 16,

[1] That provision reads, in relevant part: "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."

2017 order when 15 months passed before an order properly based on an evidentiary hearing was issued. The trial court's February 19, 2019 final opinion and order relied on events that occurred in a custodial environment that was erroneously altered in November 2017. Therefore, we cannot conclude that the error was harmless.

On remand, the trial court shall conduct a hearing within 14 days of the date of this order to determine how the case should proceed. We further direct the trial court to expedite its consideration and resolution of this case.

We do not retain jurisdiction.

CLEMENT, J., (*concurring*).

I concur with the Court's remand order. While MCL 722.27a(12) to (14) allow for the issuance of ex parte orders concerning parenting time, the November 16, 2017 order did not, practically speaking, affect only parenting time. Though it was couched in those terms, the order changed the custodial environment by completely suspending appellant's parenting time and affording appellee full parenting time. Therefore, rather than falling under the allowance for ex parte orders as provided in MCL 722.27a(12) to (14), the November 16, 2017 order falls within the requirement in MCL 722.27(c)(1) that orders modifying the established custodial environment be entered after an evidentiary hearing. Nevertheless, the trial court ignored this procedural requirement.

It is true that an established custodial environment must be just that—established—hence why an established custodial environment exists only "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." MCL 722.27(1)(c). An "appreciable time" is, of course, not a very precise phrase, and I can imagine borderline cases in which it is difficult to tell whether a custodial environment has been in place for long enough to be established. But this case is no such borderline case. I am certain that after 15 months, the children had an established custodial environment with the only parent they saw.

Moreover, I am hesitant to fault appellant for trying to resolve the dispute with appellee rather than immediately appeal the November 16, 2017 order. Even had she appealed immediately and not requested any adjournments, if the evidentiary hearings took the same amount of time as they did—almost a full year—the children's established custodial environment still would have been improperly modified by the temporary order by the time a proper opinion and order was issued.

Setting aside any effect appellant's actions might have had on the proceedings, it is important that lower courts follow the correct procedure when modifying a child's established custodial environment. As the statutory scheme reflects, doing so is serious

business. This Court has explained that the statute exemplifies a preference for stability in children's lives: "In adopting [MCL 722.27(1)(c)], the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment,' except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 576-577 (1981). Therefore, we have warned trial courts how important it is to follow the requirements of MCL 722.27(1)(c). See *Daly v Ward*, 501 Mich 897, 898 (2017). But here the trial court entered a temporary order without an evidentiary hearing and then waited 15 months to issue an order that complied with the statute. By that time, the temporary order had changed the established custodial environment. Moreover, the trial court relied on events that occurred in that new established custodial environment when issuing its February 19, 2019 opinion and order.

I believe the original error in entering the November 16, 2017 order without an evidentiary hearing, and its effect on the February 19, 2019 order, justify vacating the 2019 order and remanding the case. While vacating the order will undo the custody arrangement put in place by that order, the parties remain free to file new motions regarding custody. I fully expect them to do so. I agree with Justice VIVIANO that during the course of the remand, the trial court should not disregard the children's current living situation. See *Fletcher v Fletcher*, 447 Mich 871, 889 (1994) (holding that "on remand, the court should consider up-to-date information, including the children's current and reasonable preferences, as well as the fact that the children have been living with the plaintiff during the appeal and any other changes in circumstances arising since the trial court's original custody order"). I also share his concern about the trial court's decision to completely suspend appellant's parenting time, and I join him in encouraging the trial court to facilitate the children's redevelopment of a relationship with appellant. I believe the majority's order lays the groundwork for these steps, so I concur in the vacatur and remand.

I also concur in the majority's decision to reassign the case to a different judge. For the reasons stated in Judge GLEICHER's dissent, I believe the original judge will have a difficult time setting aside her previous opinions; and because the error in entering the November 16, 2017 order had such longstanding effects, I think reassignment is necessary to preserve the appearance of justice. In light of those concerns, I do not believe reassignment will cause excessive waste. *Bayati v Bayati*, 264 Mich App 595, 603 (2004).

VIVIANO, J. (*concurring in part and dissenting in part*).

I agree with much of the Court's order, so far as its reasoning can be discerned, but I dissent from its decision to reassign this case to another judge on remand and I write further to address its confusing and seemingly incomplete remedy of vacating the trial court's custody order. In fashioning this relief, the Court fails to give any real guidance

on the effect of its order and what the trial court should do next. I would follow our precedent and remand for reevaluation while the status quo is maintained.

Plaintiff-father and defendant-mother shared custody of their two minor children for years without issue, but in 2017, the relationship between the teenage children and defendant began to break down. On November 6, 2017, after several instances in which police officers were called to intervene in confrontations between defendant and the children, plaintiff filed an ex parte motion to suspend defendant's parenting time and to grant him sole physical and legal custody of the children. The trial court granted that motion and, after holding a hearing in which no evidence was presented, decided on November 16, 2017, to continue the previous ex parte order as a temporary order. At the time plaintiff filed his ex parte motion, plaintiff and defendant shared custody and parenting time; after the court granted his motion, plaintiff alone had custody and parenting time. The court's decision changed the children's established custodial environment, i.e., the environment in which there is a person to whom the children looked for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). But the trial court did not complete the evidentiary hearing required by that subsection until October 2018 and did not enter a final order granting plaintiff sole physical and legal custody until February 2019. That order also suspended defendant's parenting time and conditioned future contact between defendant and the children on whether the children wished to reinstate contact with defendant.

I agree with the majority that the trial court erred by entering a series of orders that had the effect over time of modifying the children's established custodial environment without first conducting an evidentiary hearing. See *Daly v Ward*, 501 Mich 897 (2017). I also believe that the trial court erred by suspending defendant's parenting time for the duration of the proceedings and conditioning future contact on the children's wishes. The purpose of parenting time is "to foster a strong relationship between the child and the child's parents." *Shade v Wright*, 291 Mich App 17, 29 (2010). We presume that it is in the children's best interests to have a strong relationship with both parents. MCL 722.27a(1). Moreover, although the child's preference is a consideration, it is only one best-interest factor among many. See MCL 722.23; *Treutle v Treutle*, 197 Mich App 690, 694-695 (1992) ("The child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child.").

The majority here glosses over the next step of determining whether these errors were harmless. See *Fletcher v Fletcher*, 447 Mich 871, 889 (1994). In finding that they were harmless, the Court of Appeals majority engaged in a standard assessment of harmlessness. It noted that the trial court's later decision in 2019 purported to assess the issue of custody from the perspective of the circumstances existing at the time of the first order in November 2017. See *O'Brien v D'Annunzio*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2020 (Docket No. 347830), p 5. This might be enough to show harmlessness if it could convince a reviewing court that the initial error

in changing the custodial environment, along with the circumstances resulting from that change, played no role in the trial court's later ratification of its initial improper decision. In those circumstances, the trial court might demonstrate that it would have reached the same decision irrespective of the error in failing to hold an earlier hearing.

But it is unclear whether such a demonstration will always be possible in this context. As the Court of Appeals majority admits, the trial court's later opinion "references and relies upon a number of events that occurred after it temporarily granted plaintiff physical custody . . . ." *Id.* And as the Court of Appeals dissent noted, the development and assessment of evidence is a critical part in combating biases that might creep into the decision-making process. *Id.* (GLEICHER, J., dissenting) at 3. Once initial impressions are formed and conclusions reached, decision-makers will naturally look for evidence that confirms the decision already made. See Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011), p 81. In addition, the consequences of the decision here were severe: the children were removed from defendant's home and were prevented from seeing her without supervision. *O'Brien* (GLEICHER, J., dissenting), unpub op at 4. As the dissent observed, this likely had inextricable effects of its own, especially on the children's relationship with defendant. *Id.* Although not every similar error in this setting will be harmful, here the trial court's reliance on intervening facts, the lengthy delay before it attempted to rectify its mistake, and the complete separation of the children and the mother make the errors harmful.

But finding an error, even a harmful one, does not end the analysis. Custody cases are perhaps unique in that remedying the harm to the wronged party risks causing even greater harm to the children caught in the middle. As this Court has recognized, "In many instances, it is difficult—if not altogether impossible—to effectively remedy on appeal, and to restore the *status quo ante*, following an erroneous order altering a child's established custodial environment without causing undue harm to the child." *Daly*, 501 Mich at 898. As a result, an error in "entering an order that alters a child's established custodial environment . . . may have lasting consequences yet effectively be irreversible." *Id.*

Where I part company with the majority is in its decision to remand the case for further proceedings in front of a new judge unacquainted with the parties or the case only months before the children turn 18 and the case must conclude.[2] In addition, the legal

[2] The majority fails to provide any justification for its decision to remand this case to a new judge—a decision that I think is unwarranted and unwise at this stage of the proceedings. See, e.g., *Bayati v Bayati*, 264 Mich App 595, 603 (2004) (noting that an appellate court may remand a case to a different judge "if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.").

effect of the majority's order to vacate is not apparent. It would seem, for example, that we are not simply inviting the trial court to revisit the conclusions it reached after the evidentiary hearing. One possible reading of the majority's order is that the parties and the children will return to the status quo as it existed before plaintiff was granted full-time parenting time on November 6, 2017. Under this scenario, the children would be thrust back to the physical custody of their mother despite having had virtually no contact with her for nearly 3½ years. Such a resolution would do nothing to meaningfully address the children's antagonism toward their mother but instead would seem primed to create a volatile situation. It is hard to imagine how this abrupt change would be in the children's best interests.

A better reading of the majority's order—one that is at least consistent with our precedent in this area—is that it allows for a more delicate remedy to balance the interests of the parties and the children. We have, in fact, prescribed such an approach for appellate courts upon determining that a harmful error was made in a custody determination. In *Fletcher*, 447 Mich at 889, we held that after finding that an error was not harmless, "an appellate court should remand the case for reevaluation . . . ." "[O]n remand," we continued, "the court should consider up-to-date information, including the children's current and reasonable preferences, as well as the fact that the children have been living with the plaintiff during the appeal and any other changes in circumstances arising since the trial court's original custody order." *Id*. This course of action does not require vacatur of the trial court order. Indeed, we rejected a rule that would allow an appellate court to order a "peremptory change of custody" precisely because that relief would not "secure custody decisions that are in the best interests of the child." *Id*.

Instead of the majority's confusing order, I would eliminate the guesswork and expressly order a *Fletcher* remand so that a reevaluation could immediately take place while the status quo is maintained. This would provide stability for the children while giving the trial court the flexibility to quickly address what I find to be the most troubling error below: the decision to completely suspend defendant's parenting time and to condition future parenting time on the children's wishes. Because time is short and the children's relationship with the mother is presumed to be in their best interests, I would explicitly order the trial court to conduct an expedited hearing on parenting time as a first step in the *Fletcher* reevaluation and to make every effort to encourage the children to develop a healthy relationship with their mother as they enter adulthood. See, e.g., *Ludwig v Ludwig*, 501 Mich 1075, 1075 (2018) (remanding for a hearing on whether reunification was in the children's best interests when the trial court's order "left up to the unfettered discretion of the [children's] therapists the 'frequency, duration, and method' of any additional contact between the defendant and the children") (citation omitted).

For these reasons, I concur in part and dissent in part.

ZAHRA, J., (*dissenting*).

I respectfully dissent from the Court's order vacating the family court's February 19, 2019 final order that is based on the family court's November 16, 2017 temporary order awarding appellee full parenting time without first conducting an evidentiary hearing. Instead, I would deny appellant's application in this case.

The rules are plainly stated. Both the Child Custody Act, MCL 722.21 *et seq*., and the court rules expressly permit an ex parte order to be entered without a hearing. MCL 722.27a(12) expressly provides that a "parent may seek an ex parte interim order concerning parenting time." "If the opposing party objects to the ex parte interim order, he or she shall file with the clerk of the court within 14 days after receiving notice of the order a written objection . . . ." MCL 722.27a(13). If there is an objection, "the friend of the court shall attempt to resolve the dispute within 14 days after receiving it." MCL 722.27a(14). Then, "[i]f the opposing party wishes to proceed without assistance of counsel, the friend of the court shall schedule a hearing with the court that shall be held within 21 days after the filing of the motion. If the opposing party files a motion to modify or rescind the ex parte interim order and requests a hearing, the court shall resolve the dispute within 28 days after the hearing is requested." *Id*. The notice provided for an ex parte order clearly states that a written objection must be filed within 14 days.

The applicable court rules largely mirror the above statutes. See MCR 3.207(B)(1) through (5), (6)(a). The relevant statutes and court rules do not require a hearing before a family court suspends a party's parenting time. Together, they only provide for a hearing within 21 days after the objection to any change in parenting time is received.

I acknowledge that MCL 722.27(1)(c) provides that "[t]he 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." I also acknowledge that *Daly v Ward*, 501 Mich 897, 898 (2017), cautions a family court not to enter an ex parte order "if it also alters the child's established custodial environment without first making the findings required by MCL 722.27(1)(c)." Importantly, though, MCL 722.27(1)(c) provides that "[t]he 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." In my view, the above cited statutes and court rules contemplate a scheme in which timely adherence prevents an ex parte or temporary order from accruing the "appreciable time" required to alter the child's custodial environment. In this case, appellant did not seek to appeal the November 16, 2017 temporary order awarding appellee full parenting time until filing an emergency appeal on March 29, 2018. Instead, appellant first requested an adjournment at a November 15, 2017 hearing, and then on January 10, 2018 filed a motion seeking the

restoration of her parenting time. At a January 17, 2018 hearing on the motion, the family court acknowledged that appellant had made "a very good argument." The court set a hearing to be held two days later:

> I'm going to set [a] hearing on Friday afternoon. I don't care what you guys have, you're coming in here Friday afternoon and I'm going to have a hearing on parenting time and custody.
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> . . . I'm clearing my docket . . . and I know there's not going to be twenty-five days of discovery, you're going to put your parties on the stand, you're going to tell me what's going on and I'm going to make a decision.

But on that date, appellant, with appellee's consent, requested an adjournment until mid-March and entered into a stipulated order on January 26, 2018 to try to resolve the dispute in the meantime. An evidentiary hearing began on March 20, 2018. It was only after the evidentiary hearing had begun that appellant filed an emergency appeal on March 29, 2018. At this point, even if the Court of Appeals or this Court were to conclude that the November 16, 2017 order was entered in error, the remedy would have been to vacate the order and remand for an evidentiary hearing that was currently taking place. In sum, I would conclude that appellant's failure to appeal the November 16, 2017 order and her decision to instead request several adjournments of the evidentiary hearing renders her claim presented in this appeal either waived or harmless. I would deny appellant's application.

STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. O'BRIEN, JR., Plaintiff-Appellee, v ANN MARIE D'ANNUNZIO, Defendant-Appellant.	UNPUBLISHED February 27, 2020 No. 347830 Oakland Circuit Court Family Division LC No. 2004-693882-DC

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff sole legal and physical custody of the parties' twin children, GDO and IDO. The same order provided no parenting time for defendant, subject to periodic review to determine whether reinstituting parenting time would be in the children's best interests. Although we agree with several claims of error raised by defendant on appeal, we affirm the trial court's order because each error was harmless.

I. BACKGROUND

The parties are parents of twin children, but were never involved in a romantic relationship with each other. Throughout most of the children's adolescence, the parties got along and effectively coparented their children with little court involvement. However, defendant's relationships with plaintiff and then 13-year-old IDO became strained in the summer and fall of 2017, prompting the parties to initiate the instant custody dispute. At the time, the parties shared legal custody and defendant had physical custody of the children, with plaintiff exercising parenting time on one weekday overnight, every other weekend, and alternating holidays.

Plaintiff filed a verified emergency motion for a change of custody, alleging that defendant had "a history of losing her temper beyond the point of control," and that defendant's recent erratic and dangerous behavior constituted a change of circumstances or proper cause to modify custody because the children were in "a state of complete emotional upheaval[,] fleeing [defendant's] residence regularly." Plaintiff identified examples of defendant's concerning behavior and detailed three instances in which the police were called to intervene in confrontations between defendant and the children. In response to plaintiff's motion, defendant alleged that IDO had

become increasingly disrespectful toward her since June 2017, particularly with respect to matters involving social media, and that plaintiff was using the parties' contrasting parenting styles to undermine defendant's relationships with the children. Plaintiff's motion was referred to the Friend of the Court (FOC) for a recommendation, and the trial court signed an interim parenting-time order with an approximately equal parenting-time schedule.

Shortly thereafter, plaintiff filed an ex parte motion to suspend defendant's parenting time. Plaintiff claimed that defendant had continued to engage in alarming behavior, such as chasing IDO down the street in a car, having an outburst during a meeting with the FOC custody and parenting-time specialist, and attempting to remove the children from school midday. Plaintiff alleged that the police had been called two more times and that a Children's Protective Services (CPS) investigation was underway. Plaintiff sought a temporary order suspending defendant's parenting time because the children were "petrified" of defendant and refused to spend time with her. The trial court signed an ex parte order granting plaintiff "temporary full-time parenting time" until the matter could be addressed at the court's next motion call. The order also barred defendant from appearing at the children's school or initiating contact with the children in any manner.

At the hearing on November 15, 2017, plaintiff's counsel asked the trial court to adopt a recent recommendation from Kathleen Doan, the court's FOC custody and parenting-time specialist, in which Doan recommended that defendant complete a psychological evaluation and parenting classes and that the trial court suspend defendant's parenting time in the interim. Consistent with Doan's recommendation, the trial court continued the order suspending defendant's parenting time in light of the high-conflict state of the case. The children remained free to contact defendant at their discretion and plaintiff was ordered not to discourage the children from doing so. Defendant had little direct contact with the children throughout the remainder of the case.

The court scheduled an evidentiary hearing concerning plaintiff's motion to modify custody in January 2018, but the matter was adjourned when the parties agreed to try to resolve the matter with therapeutic counseling outside of court. The parties quickly disagreed about the requirements of their stipulated order, so the evidentiary hearing began on March 20, 2018, and consisted of nine days of proceedings over the course of eight months. In July 2018, the parties again tried to resolve their dispute by agreeing to a specific schedule of parenting-time visits and joint counseling sessions with defendant and the children. However, each time defendant had in-person contact with the children, the children were left in a distraught and emotional state. The children repeatedly expressed fear and anger toward defendant in counseling and little progress was made to repair the relationships between defendant and the children.

Several months after the evidentiary hearings concluded, the trial court issued a lengthy opinion regarding the parties' custody and parenting time. The trial court determined that revisiting the parties' custody arrangement was warranted because the extreme coparenting difficulties the parties faced took a high toll on the children and was contrary to their best interests. Although the trial court's discussion of the children's established custodial environment was somewhat ambiguous, it analyzed the matter as though the children had an established custodial environment with both parties. Applying a clear and convincing evidence standard, the trial court considered each of the statutory best-interest factors, MCL 722.23, citing evidence relevant to each factor and concluding that granting plaintiff sole legal and physical custody was in the children's

best interests in light of defendant's "bizarre and concerning behaviors" and the emotional and chaotic environment in which the children lived while in defendant's care. With respect to parenting time, the court held that it was not in the best interests of the children to have parenting time with defendant because there was clear and convincing evidence that parenting time would further endanger the children's physical, mental, or emotional health. The court reasoned that forcing the children to interact with defendant would only damage, rather than foster, the parent-child relationships. However, "cognizant of the significance of its ruling, and so as not to constitute a *de facto* termination of [defendant's] parental rights with no review mechanism," the court permitted periodic review hearings to determine whether reinstituting parenting time would be in the children's best interests. This appeal followed.

II. STANDARDS OF REVIEW

In matters involving child custody, " 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or clear legal error on a major issue.' " *Yachcik v Yachcik*, 319 Mich App 24, 31; 900 NW2d 113 (2017), quoting MCL 722.28. "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). The trial court's ultimate decision to change custody is reviewed for an abuse of discretion, which exists in the context of child custody disputes " 'when the result 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.' " *Yachcik*, 319 Mich App at 31, quoting *Sulaica v Rometty*, 308 Mich App 568, 577; 866 NW2d 838 (2014). Questions of law are reviewed for clear legal error, which occurs when the trial court "incorrectly chooses, interprets, or applies the law." *Sulaica*, 308 Mich App at 577. In addition, this Court reviews a trial court's discovery rulings for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

III. PROCEDURE FOR MODIFYING CHILD CUSTODY

Defendant first argues that the trial court erred by effectively granting plaintiff custody on November 15, 2017, without complying with the procedural requirements of the Child Custody Act, MCL 722.21 *et seq*. In a related argument, defendant also takes issue with the trial court's reliance on an FOC recommendation in ruling on defendant's January 2018 motion to restore her custodial rights. We agree, in part, but conclude that the trial court's procedural error was harmless.

"As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change of circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests." *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). This Court announced the threshold requirements a party seeking a change of custody must satisfy in *Vodvarka v Grasmeyer*, 259 Mich App 499, 512-514; 675 NW2d 847 (2003):

> [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.
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> [I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors.

If the trial court determines that proper cause or a change of circumstances has been established, it must then consider whether the proposed change is in the best interests of the child. *Lieberman*, 319 Mich App at 83. "In matters affecting custody, when the child has an established custodial environment with each parent, the movant must prove by clear and convincing evidence that the proposed change is in the best interests of the child." *Id*. at 83-84. Custody decisions, as well as parenting-time decisions that would alter the child's established custodial environment, require findings under all of the statutory best-interest factors. *Id*. at 84. "An evidentiary hearing is mandated before custody can be modified, even on a temporary basis." *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005).

Defendant asserts that the trial court erred by failing to comply with these procedural requirements before granting plaintiff full-time parenting time in November 2017. We agree. On November 6, 2017, while plaintiff's motion to change custody was pending, the trial court signed an ex parte order suspending defendant's parenting time. The court heard oral arguments concerning plaintiff's emergency motion to suspend defendant's parenting time on November 15, 2017. At the conclusion of the brief hearing, the trial court signed an order continuing the suspension of defendant's parenting time and ordering that plaintiff "have the children full-time." Although the trial court framed its order in terms of parenting time only, the complete suspension of defendant's parenting time had the effect of modifying physical custody of the children because it gave plaintiff complete physical care and supervision of the children while the order remained in effect, where physical custody had previously been vested in defendant. See *Lieberman*, 319 Mich App at 79-80 (describing physical custody). Because the trial court's order modified the children's custody, the court was required to first hold an evidentiary hearing and make the findings detailed above, which it did not do. This was a clear error of law. Nonetheless, the trial court's error was harmless under these circumstances. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994) ("[U]pon a finding of error, appellate courts should remand to the trial court unless the error was harmless.").

In its later opinion following the evidentiary hearings, the trial court found proper cause or a change of circumstances based upon the breakdown of the parties' ability to coparent that occurred before plaintiff filed his motion for change of custody, which the court reasoned had taken "an increasingly high toll on the children, their health, and [was] contrary to their best interests." Because the trial court's opinion makes it clear that it considered whether the circumstances that existed *before* November 2017 warranted revisiting the custody order, there is no reason to believe that the trial court would have reached a different result if it had considered this issue before entry of the November 15, 2017 order that effectively granted plaintiff physical custody.

In arguing that the trial court's procedural error was not harmless, defendant contends that the suspension of her parenting time resulted in a "judicially engineered . . . new established custodial environment" and "invariably affected all of the future proceedings in this case." We disagree. "An established custodial environment exists '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.' " *Yachcik*, 319 Mich App at 47, quoting MCL 722.27(1)(c). "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." MCL 722.27(1)(c). The existence of an established custodial environment affects the burden of proof imposed on the party seeking a change in custody as it relates to the best interests of the child. *Griffin v Griffin*, 323 Mich App 110, 119-120; 916 NW2d 292 (2018). Although the trial court's opinion is somewhat contradictory in its discussion of the children's established custodial environment, the court applied the higher clear and convincing evidence burden of proof that applies when the established custodial environment will be altered by the court's order. See *id*. at 119. Because the trial court applied the highest burden of proof applicable to plaintiff's motion, any effect the court's procedural error had on the established custodial environment was harmless. See *Kubicki v Sharpe*, 306 Mich App 525, 541; 858 NW2d 57 (2014) (failure to articulate established custodial environment findings was harmless where trial court applied clear and convincing evidence standard).

Turning to defendant's contention that the court's procedural error tainted the later proceedings, defendant failed to expand upon this conclusory argument. "It is well established that [a] party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001) (quotation marks and citation omitted; alteration in original). As such, this Court need not address it. *Id*. Defendant's position lacks merit at any rate because the trial court followed the appropriate framework for modifying custody in its opinion, albeit well after it first granted plaintiff physical custody on a temporary basis. That is, after finding that it was appropriate to revisit the issue of custody, the court determined the applicable burden of proof on the basis of the children's established custodial environment, and proceeded to conduct an in-depth analysis of the statutory best-interest factors. See *Lieberman*, 319 Mich App at 79-84.

Furthermore, while the trial court's opinion references and relies upon a number of events that occurred after it temporarily granted plaintiff physical custody, it is evident that the best-interest factors the court found most important were Factors (a), (j), and (*l*), and the court's emphasis on those factors would still have been supported around the time plaintiff originally sought suspension of defendant's parenting time. Factor (a) considers "[t]he love, affection, and

other emotional ties existing between the parties involved and the child." MCL 722.23(a). In pertinent part, the trial court found that Factor (a) greatly favored plaintiff because, despite the love both parents felt for the children, defendant's actions "produced significant conflict and impacted the existing emotional ties between her and the children." Had the trial court held an evidentiary hearing before modifying the custody arrangement on a temporary basis, this finding would still have been supported by evidence of the events that occurred in the fall of 2017. By that time, the relationship between defendant and IDO had already deteriorated to the point that IDO was running away from defendant's home in fear of defendant's antics, clearly evincing a breakdown in the emotional ties IDO felt toward defendant. Although the discord between defendant and GDO was less severe, GDO's protective attitude toward his twin sister apparently caused him to resent defendant's treatment of IDO and to similarly reject voluntary contact with defendant. For instance, there was evidence that GDO locked himself in a friend's house with IDO on August 24, 2017, to avoid defendant and that he refused to leave the school with defendant on more than one occasion that fall. In comparison, while defendant clearly disagreed with many of plaintiff's parenting decisions, it appears undisputed that the children felt great love, affection, and emotional ties with plaintiff, further supporting the trial court's finding that Factor (a) favored plaintiff.

Factor (j) addresses "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 . . . ." MCL 722.23(j). The trial court determined that this factor overwhelmingly favored plaintiff because defendant "actively wage[d] acrimonious campaigns designed to alienate the children both from her and from [plaintiff]," while believing that plaintiff was responsible for turning the children against her. The court also found that defendant was unwilling to facilitate a relationship between the children and plaintiff. Again, the trial court could have reached these same findings if it had considered the matter at or near the time it granted plaintiff physical custody. Focusing on the fall of 2017, there was evidence that defendant placed a calling restriction on the children's phones so that they were unable to directly call plaintiff and that plaintiff's phone number was placed on a "watch list" that alerted defendant when GDO was communicating with plaintiff. Because of these restrictions, IDO was forced to communicate with plaintiff through social media applications and it is unclear whether GDO, who was not using social media at the time, had any contact with plaintiff while in defendant's care. Defendant's interference with the children's ability to communicate with plaintiff, even in the face of a court order requiring that the children have access to their phones to communicate with the noncustodial parent, supports that trial court's finding that defendant was unwilling to facilitate plaintiff's relationships with the children. Furthermore, defendant's response to plaintiff's motion for change of custody was riddled with criticism and attempts to portray plaintiff as the source of the family's problems, and defendant's belief that plaintiff was at fault for the family discord continuously pervaded her testimony about the fall of 2017. In contrast, plaintiff testified that he consistently consulted the children about whether they wanted to begin repairing their relationships with defendant, reminding them that defendant loved and missed them, and the trial court found plaintiff's testimony highly credible. Thus, the trial court's finding that Factor (j) favored plaintiff would have been supported had the trial court addressed the matter earlier in compliance with the procedural requirements of the Child Custody Act.

Factor (*l*) permits the trial court to consider any other factor relevant to the dispute. MCL 722.23(*l*). Under this factor, the trial court relied on several concerning attributes of the case: (1) defendant's failure to appreciate the emotional damage her actions were inflicting upon the children; (2) defendant's decision to "publically humiliate" GDO by adding the phrase "ur mom" to his Xbox gaming account, which was visible to the public; (3) defendant's act of leaving an FOC meeting to drive to the children's school in an attempt to remove them from class in the middle of the day; (4) defendant's "somewhat concerning and bizarre" messages to plaintiff; (5) the fact that defendant's "intentionally antagonistic, spiteful, and emotionally damaging behavior" inflamed the familial conflict; (6) that plaintiff had to seek therapy to obtain tools to better handle defendant's behavior over the years; and (7) a variety of matters noted in the children's 2015 counseling records. Again, the majority of the additional considerations that the trial court addressed under Factor (*l*) were present to some degree at the time the court temporarily granted plaintiff physical custody. As noted by the trial court, a CPS investigator testified that she would have substantiated a complaint for emotional abuse in November 2017 had the children remained in defendant's care. Defendant went to the children's school to remove them from class after the second meeting with Doan in November 2017. With respect to defendant's concerning messages to plaintiff, the trial court cited messages admitted as defendant's Exhibit 19 and plaintiff's Exhibit P, which were exchanged in June 2017 and September 2017, respectively. Plaintiff's therapist testified that she had been working with plaintiff for more than 10 years to help him learn ways to effectively communicate with defendant. Finally, although the trial court quoted extensively from the children's 2018 counseling records, that fact alone does not undermine the strength of the trial court's other findings concerning matters that existed in the fall of 2017.

Defendant also takes issue with the trial court's reliance on a referee recommendation to resolve her January 2018 motion to restore her custodial rights. Defendant contends that the recommendation was the product of a meeting between the referee, Doan, and the parties' attorneys, which the parties were not allowed to attend. Defendant argues that the trial court blindly accepted the recommendation in open court without making any findings concerning proper cause, the children's established custodial environment, or the best-interest factors.

Defendant's argument mischaracterizes the record. On January 17, 2018, two motions were before the court for hearing: plaintiff's show cause motion concerning defendant's violations of the court's earlier orders and defendant's motion to restore her custodial rights. The parties sought several forms of relief in their respective motions. After the parties' attorneys met with a referee in private, the trial court opened the hearing by noting that there were three different recommendations from the referee. The first recommendation concerned the children's counseling, which defense counsel had no objection to. The second recommendation related to recalculating child support, with which defense counsel similarly expressed satisfaction. The third recommendation concerned the transfer of GDO's gaming account. The trial court overruled defendant's objections concerning the gaming account and affirmed an earlier order requiring defendant to transfer the account to GDO. No further recommendations were referenced by the trial court or the parties, and defendant has not presented any evidence to the contrary. Thus, while the trial court did resolve some of the ancillary matters involved in the motions by relying primarily on the referee's recommendation, those issues did not involve custody or parenting time and, thus, did not require findings regarding proper cause, the established custodial environment, or the best-interest factors.

Furthermore, at the same hearing, the trial court acknowledged that defendant's motion to restore her custodial rights presented a strong argument that should be addressed at an evidentiary hearing. To that end, the trial court scheduled a hearing to take place two days later, at which time custody and parenting time would be addressed. Although the evidentiary hearing was ultimately adjourned, the adjournment was entered at the request of the parties. Extensive testimony was later taken, and the trial court made detailed findings in support of its final order granting plaintiff sole legal and physical custody. Accordingly, defendant's argument is unsupported by the record.

IV. ADMISSIBILITY OF EVIDENCE SUPPORTING THE TRIAL COURT'S RULINGS

Defendant next argues that the trial court erred by basing its decisions on ex parte communications and inadmissible evidence. Again, we agree, in part, but find the trial court's error harmless in the context of this case.

Defendant argues that the trial court erred by considering ex parte communications with Doan. Defendant's argument is fundamentally flawed because an ex parte communication is "[a] communication between counsel or a party and the court when opposing counsel or party is not present." *Black's Law Dictionary* (11th ed). Because Doan was neither a party nor counsel in this matter, the trial court's private communication with Doan does not constitute ex parte communication. Furthermore, this Court has held that the trial court may consider an FOC report "as an aid to understanding the issues to be resolved." *Harvey v Harvey*, 257 Mich App 278, 292; 668 NW2d 187 (2003). The trial court's August 14, 2018 order directing Doan to consult with the children's counselor, Kaca Popovic, for the purpose of submitting a recommendation for continued reunification efforts was not improper, as the Child Custody Act permits the court to "[u]tilize community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes," MCL 722.27(1)(d), and "[t]ake any other action considered to be necessary in a particular child custody dispute," MCL 722.27(1)(e). As the children's treating counselor, Popovic undoubtedly had significant insight on the children's progress and should have been a neutral source of information.[1]

That being said, the portion of the trial court's order enjoining Popovic and Doan from "discussing or disclosing the contents of their communication to counsel or the parties," is more problematic. Section 7a of the Friend of the Court Act, MCL 552.501 *et seq*., provides that

> [a] copy of each report, recommendation, and any supporting documents or a summary of supporting documents prepared or used by the friend of the court or an employee of the office shall be made available to the attorney for each party and to each of the parties before the court takes any action on a recommendation by the office. [MCL 552.507a(1).]

[1] At the time the trial court signed the August 14, 2018 order directing Doan to consult with Popovic, it had no reason to believe that Popovic harbored bias against either party. However, Popovic later admitted that she was biased against defendant as a result of an explosive joint counseling session that took place later that month.

Similarly, MCR 3.210(C)(6) directs the trial court to give the parties an opportunity to review and file objections to a report submitted by the FOC before a decision is made. Given these mandates, the trial court committed clear legal error by precluding disclosure of the recommendation to the parties.

However, the trial court's error does not require appellate relief because it was harmless. *Fletcher*, 447 Mich at 889. Although the trial court's communication with Doan does not constitute ex parte communication, the dangers inherent in ex parte communications bear consideration. *Cheesman v Williams*, 311 Mich App 147, 162; 874 NW2d 385 (2015) stated:

> In *Grievance Administrator v* Lopatin, 462 Mich 235, 262-263; 612 NW2d 120 (2000), our Supreme Court discussed the danger of ex parte communications:
>
> "Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge 'may be incomplete or inaccurate, the problem can be incorrectly stated.' At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence if not outright corruption." [Quoting Shaman, Lubet & Alfini, Judicial Conduct and Ethics (3d ed), § 5.01, pp 159-160.]

These risks are not present in this case because the parties were not deprived the opportunity to respond and be heard. At a hearing on September 13, 2018, the trial court told the parties that Doan and Popovic recommended that the children needed "a break," with defendant "out of the picture" for a while, perhaps until the end of the school semester. Both parties had an opportunity to advise the court about their respective perceptions of the parties' recent attempts to restore parenting time and engage in joint counseling, and both parties had previously elicited testimony from Popovic about her counseling techniques. Lastly, defense counsel opposed the recommendation at the hearing, arguing that the continued separation of the children from defendant was making the situation worse. Thus, the trial court did not make the decision to resume the evidentiary hearing in lieu of ordering a specific counseling and parenting-time schedule based solely on one-sided communication.

Defendant also challenges the trial court's reliance on certain evidence in its final opinion and order, namely, text messages that were not properly before the court and the court's *in camera* interview with the children. The text messages that defendant challenges were included in a motion filed by plaintiff after the evidentiary hearings concluded. It is notable that while the motion was never heard by the trial court, defendant filed a response to the motion in which she admitted sending the messages, disputing only the negative implications plaintiff attached to the messages. Assuming, without deciding, that the trial court's reference to these messages in its opinion was improper under these circumstances, we disagree with defendant's assertion that the trial court "extensively relied" on the messages to reach its decision regarding custody and parenting time.

The trial court conducted an in-depth analysis of the best-interest factors, citing specific evidence and findings as to each factor, including Factor (*l*), which serves as a catch-all provision permitting consideration of any factor the court deems relevant. It was only after the court concluded its analysis of the best-interest factors that it noted, almost as an aside, the messages submitted with plaintiff's motion after the evidentiary hearings. Thus, it does not appear that the trial court considered the messages in the context of its best-interest analysis, which is what ultimately controls all important decisions regarding the children involved in a custody dispute. See MCL 722.25(1) (stating that the best interests of the child control in custody disputes); *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) ("[W]hen the parents cannot agree on an important decision . . . the court is responsible for resolving the issue in the best interests of the child."). Moreover, the court cited the messages as evidence that defendant took no responsibility for her actions, believed that plaintiff was at fault for the situation, and failed to acknowledge or internalize the basis for IDO's adverse feelings toward her. Even if the court had not referred to the messages in its opinion, it could have reached the same conclusion from other evidence presented at the evidentiary hearings and cited throughout its opinion.

Turning to defendant's challenge regarding the trial court's *in camera* interview of the children, defendant contends that the trial court improperly used the *in camera* interview for fact-finding. We disagree. Under MCL 722.23(i), the reasonable preference of a child involved in a custody dispute is a factor that must be considered in the court's best-interest analysis if the court determines that the child is of sufficient age to express a preference. *Kubicki*, 306 Mich App at 544-545. The trial court can discern the child's preference during an *in camera* interview, as long as the interview is limited "to a reasonable inquiry of the child's parental preference." *Molloy v Molloy*, 247 Mich App 348, 351; 637 NW2d 803 (2001), vacated in part on other grounds 466 Mich 852 (2002). See also MCR 3.210(C)(5) (permitting private interview with child focused on child's reasonable preference). While the interview cannot be used for fact-finding, it also "should not take place in a vacuum[.]" *Thompson v Thompson*, 261 Mich App 353, 365; 683 NW2d 250 (2004), quoting *Molloy*, 247 Mich App at 353 (quotation marks omitted). Indeed, the trial court should make inquiries "to test the authenticity, the motives, and the consistency of the preference." *Molloy*, 247 Mich App at 353. The trial court "must state on the record whether children were able to express a reasonable preference and whether their preferences were considered by the court, but need not violate their confidence by disclosing their choices." *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871 (1994).

Apart from noting that an *in camera* interview occurred, during which the children appeared "grounded," the trial court's only discussion of the interview was in the context of analyzing Factor (i). With respect to that factor, the court stated only that it interviewed the children, "found their statements credible and compelling," and "considered their preference and statements in its deliberations." Thus, even if the court heard extraneous information in the course of testing the reasonableness of the children's preferences, there is simply no indication that it asked the children questions outside the permissible scope of the interview or considered extraneous information in evaluating the other best-interest factors. See *Thompson*, 261 Mich App at 365-366.

V. DISCOVERY

Next, defendant argues that the trial court erred by denying her requests to compel production of plaintiff's social media posts, the user names and passwords for the children's social media accounts, and the raw test data from the psychological evaluations of the parties and children. We agree, in part, but again find that the trial court's error was harmless.

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Augustine*, 292 Mich App at 419. "However, a trial court should also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005). Defendant alleged that she should be allowed access to the children's social media accounts because the children's state of mind, as well as their social media use, was central to the parties' dispute. Although the trial court did not articulate its reason for denying defendant's request, we cannot conclude that the trial court's ruling amounted to an abuse of discretion because there was evidence that defendant had abused similar access in the recent past. Defendant had access to GDO's Xbox gaming account for several months because it was associated with her personal Microsoft account. Before giving GDO the information needed to access the account at plaintiff's house, defendant added the phrase "ur mom" to GDO's publically accessible profile information. The trial court characterized defendant's action as "highly concerning" in that defendant chose to "publically humiliate" GDO. Given this finding, it is not difficult to infer the trial court denied defendant's request for access to the children's social media accounts to prevent defendant from abusing the access. Despite Michigan's broad discovery policy, the trial court did not err by denying a request that could be used for abusive purposes, particularly when the parties presented ample evidence from which the children's state of mind could be discerned, including, most notably, the children's counseling records. *Id.*

Furthermore, defendant's contention that the children's accounts were relevant because "the children's access and use of social media was a prime issue of contention between the parties," is misplaced. Although defendant's discipline related to social media may have been a catalyst for the breakdown of defendant's relationship with IDO, the issue before the court was whether modification of the parties' custody arrangement was in the children's best interests. Regardless of whether defendant's disciplinary measures were appropriate or whether the children's feelings about defendant were objectively reasonable, the evidence demonstrated that the children had an honest and deep-set fear of defendant such that continuing the previous custody arrangement was no longer in their best interests.

With respect to defendant's request for copies of plaintiff's social media posts, defendant alleged that the posts might demonstrate that plaintiff had been alienating the children against defendant. On appeal, defendant contends the materials were relevant to plaintiff's state of mind about defendant, the children, and the custody dispute. Despite the limited relevance asserted by defendant, defendant sought *all* of plaintiff's social media posts for "the last year," without attempting to narrow the scope of the request to posts that related to defendant, the children, or the custody dispute. As such, the trial court could have reasonably determined that defendant's request improperly sought excessive discovery. *Id.* More importantly, the trial court reviewed plaintiff's posts *in camera* and determined that none of the materials were relevant to the custody dispute.

Thus, even if the trial court had permitted discovery of plaintiff's social media posts, it is improbable that the court would have permitted admission of the posts at the evidentiary hearing.

Defendant also alleges that the trial court erred by denying her request to compel production of the raw data upon which FOC psychologist Linda Green relied to reach the opinions outlined in her psychological report. Defendant filed an emergency motion to compel the raw data, alleging that it was discoverable under MCR 3.218(B) and the trial court's order referring the family for psychological assessment, which designated information relied on by the expert as nonconfidential. The trial court denied defendant's motion without explanation.

Under MCR 3.218(B)(1), the FOC must give parties and attorneys of record access to nonconfidential records. MCR 3.218(A)(1) defines "records" as "any case-specific information the [FOC] office maintains in any media[.]" As a psychologist employed by the FOC, Dr. Green would be subject to the requirements of MCR 3.218. Given the plain language of these rules, we agree that the trial court erred by denying defendant's motion to compel production of the raw test data, as the data was "case-specific" and requested by defendant's attorney of record.

Defendant also argues that the trial court exacerbated this error by barring defense counsel from eliciting testimony about the raw data when Dr. Green testified at the evidentiary hearing. Defense counsel asked Dr. Green about defendant's specific results on four individual scales from the Minnesota Multiphasic Personality Inventory II (MMPI-II) test.[2] Dr. Green indicated that she did not have the raw data available during her testimony, but that all of defendant's clinical scales were within normal limits, which meant that defendant's results reflected trends, rather than clinical syndromes. Dr. Green also relied on "other validating information," such as defendant's history, documentation, and input from other professionals, to characterize the trends reflected in the test results. When Dr. Green refused to read aloud the "complete computer printout . . . about [defendant's] personality profile," the trial court rejected defense counsel's objection, reasoning that Dr. Green was the expert on how to interpret the data. The court concluded that counsel could "ask [Dr. Green] what she used, but I'm not going to get into the raw data." With respect to plaintiff's test results, Dr. Green agreed that some of plaintiff's validity scales were elevated, but not to a point that would render plaintiff's profile invalid.

Because Dr. Green testified as an expert in psychology, the admissibility of her testimony was governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[2] According to Dr. Green's report, the MMPI-II is a "self-administered standardized psychometric test of adult personality and psychopathology."

By limiting defense counsel's inquiry into the data upon which Dr. Green relied, the trial court improperly limited defendant's ability to test the reliability of Dr. Green's expert opinion.

Although the trial court abused its discretion in this regard, this Court must affirm the trial court's order granting plaintiff physical and legal custody unless the trial court "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. Even when such an error occurred, appellate relief should not be granted if the error was harmless. *Fletcher*, 447 Mich at 889. The trial court's error was ultimately harmless because the trial court did not place particular emphasis on Dr. Green's report or opinion. The parties' psychological profiles were most relevant to best-interest Factor (g) (mental and physical health of the parties), MCL 722.23(g), and the trial court did not find Dr. Green's reiteration of defendant's self-reported mental health history dispositive, nor did the court refer to either party's psychological profiles in its analysis. The only other time the trial court cited Dr. Green's report or opinion was in the context of Factor (b) (capacity and disposition to provide love, affection, and guidance and to continue education and raising of child in his or her religion or creed, if any), MCL 722.23(b). With respect to that factor, the trial court noted Dr. Green's opinion that defendant's capacity to give love, affection, and guidance was hindered by her "unpredictable and intimidating reactions," which resulted in "fragile attachments, withdrawal, mistrust, and anxiety." Outside of Dr. Green's opinion, the record was replete with examples of defendant's extreme reactions to conflicts with plaintiff and the children. Furthermore, the children's diminished relationships with and feelings toward defendant were at the heart of the custody dispute. Given the ample evidence regarding these matters, the trial court's repeated comments about the way defendant's behavior affected the children, and the court's minimal citation of Dr. Green's opinion, it is nearly certain that the trial court would have made a similar finding under Factor (b) even if defendant had received the raw test data in discovery and been permitted to question Dr. Green more closely regarding the same.

Reviewing the entirety of the trial court's opinion, it is clear the court was most concerned with the implications of each party's behavior during the proceedings and the manner in which that behavior affected the children, rather than the details of the parties' psychological profiles. Thus, even if the trial court had ordered Dr. Green to supply the raw data from the psychological testing and permitted defense counsel to question Dr. Green about the same, it is improbable that the result of the proceedings would have been different because the tendencies implicated by the parties' psychological profiles did not alter their actual conduct throughout the case or the fact that defendant's actions were having a significant negative effect on the children's mental and emotional well-being. As such, the trial court's error in this regard does not warrant relief.

VI. BIAS IN ENTERING AND ENFORCING ORDERS

Defendant next contends that the trial court exhibited bias toward her by striking provisions in stipulated orders that provided parenting time for defendant, refusing to enforce a stipulated order for parenting time, and refusing to appoint a new counselor after Popovic admitted that she was biased against defendant. We disagree.

Defendant's position ignores the fact that the Child Custody Act imposes an affirmative obligation on the trial court to "ensure that the resolution of any custody dispute is in the best interests of the child." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). While

defendant cites caselaw supporting the general notion that courts must enforce unambiguous agreements as written, defendant's authority is unpersuasive in the context of custody disputes because "the deference due parties' negotiated agreements does not diminish the court's obligation to examine the best interest factors and make the child's best interests paramount." *Id*. at 193. Each of the decisions defendant complains of was clearly undertaken in recognition of this rule of law.

Although the parties stipulated in January 2018 that defendant could contact the children by phone and text message, the trial court struck that provision before signing the order. At that time, the children had not communicated with defendant for several months, and defendant had yet to engage in any sort of reunification counseling with the children. The trial court's order did not preclude defendant from reconnecting with her children, it merely required that the first contact between them occur in a therapeutic setting. The trial court's later decision to modify an order requiring the children to respond to defendant's phone calls and text messages was similarly guided by the best interests of the children. The subject order used mandatory language to describe the children's obligation to respond, and the trial court modified the order to "encourage," rather than require, the children's cooperation, doing so only after the parties filed motions that made the children's negative responses to the forced contact evident. A month later, the trial court clearly articulated that it declined to enforce a stipulated order regarding parenting time because it was not convinced that the children were ready to have more contact with defendant after recent attempts to force the matter had been disastrous. Finally, despite Popovic's admission of bias toward defendant in October 2018, the trial court declined to appoint a new counselor because the children had developed a good rapport with Popovic and were in need of stability and "respite from the significant strain and emotional turmoil" caused by the custody dispute. Given the trial court's focus on the well-being and best interests of the children, we cannot conclude that the court's rulings were "so palpably and grossly violative of fact and logic that [they] evidence[] a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Yachcik*, 319 Mich App at 31 (quotation marks and citation omitted).

VII. CHILD CUSTODY RULING

Next, defendant challenges the trial court's decision to grant plaintiff sole legal and physical custody, arguing that the ruling was an abuse of discretion and against the great weight of the evidence. We disagree.

Defendant first argues that the trial court abused its discretion by making an unfounded credibility determination to insulate its decision from review. We disagree. It is well-accepted that appellate courts generally defer to a trial court's determinations regarding credibility, *Elahham v Al-Jabban*, 319 Mich App 112, 126; 899 NW2d 768 (2017), as the court that hears the testimony and observes the witnesses is in a superior position to make that determination, *Fletcher*, 447 Mich at 890. However, because factors apart from demeanor and inflection affect credibility, a trial court's credibility determination is not completely shielded from review. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990). This Court may scrutinize and reject a credibility determination when a witness's testimony is contradicted by objective evidence or when the testimony is "so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Id*. (quotation marks and citation omitted).

The trial court found defendant's testimony "wholly not credible, largely disingenuous, and fantastical at best," noting that it had to repeatedly admonish defendant to answer questions directly instead of providing unprompted narratives and that defendant's testimony was "wildly misleading and nonsensical" at times. The trial court also indicated that defendant provided combative and evasive responses and that her demeanor over the lengthy series of hearings "vacillated between laughing, crying, tense, and calm seemingly independent of anything occurring in the courtroom, the question posed to her, or anything about the particular incident about which she testified." While we are unable to evaluate defendant's demeanor at the hearings, the remainder of the trial court's criticisms are well supported by the record.

For instance, when asked whether she added plaintiff's phone number to a watch list to monitor plaintiff's communications with GDO, defendant said, "I have a right to see what my son's doing, so I don't really know." Defendant also stated that she did not create a watch list and did not know what it was. Plaintiff's counsel confronted defendant with a message from GDO's phone indicating that plaintiff's phone number had been added to the watch list, which read, "Your parent will be notified when you call or text this person." In response, defendant said she did not know how GDO "got that" because he should not have access to the parental controls for defendant's Verizon account. Defendant also reasoned: "I think I have a right to do that as a parent. So fine with me." Later, when pressed about whether she knew that GDO would see that she changed his Xbox account profile to include the phrase "ur mom," defendant began a denial before shifting her answer midsentence to say, "Yeah, you know what and I am his mom so there." Plaintiff's counsel also asked defendant whether she went to the children's school with her former lawyer on the second day of class, and defendant began saying, "You know that we did because we were supposed to have—" at which point the trial court asked defendant to answer yes or no. Defendant admitted going to the school, but denied asking to take the children out of school early because it was her lawyer who made the request. When asked about her plans to relocate after selling her home, as required by her judgment of divorce, defendant said, "I just want to have my children back in my arms." Each of these examples of nonresponsive or misleading testimony occurred on the first day of the hearing alone, and the trial court had to instruct defendant to answer questions directly at least eight times that day. Given the nature of defendant's testimony that day and throughout the remainder of the proceedings, the trial court's poor view of defendant's credibility appears well grounded.

Defendant contends that the trial court's perception went against the great weight of the evidence because her testimony was corroborated by text messages and over 40 exhibits that the trial court failed to consider. We disagree. While many of the text messages do corroborate assertions defendant made at the hearings, the matters to which they relate were essentially uncontested, such as defendant's insistence that IDO stop using social media; an inappropriate message IDO received from an anonymous person asking for nude photographs; plaintiff telling defendant that the children were only comfortable with receiving text message communications from her on their birthday; and the numerous text messages defendant sent the children without receiving a response. Other exhibits, like defendant's letter to Doan after their second meeting and defendant's e-mail to plaintiff on February 2, 2018, merely reiterated defendant's perception of events and were contradicted by other evidence. The few exhibits that were particularly favorable to defendant's credibility, such as a June 2017 text message in which plaintiff agreed to a family meeting to discuss name calling and other respect issues with the children, were not so

persuasive that they would adequately rehabilitate defendant's credibility and render the trial court's determination contrary to the great weight of the evidence.

Defendant also argues that the trial court erred by focusing on its negative view of defendant, without considering any of plaintiff's actions, expert testimony that both parties were at fault, and testimony from several witnesses indicating that defendant was polite, appropriate, and did not yell. Defendant is correct that nearly every witness testified that she was appropriate, polite, and respectful during their interactions. Defendant's behavior toward third parties, however, is not necessarily indicative of her behavior toward plaintiff and the children. Indeed, according to Dr. Green, defendant has "difficulty modulating her response to conflict *particularly when it involves her family and her children* and at those times has been known to have exaggerated responding." (Emphasis added.) Defendant's other arguments are simply unsupported by the record. Contrary to defendant's assertion that the children's guidance counselor and Dr. Green indicated that both parties were culpable for the custody dispute in this case, both witnesses actually testified in general terms, agreeing that both parents typically have some level of responsibility for familial conflict. Furthermore, while there was evidence suggesting that the children *might* be negatively impacted if they heard plaintiff express his fear of defendant, the evidence that plaintiff did so on a regular basis was far from "uncontroverted." Defendant presented a single recording of the parties' October 11, 2017 encounter with the police in which plaintiff, in IDO's presence, said he feared defendant. This single instance does not bear significant weight in comparison to the balance of the evidence presented to the court. Furthermore, while defendant may disagree with the trial court's findings, the trial court found from the totality of the evidence that plaintiff's actions were generally appropriate and in the best interests of the children.

Lastly, defendant argues that the trial court's findings were flawed because the court did not address the best interests of the children individually. This Court has previously explained that "in most cases it will be in the best interests of each child to keep brothers and sisters together." *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001), quoting *Wiechmann v Wiechmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995) (quotation marks omitted). "However, if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control." *Wiechmann*, 212 Mich App at 440. Defendant argues that the trial court erred by failing to take into account that she had no conflicts with GDO. We disagree.

Even though GDO was not directly involved in the underlying conflicts that caused this matter to come before the trial court, the evidence demonstrated that the twin children shared an extremely close sibling bond and that GDO felt particularly protective of his sister. Thus, while there was no indication that GDO initially had the same volatile relationship with defendant that IDO did, GDO still began to distance himself from defendant, going so far as to lock himself inside a friend's home with IDO to avoid defendant. GDO was also presenting as emotional and "burnt out" at school. Furthermore, the police officer who spoke with GDO on October 11, 2017, testified that GDO was timid, chose his words very carefully, and seemed scared to say what he wanted to. GDO remained with defendant that night while IDO stayed with plaintiff and, the very next day, GDO went to plaintiff's home and refused to return to defendant. According to the psychologist who briefly treated the children in the fall of 2017, GDO was shut down and "afraid to take a stand" because he feared that the same things that happened to IDO would happen to him. The animosity GDO felt toward defendant continued to grow in the following months, particularly in

the aftermath of defendant's interference with his gaming account. By June 2018, GDO was expressing extreme hatred toward defendant in his counseling sessions with Popovic. In light of these facts, the trial court did not err because keeping the children together was consistent with GDO's best interests. Moreover, given the strength of the children's bond, it is quite probable that separating the children would have created yet another hurdle in the path to the children repairing their relationships with defendant. See *id*. at 439-440 ("The sibling bond and the potentially detrimental effects of physically severing that bond should be seriously considered in custody cases where the children likely have already experienced serious disruption in their lives as well as a sense of deep personal loss.").

VIII. PARENTING-TIME RULING

Next, defendant challenges the trial court's final order, in which she was granted no parenting time. Defendant argues that the ruling was contrary to the statutory presumption that parenting time should be granted in a manner that will foster a strong parent-child relationship and that the lengthy suspension of her parenting time constitutes a de facto termination of her parental rights. We disagree.

MCL 722.27a(1) creates a statutory presumption that it is in a child's best interests to have a strong relationship with both of his or her parents. *McRoberts v Ferguson*, 322 Mich App 125, 140; 910 NW2d 721 (2017). To that end, parenting time should be granted "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). But while a child has a presumed right to parenting time, parenting time should not be ordered if "the court determines on the record by clear and convincing evidence that parenting time would endanger the child's physical, mental, or emotional health." *Lieberman*, 319 Mich App at 80, citing MCL 722.27a(3).

This Court recently addressed an identical argument in *Luna v Regnier*, 326 Mich App 173, 183; 930 NW2d 410 (2018). In that case, the father moved to suspend the mother's parenting time, alleging that the children did not want to see the mother and would act out in frustration whenever she was mentioned. *Id*. at 177. The children's guardian ad litem testified that the children struggled with the court-ordered parenting time and would run into the woods to avoid the mother. *Id*. at 178. The children's negative behaviors toward the mother continued to increase, and the children's counselor believed it would be "beneficial to suspend parenting time because the stress and anxiety it caused the children negatively affected their progress on other mental, social, and educational issues." *Id*.

This Court affirmed the trial court's suspension of the mother's parenting time under MCL 722.27a(3). *Id*. at 180-183. This Court agreed that forcing parenting time under the circumstances "was likely to cause emotional trauma and to drive a wedge further between mother and child, not foster a strong relationship." *Id*. at 180-181. The mother maintained that the children's negative feelings could not be attributed to her when her contact with them had been limited. *Id*. at 181. This Court agreed with the trial court's conclusion that forced parenting time would cause emotional or mental harm to the children, even if the children's perceptions regarding the mother were unfounded. *Id*. This Court also rejected the mother's argument that the father had disparaged her in front of the children, noting evidence to the contrary and deferring to the trial court's assessment of the witnesses' credibility. *Id*. at 182. Finally, this Court disagreed that the

suspension of the mother's parenting time without reunification therapy was akin to a de facto termination of her parental rights, but remanded the matter to the trial court to conduct periodic hearings to determine whether resuming parenting time would be in the children's best interests at a later time. *Id*. at 183.

The facts involved in the instant case are remarkably similar. Much like in *Luna*, the children remained extremely unwilling to engage with defendant throughout the proceedings, consistently expressing fear and anger toward her. Defendant raises similar objections to the trial court's ruling, arguing that her continued separation from the children is making matters worse and that the dysfunction in their parent-child relationships has been influenced and exacerbated by plaintiff. This Court's rationale in *Luna* is equally applicable here. Dr. Green opined that the children's reunification with defendant should be a gradual process "interdependent upon successful completion of goals, stability of mood, and readiness of the children." She further cautioned that the treatment would not necessarily involve a linear approach and may "ebb and flow with the children's tolerance of anxiety and feelings of safety." At the last evidentiary hearing, Popovic testified that the children continued to harbor feelings of fear and frustration and were not ready to resume their relationships with defendant. The court also interviewed the children about their custodial preferences and could have reasonably determined that the children's adamant opposition to any contact with defendant remained unchanged. Furthermore, the court and parties attempted to force the children to communicate with defendant on more than one occasion throughout the proceedings, and each attempt left the children emotionally distraught. Regardless of whether the children's feelings toward defendant were objectively reasonable, the evidence demonstrated that their feelings appeared genuine and were so strong that parenting time with defendant would endanger their mental or emotional well-being.

Also like in *Luna*, while there was some evidence that plaintiff's behavior could have affected the children, plaintiff denied speaking poorly of defendant, repeatedly testified that he was open to the children repairing their relationships with defendant, and spoke with the children often about whether they were ready and willing to resume contact with defendant. Given the substantial similarities between this case and *Luna*, we likewise conclude that the trial court did not abuse its discretion by suspending defendant's parenting time under MCL 722.27a(3). *Id*. at 180-183.

Defendant's characterization of the trial court's suspension of her parenting time as a de facto termination is also unpersuasive. Defendant exaggerates the record by claiming that she has been deprived all contact with the children since November 2017. Although her contact has been severely limited, defendant's assertion is clearly untrue because she engaged in a handful of joint counseling sessions with the children and exercised parenting time on at least one occasion. These contacts were ultimately counterproductive, but they occurred. Furthermore, while termination of parental rights results in a permanent severing of the legal ties between a parent and child, the trial court's suspension of defendant's parenting time is modifiable, and the trial court explicitly incorporated into its final order the periodic review mechanism described by the *Luna* Court to ensure that defendant's parenting time is restored if and when doing so would serve the best interests of the children. Accordingly, the trial court has not terminated defendant's parental rights.

IX. REASSIGNMENT ON REMAND

Defendant's last argument on appeal is that this Court should order reassignment of this matter to a different judge on remand. Because we have found no error requiring a remand, we need not address defendant's request. *Cassidy v Cassidy*, 318 Mich App 463, 510; 899 NW2d 65 (2017). At any rate, we do not believe reassignment is necessary in this case. Repeated adverse rulings, no matter how erroneous, are generally not grounds for disqualification. *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). Although we can infer from the tone of the trial court's opinion that it developed a strong view of defendant's culpability in this case, the court's perception does not appear unreasonable. Furthermore, given the length and complexity of the lower court proceedings, reassignment would necessarily involve extensive waste of judicial resources without a clear indication that such waste is required. See *id*. Accordingly, we decline defendant's request to order reassignment of this matter.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer

STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. O'BRIEN, JR., Plaintiff-Appellee,	UNPUBLISHED February 27, 2020
v	No. 347830
ANN MARIE D'ANNUNZIO, Defendant-Appellant.	Oakland Circuit Court Family Division LC No. 2004-693882-DC

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

MURRAY, C.J. (*concurring*).

I concur in the majority opinion's analysis and conclusion to affirm the trial court's February 19, 2019 order regarding custody and parenting time. I write separately to point out several ways in which the dissenting opinion misses the mark.

I. THE DISSENT'S THEORY

The dissent's main theory is that defendant could not (and did not) get a fair decision from the trial court because the trial court entered an ex parte order changing custody and parenting time on November 6, 2017. And, the theory goes, had four witnesses (two police officers and two physicians) testified on November 6, 2017, plaintiff's allegations would have been proven false, and no changes to the prior orders would have occurred. Though we all agree that the trial court erred in changing custody and parenting time without an actual hearing (a fact the trial court implicitly recognized by scheduling a hearing the very next week), the dissent's underlying assumption is simply that–an assumption as to how the trial court would have ruled had a hearing been held–and the assumption as to the outcome had a hearing been held is based upon the dissent's own view of the evidence, gleaned from the cold record.

Initially, it is important to point out that when plaintiff came to court on November 6, 2017, the trial court was already aware that the custodial situation between the parties had again turned for the worse. The record shows that since August 2017, both parties had filed emergency motions regarding custody and parenting time, both motions were denied on an emergency basis, but as a result of the motions, two orders were entered: one for a custody and parenting time investigation,

and another for interim parenting time. Thus, what was presented by plaintiff to the court on November 6, 2017, was a continuation of what had been occurring for months.

Additionally, the dissent asserts that if two police officers and two physicians would have testified on November 6, 2017, then the trial court would have never entered the ex parte order. If, however, a hearing had been held that day, who is to say that only those four witnesses would have testified? If we are going to speculate about what could have occurred had a hearing been held, it seems safe to assume that the parties and the children would have also participated in the hearing. And, if they did, it is also safe to assume that the trial court would have made the same credibility findings and conclusions that it did in its final opinion rendered after nine days of hearings. In other words, it likely would have found plaintiff credible, and defendant to have serious behavioral and emotional issues that seriously affect her ability to parent the teenagers. Thus, if we are going to speculate as to what would have happened on November 6, 2017, we should at least guide it by looking to the complete evidence presented during the case.

Consequently, the dissent's premise is built upon speculation and assumptions (who would have testified, how the trial court would have ruled, etc.) and, as shown below, to reverse the ultimate order would necessitate casting aside well-established principles and recent caselaw that supports the trial court's decision.

II. THE TRIAL COURT'S OPINION

It is not often that our Court overturns a trial court's custody decision, let alone a decision explained in a thorough 55-page opinion, and which was issued after nine hearing days, where 15 witnesses and numerous exhibits were submitted and analyzed by the court. There are a couple of overarching reasons why custody decisions, and especially thorough ones like this, are rarely overturned. First, custody decisions are one of the few decisions that remain subject to the most onerous abuse of discretion standard existing in Michigan: the appellant must show that the trial court's ultimate 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." *Yachcik v Yachcik*, 319 Mich App 24, 31; 900 NW2d 113 (2017) (quotation marks and citation omitted). Custody decisions like this one therefore remain subject to "the utmost level of deference." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). Second, Michigan courts have historically and correctly concluded that it is the trial court, and not the appellate court, that is most familiar with the family, the family circumstances, and has heard first-hand the testimony coming from family members and other witnesses familiar with the family. *Brandt v Brandt*, 250 Mich App 68, 71-72; 645 NW2d 327 (2002) (recognizing that "[t]he 'one family, one judge' approach allows the judge to be intimately familiar with all the proceedings involving the parties."). Through regular motion hearings, conferences, and evidentiary hearings, trial courts become "familiar" with a case and those involved. *Id.* Here, the trial court noted at the start of its opinion that these parents and children had been before the court on many different occasions, and almost always for custody and parenting time disputes.

And that is also why, no matter what type of case is involved, our Courts have long recognized the ability of *trial courts* to pick up on the many nuances of witness testimony, which places trial courts in the optimal position to not only resolve credibility issues, but to determine

what weight to give testimony. What the Court stated in *Hartka v Hartka*, 346 Mich 453, 455; 78 NW2d 133 (1956), is applicable here:

> This matter being an appeal from a decree of divorce is, of course, heard here on the record *de novo*; but the Court generally gives great weight to the findings of fact of the trial judge.
>
> The trial court is our arena for the test of truth. There the contesting parties and their witnesses appear face to face in flesh and blood with weight and size and demeanor under the eye of the trial judge. He sees the averted glance, marks the hesitation, detects the note of hysteria in the voice of a witness whose words may be calculated to deceive. The cold words on a printed page show none of these essentials to the search for fact.

See, also, *Kessinger v Kessinger*, 360 Mich 528, 532; 104 NW2d 192 (1960); *Vollrath v Vollrath*, 163 Mich 301, 303; 128 NW 190 (1910).[1]

That is not to say that we, as an appellate court, abdicate our appellate review when reviewing these decisions. Our appellate duty is, however, fully and properly exercised when enforcing the "utmost level" of deferential review to the challenged decision. And, just as importantly, we *do* abdicate our proper appellate role when we take on the fact-finding role, picking and choosing what evidence is most compelling or persuasive, in deciding for ourselves what implications and inferences can be made from the evidence, and what evidence the trial court *should have* found persuasive. Acting in that manner raises serious concerns. See, e.g., *United States v Raddatz*, 447 US 667, 681 n 7; 100 S Ct 2406; 65 L Ed 2d 424 (1980) ("[I]t is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions. . . .").

The dissenting opinion is well-written and thoughtful. However, the opinion goes well beyond the highly deferential standard of review by engaging in a microscopic and one-sided review of the evidence and procedural background that led to the ultimate decision. Indeed, if one were to read the dissent in isolation, one would conclude that the trial court had no regard for defendant, and intentionally disregarded all credible evidence in concluding that defendant was not entitled to custody or, at the time, parenting time. But, as the majority opinion makes clear, that is far from the case. Instead, as the majority opinion acknowledges, despite several legal errors that occurred during the process, that the trial court ultimately issued an opinion and order

[1] This law alone essentially precludes a reversal of this decision. It is impossible for an appellate court to disregard a trial court's finding that one of the party's testimony "vacillated between laughing, crying, tense, and calm seemingly independent of anything occurring in the courtroom, the question posed to her, or anything about the particular incident about which she testified." None of these descriptions of a witness's mannerisms are evident from a cold transcript.

that was extraordinarily thorough, addressed all issues presented by the parties (as well as some of the concerns raised by the dissent), and adhered to the controlling child custody factors. In the end, the dissenting opinion merely represents a different opinion as to what evidence was best to rely upon in making this custody decision.[2] But a mere difference of opinion regarding the evidence is not a basis for reversal, even under a less deferential standard of review. *People v Cress*, 468 Mich 678, 690-691; 664 NW2d 174 (2003).

According to the dissent, the trial court was tainted against defendant as a result of one ex parte hearing, disregarded facts supporting defendant's position, misrepresented evidence to make it look more harmful to defendant, had no interest in helping rebuild the relationship between defendant and the children, and allowed teenagers to dictate the situation. A reading of the trial court's opinion proves otherwise. For example, the dissent correctly emphasizes language within MCL 722.27a(1) regarding a trial court's obligation to grant parenting time in a frequency, duration, and type reasonably calculated to "promote a strong relationship between the child and the parent granted parenting time." This mandate is familiar to anyone who practices domestic-relations law in this state, and the trial court was quite aware of the statutory duty, as it specifically quoted MCL 722.27a(1) and the need to promote parenting time.

The dissent uses this law as a springboard to argue that the trial court abdicated its duty to help rebuild the relationships through parenting time. The trial court did no such thing. Instead, it just came to a different conclusion than does the dissent. In addressing parenting time, the trial court recognized that, in light of its findings regarding defendant's inability to control her negative feelings about plaintiff, her inability to properly communicate and deal with her children, and to otherwise control her temper, granting parenting time would "further 'endanger the child's physical, mental, or emotional health.' " MCL 722.27a(3). The court in fact quoted a recent decision of this Court, *Luna v Regnier*, 326 Mich App 173, 180-181; 930 NW2d 410 (2018), which recognized that *forcing* parenting time between children and a parent may at times cause emotional trauma, and further drive a wedge between parent and child:

> In regard to ZR, our review indicates that forced parenting time, especially in light of ZR's strongly expressed preference that he be allowed to consider a relationship with defendant in the future at his own discretion, was likely to cause emotional trauma and to drive a wedge further between mother and child, not foster a strong relationship. See MCL 722.27a(1).

In *Luna*, *id*. at 181, the parent that was restricted from engaging in parenting time had been restricted for several years, unlike the situation here where defendant was deprived of parenting time (except for sporadic phone calls) for just over a year before the decision was issued.

[2] As noted, there were 15 witnesses. The dissent addresses the testimony of only six of those, and does not address the credibility findings made by the trial court about the parties, i.e., the parents of the children. Thus, even if the dissent is correct about what more accurate testimony could have been presented in November 2017, the apparently untainted evidence of nine other witnesses (including all four family members) would still support the trial court's decision.

Moreover, because the trial court recognized the significance of its ruling, it permitted, consistent with *Luna*, *id*. at 183, "periodic hearings to determine whether reinstituting parenting time would be in the children's best interests." There is no question that the trial court fulfilled its responsibility under MCL 727.27a(1) and (3), even if the result was no current parenting time for defendant.[3]

Luna also resolves the dissent's sua sponte conclusion that reunification therapy is necessary to help restore a relationship between defendant and her children. For one, it is certainly not our role to make recommendations or issue orders regarding what type of therapy should be utilized for a particular family. Second, the *Luna* Court specifically addressed a trial court's decision to not order reunification therapy, and to instead opt for periodic hearings on parenting time. *Id*. Not surprisingly, the *Luna* Court concluded which option to take was within the trial court's discretion:

> Finally, defendant argues that the trial court's order suspending her parenting time without ordering reunification therapy constituted a de facto termination of her parental rights. While we do not believe that the trial court abused its discretion by suspending defendant's parenting time and declining to order reunification therapy, we do believe that it is necessary to remand this case and direct the trial court to conduct periodic hearings to determine whether the children wish to reinitiate contact with defendant and whether resumption of parenting time would be in their best interests. [*Id*.]

The dissenting opinion also repeatedly chastises the trial court (and plaintiff) for purportedly giving too much power to the children as to whether parenting time should occur. The *Luna* Court, however, concluded that the children's wishes regarding reinitiating contact with a parent were a highly relevant consideration in whether to resume parenting time. *Id*. Again, it is the trial court's decision to determine the weight to be given the children's preference because the trial court, not us, has had the opportunity over an extended period of time to get a feel for the family dynamics at issue. *Brandt*, 250 Mich App at 74. Both of these children were also 15, and quite possibly (only the trial court would know for sure), articulated mature answers to the long-lasting and difficult family dynamics.

Another concern is that the dissenting opinion ignores the trial court's long familiarity with the case. Although this judge has not handled the case from the outset, it having been filed in 2004, the trial court did familiarize itself with the history of this case that dates back to 2005. As the trial court recounts in its opinion, there have been numerous orders and hearings involving

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[3] The dissent's citation to *In re Kellogg*, __ Mich App __; __ NW2d __ (2020) (Docket No. 349930), is inapt. That case dealt with the law governing the termination of parental rights, and this case does not. Additionally, we must presume that the trial court will be able to grant defendant parenting time if evidence is brought forth warranting the change. Trial courts addressing custody and parenting time issues are required to acknowledge that people and circumstances can change, and must consider that potential until jurisdiction over the children is lost.

these parents and these children in 2005, 2007, 2008, and 2009, and then those that began in 2017. The trial court was aware that, in the first few years after initiation of this case, there were repeated orders regarding the need for a parenting time coordinator, and the recommendations made regarding custody and parenting time.

Finally, the dissenting opinion has one theory of the case, while the trial court had another theory of the case. Both theories have a basis in the evidence, but as set forth in the initial part of this opinion, it is not our duty as appellate judges to decide which facts are more persuasive or worthy of more weight. It is enough to say, as the majority does, that evidence supported the trial court's findings.

Nevertheless, several factual points need to be made. First, the record does not support the dissenting opinion's conclusion that the trial court simply "terminated" defendant's rights without any actual evidentiary support. To the contrary, the trial court recognized (among many other things) that since at least 2008, defendant has had great difficulty controlling her emotions and her hatred for plaintiff, and exhibited these feelings through poor behavior and antics in front of the children. And, she continued in her ways even when she knew it was causing significant problems with her relationships. The court cited to a 2008 ADEPT report that outlined defendant's numerous parenting difficulties, attitude problems, and disruptions that had still not been rectified by 2018, despite many years of coparenting. Importantly, the concerns the trial court had with defendant were not attributable to the fact that she had personality disorders (Dr. J. Scott Allen, defendant's psychiatrist, testified that defendant has ADHD, major depression disorder and PTSD, and treats her with a combination of psychotherapy, counseling, and medication), a fact the dissent cannot seem to overcome.[4] Instead, the court focused on defendant's tortured relationship with her children (which existed, according to the evidence and the court's findings, well before November 6, 2017), and concluded that defendant's behaviors and dealings with her children and plaintiff led to the existing severed relationship. The record and the trial court's finding are replete with examples of how defendant would routinely interfere with the children's lives in an abnormal and unhealthy way.[5]

[4] The dissent discredits plaintiff for opining that defendant has a "mental illness." The dissent may be correct, but the only relevant point is that the trial court specifically gave *no weight* to that testimony, so what plaintiff said had nothing to do with the trial court's decision.

[5] For example, it is undisputed that on one occasion defendant *and her attorney* showed up at the children's school in the middle of the day, and attempted to extract them without any basis for doing so. A school employee testified that despite many children of divorced parents attending the school, he had *never* seen anything like what defendant did. Also, during a therapy session with the children, defendant demanded that the therapist call *defendant's attorney* on the speaker phone because she was outraged with certain aspects of the therapy. Other evidence showed that defendant had many other improper communications or interactions with the children. Although it is certainly true, as the dissent states, that teenagers should not control a parenting situation, it is equally true that a parent needs to understand the complications and special circumstances that teenagers are experiencing. As the trial court found, for many years prior to these most recent

Lastly, although the trial court did err in completely eliminating the parenting time and custody of plaintiff without an evidentiary hearing on November 6, 2017, the trial court's final determination on the existence of a change in circumstances was based upon evidence that *predated* the November 6, 2017 motion. And, with respect to the delay between November 15, 2017, and the first day of the evidentiary hearing on March 20, 2018, *the parties* agreed to adjourn several scheduled hearing dates before March 20, 2018, because, to their credit, they were seeking to resolve these disputes without court intervention. Indeed, at a January 17, 2018 motion hearing, the court again recognized the importance of having a quick hearing, and set it to start two days later, January 19, 2018. But it was adjourned. Thus, the trial court was not acting in any type of dilatory manner in scheduling the evidentiary hearing, and in fact, repeatedly stated at the motion hearing about the need to conduct the hearings in light of the order suspending defendant's parenting time.

For these reasons, and for those reasons set forth in the majority opinion, I conclude that under the proper standards of review, the trial court's decision must be affirmed.

/s/ Christopher M. Murray

hearings, and continuing up to and including these hearings, defendant exhibited an inability to understand these relationships, and in fact, exacerbated them.

STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. O'BRIEN, JR., Plaintiff-Appellee, v ANN MARIE D'ANNUNZIO, Defendant-Appellant.	UNPUBLISHED February 27, 2020 No. 347830 Oakland Circuit Court Family Division LC No. 2004-693882-DC

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

Defendant-mother Ann Marie D'Annunzio has not parented her children in more than two years. Mother has not been adjudged unfit, and no evidence in the voluminous record even hints at unfitness. Without benefit of an evidentiary hearing and based on unsubstantiated allegations reinforced by improper off-record communications, the trial court suspended Mother's parenting time. Fifteen months elapsed before the trial court rendered an opinion stripping Mother of custody and denying her any opportunity to visit or communicate with her children.

The lead opinion affirms, characterizing the trial court's multiple, serious legal errors as "harmless." I respectfully disagree for three reasons: several of the errors were egregious and far from harmless; the great weight of the evidence contravenes many of the trial court's findings; and the trial court abused its discretion by depriving Mother of parenting time. Rather than working toward reunifying this family, the record substantiates that the trial court displayed an unbridled animosity toward Mother and likely will never allow her to regain even the barest contact with her children. I would remand for entry of an order requiring immediate efforts at reunification conducted by a therapist selected from outside the court, and prompt reassignment to a new judge.

I

Certain fundamental legal principles faded into the background during this protracted and contentious case. First and foremost:

> 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.* [MCL 722.27a(1) (emphasis added).]

The right to parenting time may be withdrawn only when clear and convincing *record* evidence demonstrates that parenting time "would endanger the child's physical, mental, or emotional health." MCL 722.27a(3) (emphasis added). The meaning of these legislative commands cannot be emphasized strongly enough. Children have the best chance to grow into healthy adults when they have relationships with *both* parents. Depriving a child of a parent, and a parent of a child, is a drastic measure that should be undertaken only under the direst circumstances, and in a process that strictly conforms with the rules. This case comes nowhere close to fulfilling those prerequisites.

Second, our Legislature has enacted a statutory framework designed to protect parents' due process rights in custody disputes. One such procedure, MCL 722.27(1)(c), empowers a circuit court to "modify or amend" previous judgments or orders conditioned on a showing of proper cause or changed circumstances. Our Supreme Court has described as "critical" that courts "carefully and fully comply with the requirements of MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment." *Daly v Ward*, 501 Mich 897, 898; 901 NW2d 897 (2017). In *Daly*, Supreme Court emphasized that a child's established custodial environment should not be changed absent "clear and convincing evidence" that doing so "is in the best interests of the child." *Id*. The Supreme Court highlighted that "[t]his heightened evidentiary burden for altering a child's established custodial environment recognizes the commonsense proposition that a child benefits from the permanence and stability of an established custodial environment, and therefore that such an environment should not lightly be altered." *Id*. Although a trial court may enter an order upsetting a child's established custodial environment ex-parte, it may not do so "without first making the findings required by MCL 722.27(1)(c)." *Id*.

The Supreme Court issued its order in *Daly* on October 13, 2017. The trial court in this case entered a temporary order changing the children's established custodial environment and suspending Mother's parenting time on November 6, 2017, without holding or even scheduling an evidentiary hearing. The order reflects that the "evidence" on which the court relied was an "interview[]" it conducted with Father off-the-record. Based solely on Father's unsubstantiated allegations, the order prohibited Mother from "appearing at the children's school" or having any contact with the children "in any fashion." On November 15, again without taking a shred of evidence or making the requisite findings, the court "extended" its November 6 order. These orders defied *Daly*. And they produced lasting and tragic consequences.

This case exemplifies what happens when a trial court ignores the rules. Without benefit of a hearing, the trial court unhesitatingly accepted inflammatory and, as the actual evidence later revealed, exaggerated or false allegations set forth in an emergency motion. From the moment the trial court took away Mother's right to have a relationship with her children, Mother was on the defensive. She was forced to refute or rebut allegations that had never been verified with admissible evidence or tested with cross-examination. And yet the trial court dug in, finding fault with virtually every attempt Mother made to reestablish a relationship with her children. By denying Mother any parenting opportunity without benefit of a hearing and relying instead on

impressions gleaned from information imparted off the record, the trial court became a driving force in the deterioration of the parent-child relationship.[1]

Aside from the fact that basic due process principles mandate a hearing before a parent's right to the custody of her children is withdrawn, perhaps another reason that our law requires an evidentiary hearing before a custodial change stems from the power of first impressions. The facts alleged in Father's emergency motions portrayed Mother as a dreadfully unstable harridan who constantly placed her children at substantial risk of physical and mental harm. This was effective advocacy, but proved far from true.

The extensive hearings eventually conducted consume more than 1,000 transcript pages. The process of taking testimony started in March 2018 and continued sporadically for the next six months. An enormous amount of evidence was gathered, much of which described events that occurred well *after* father's emergency change of custody motions had been granted. The initial legal questions concerning the children's established custodial environment were lost in the ensuing evidentiary abyss.

That is why *timely* evidentiary hearings play a vital role in evaluating the need for a custodial change. As this case epitomizes, there is a natural danger that the *first* message received, especially when bombastic or shocking, will retain a disproportionate impact on a judge's ultimate opinion.[2] Negative first impressions can create long-lasting, unshakeable biases and prejudices (also known as confirmatory bias). Therefore, the taking of actual evidence, under oath and subject to cross-examination, is critical before life-changing judgments are rendered.[3] After all, once a

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[1] The lead opinion takes issue with using the term "ex-parte" to refer to the substantive conversations the trial court had concerning Mother with Family Court personnel. This is much ado about nothing, as conventionally the term is used in our caselaw to describe such communications. See *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2009) ("An in camera interview is an ex parte communication that occurs off the record in a judge's chambers and in the absence of the other interested parties and their attorneys.").

[2] "Impression formation is often subject to a primacy effect, when early information has a disproportionate influence on judgements . . . . The disproportionate influence of first impressions is one of the most robust and reliable effects distorting such judgments." Forgas, *Can Negative Affect Eliminate the Power of First Impressions? Affective Influences on Primacy and Recency Effects in Impression Formation*, 47 Journal of Experimental Social Psychology 425, 425, 427 (2011). See also Garner, *The Psychology of Credibility: First Impressions Endure, Even in Brief Writing*, 101 ABA Journal 24 (May, 2015).

[3] "Confirmatory bias" is "the desire to identify data that support an initially developed hypothesis." "[C]onfirmatory distortion" involves "overconfidence in the accuracy of one's initial hypotheses," which leads to an intentional selection of data "to be considered and to be reported." Martindale, *Confirmatory Bias and Confirmatory Distortion*, 2 Journal of Child Custody 31, 44 (2005).

court peremptorily changes a child's established custodial environment, is it surprising that *15 months* later the court will reaffirm that it did the right thing?

I cannot regard the trial court's initial legal error as "harmless," as its consequences flowed into its final decision and poisoned the well. Not only were the children removed from Mother's home; before depriving Mother of *any* contact with her children, Mother was prohibited from seeing them except under supervision, a decision made before the court heard from any health professionals. The message this arrangement sent, even to a 13-year-old, is unmistakable: something is terribly wrong with Mother. And for a 13-year-old girl at war with her mother anyway, the trial court's ruling was an invitation to continue and escalate the conflict. As Father readily admitted, in his house there are no rules.[4] It does not take a degree in child psychology to understand what every parent knows: teenagers prefer making their own decisions and running their own lives to having a parent enforce familial law and order. Or, as the court-appointed psychologist later put it: "All teenagers are rebellious." This characterization is particularly apt when it comes to cell phones and social media, which are at the heart of this case.

The concurring opinion stresses that decisions involving parenting time and custody are shielded from exacting review by the abuse of discretion standard, that the trial court saw and heard the witnesses while I did not, and that my review of the evidence is "one-sided." The questions at the heart of this case, however, are *legal* rather than factual. The court ignored the rules governing the process the Legislature created for requested parenting-time and custody changes. The distorted process created a distorted result—findings inextricably tainted by later events.

The concurring opinion insists that "it is impossible for an appellate court to disregard a trial court's finding that one of the party's testimony 'vacillated between laughing, crying, tense, and calm seemingly independent of anything occurring in the courtroom.' " I have no reason to dispute the trial court's personal interpretation of Mother's demeanor. The trial court described Mother's deportment when Mother testified in a courtroom many months after she had lost her right to parent her children. During those intervening months, Mother had been repeatedly described as crazy by Father, and characterized as desperately in need of intense mental health

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[4] At trial, Father testified:

Q. What rules does [IDO] have in your household?

A. I mean I don't have rules.

* * *

Q. What kind of rules do you have regarding Xbox usage for [GDO]?

A. I don't have rules. He's responsible for his playing time.

intervention both by Father and the trial court. Every motion Father filed further humiliated and debased her.

I assume that the trial court's description of Mother's testimony was accurate. Who wouldn't feel desperately sad and intensely anxious under the circumstances, especially given that the trial court had already telegraphed its impression that Mother was nuts? Mother's demeanor as a witness in the spring of 2018, however, has no bearing on whether proper cause or changed circumstances existed in November 2017. Too much poisoned water had flowed over the dam. That Mother had an argument with IDO and that IDO behaved poorly and ran away does not does not supply clear and convincing evidence that a modification of custody or parenting time was warranted. That Mother yelled at the IDO on a few memorable occasions and took away her cell phone does not rise to the necessary level of life-effecting, significant change.[5]

Aside from improperly depriving Mother of custody and parenting time in November 2017—an error the lead opinion acknowledges, characterizes as "clear," but brushes aside—the evidence does not support the trial court's best-interest findings. The trial court's opinion has a decidedly agitated tone, bordering on hysterical. It portrays Mother as a source of "wildly misleading and nonsensical testimony" who behaves in a "juvenile, harassing, and utterly bizarre" fashion, and is "physically and emotionally abusive." According to the trial court, Mother's behaviors are so "unconscionable" that the court "question[s] her morality."

Two mental health professionals evaluated Mother. Neither characterized her in a manner even remotely consistent with the trial court's description, and neither found that she posed a danger to her children. A few examples of the court's "fact finding," detailed below, illustrate the disingenuous manner in which the trial court approached its role. Rather than evaluating the evidence in a neutral fashion, the judge demonstrated animosity toward Mother that it made no effort to disguise. This animosity, in my view, cannot be turned on and off like a light switch. The trial court's opinion is dripping with anger and hostility, and it is impossible to expect that sometime in the future, the court will magically remove those views from its mind.

The lead opinion holds that in addition to improperly altering the children's established custodial environment without holding a hearing, the trial court committed several additional legal errors. I agree. I respectfully disagree with the lead opinion's conclusion that all of the circuit court's errors are "harmless." The most egregious error was committed at the outset, when the court changed the children's established custodial environment without a hearing. This error was far from "harmless," for the reasons discussed above and in more detail throughout this opinion. But the other errors were far from benign. As the lead opinion acknowledges, the trial court

[5] The concurring opinion's ode to the abuse of discretion standard is misplaced for a second reason. My criticisms of the trial court spring primarily from the trial court's inaccurate and unsupported fact finding. That task is not reviewed for an abuse of discretion. "[A] court's discretion in weighing the evidence regarding a particular factor is not unlimited; rather, it must be supported by the weight of the evidence." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Regardless of the number of pages the trial court put into its effort to permanently deprive Mother of custody and parenting time, its findings of fact had very little to do with the actual evidence.

wrongfully prevented disclosure of the Friend of the Court (FOC) reports; improperly admitted and relied on text messages submitted after the close of the evidence, improperly denied Mother's request for the raw data underlying Dr. Green's report; and improperly limited Mother's cross-examination of Dr. Green. These errors combined to hamstring Mother's ability to defend herself at the trial. I would add to that list the following: after improperly and injudiciously removing the children from Mother's physical custody and terminating her parenting time, the court utterly failed to expedite the matter. As a result, a four-month delay ensued before the required custody hearing even commenced. The hearing itself stretched over eight months. And it took the court three more months to write an opinion. All the while, Mother was prevented from visiting with or even contacting her children.

Singularly and in combination, the trial court's errors warrant reversal.

II

My elucidation of the harmful impact of the trial court's rulings requires a brief review of the background facts. The parents never married or lived together. Mother had sole physical custody of the parties' twin children until the 2017 order at the center of this case. Father had liberal parenting time. The parties occasionally quarreled about parenting time issues between 2004, when the children were born, and 2017. But no major changes were made. Mother retained sole physical custody.

The events culminating in the court's order began with a July 2017 "sleepover" at Mother's home. Sometime after midnight, Mother discovered that 13-year-old IDO and the girl's friends had covered the dining room with shaving cream so that they could "skate" in it. Mother lost her temper and shouted at the girls. She used profanity. IDO was embarrassed and angry.

IDO's relationship with Mother was already on thin ice due to their conflicts regarding cell phone usage and social media rules. A month or so before the shaving cream debacle, Mother had asked Father for the passwords for the cell phones Father had purchased for the children. Father replied: "I don't have passwords. They do." Mother repeatedly expressed concerns about IDO's use of Instagram and other social media applications. Both Father and IDO rebuffed her. Yet Mother's concerns were not unfounded. In early September 2017, Mother found the following text messages on IDO's phone: "How old r u;" "Your cute and I wanna seem them nudes mama;" "Dont tell me what to do bby girl." Mother was also concerned about her son's frequent use of violent content on his XBox, and attempted to put herself on the account to monitor his use of it.[6]

[6] This Court recently highlighted the dangers of uncontrolled social media use by teenagers. *In re JP*, __ Mich App __; __ NW2d __ (Docket No. 344812, 2019). In this case, the trial court was "shocked" that Mother added herself to her son's XBox account, in part because doing so "publicly humiliated" the 13-year-old. I suggest that a parent has a right to add herself to a gaming account and that courts should tread very carefully before implying otherwise. Parents frequently make "oversight" decisions regarding their children's social media and internet experiences. Judicially faulting a parent for doing so is concerning.

Strife between Mother and her 13-year-old daughter escalated in late August 2017, when Mother denied the girl's request to go to a friend's house. IDO defied her mother and left anyway. Mother followed in her car as IDO walked or ran through the neighborhood. When Mother was able to confront IDO at a neighbor's home, she asked IDO to hand over her cell phone. IDO refused. Mother reached around the child from behind and took it from her.

During her flight, IDO sent her father a stream of text messages, including: "Mom wouldn't let me leave so I just [ran] away again. Being in that house is making me go crazy. . . . She's following me in her car. . . . I can't control what I say to her I just keep screaming. . . . I don't want to stay at moms anymore seriously[.] She scares me and she makes me go insane[.] Like I can't control myself anymore. . . . It didn't hurt but she wrapped her arms around me and throwing me around to get my phone." Father called the police. This event featured prominently in his emergency motion to change custody and to immediately suspend Mother's parenting time.

When the responding officer finally testified *seven months later*, he described the situation as nonemergent, "just an argument," and Mother as "polite" and respectful. When asked about Mother's mental state he testified: "I haven't seen Ms. D'Annunzio act in a way that would give me any type of impression that she is crazy. My conversations with her have been brief and to the point."[7]

In August 2017, Father withheld the children following the end of his parenting time, and Mother filed an emergency, ex-parte motion, pro se, to enforce the court's order. The trial court instructed her to praecipe the motion for a motion call and to serve Father. Father then filed a motion seeking an emergency hearing, a change of custody, and "an independent psychological exam of Mother." Father's allegations included the following:

- "[T]here is a long history of instability in Mother's life and it has escalated dramatically in the very recent past;"
- "The children are now unsafe and in a state of complete emotional upheaval fleeing Mother's residence regularly;"
- "It is believed that her ex-husband will testify as to her volatility and frightening behavior towards the children, especially their daughter. Unfortunately he is no longer in the home to help protect the children."[8]

[7] Father called the police again a few days later to report that Mother was allegedly videotaping him while he walked his dog. That officer agreed under oath (seven months later) that Mother was appropriate, not rude, and that the officer had no reason "to question her mental health."

[8] Rather than waste pages discussing the ex-husband's testimony in any detail, suffice it to say that this allegation proved 100% wrong. The ex-husband testified to exactly the opposite: that Mother had a good relationship with the children while he was around, and asserted: "I thought she was a good mother. . . . [S]he was very loving and cared for her children, looked after them." He

- "Mother has a history of losing her temper beyond the point of control. Father believes that Mother suffers from a psychological condition making it impossible for her to control her behavior. There are recordings of her screaming at the children that illustrate Mother's inability to control herself. It can only be classified as rage."[9]

The trial court referred the matter to an FOC referee, who apparently recommended approximately equal parenting time (the report is not in the record). The trial court rejected this recommendation, despite that counsel had reached an agreement that Mother would be involved in parenting the children. The trial court rejected that agreement as well, announcing that the children's reactions were "not normal" and that they might not "do very well" if forced to visit with their mother.

In making its decision, the trial court relied heavily on information provided off-the-record by Kathleen Doan, whom the court identified as "my family counselor." Doan met with the parents twice and the children once. She then communicated verbally with the court and wrote a brief letter to the court describing Mother as "rude and confrontational." Moreover, Doan asserted that "[b]ased on information I have received from Children's Protective Services [CPS], School Counselor from Bloomfield Hills Middle School, information provided by parents and personal observations of [Mother's] behavior, I am recommending she have a complete psychological evaluation and take parenting classes." Doan further recommended that the court grant Father sole legal and physical custody of the children, and indefinitely suspend Mother's parenting time.

Remarkably, Doan never testified at the beginning of these proceedings, or during the lengthy trial. Her opinions were never subjected to cross-examination. But their underpinnings were examined in great detail. The CPS worker did not support Doan's view of the situation, and neither did the school counselor. Again, this is why the law (and basic due process principles) require hearings in open court and eschews hearsay-driven decision making. The lead opinion papers over with a stamp of "harmless" both the court's violation of the law and the fact that if gathered in November 2017, the evidence would have shredded Doan's conclusions and exposed her bias. By relegating the trial court's errors to the realm of the inconsequential, the lead opinion invites the trial court to do it all again.

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believed the children were "safe" with Mother and never witnessed any "frightening" behavior when the children were present." He read into the record a letter he wrote in which he stated: "I can honestly say that her relationship with the children . . . could be characterized as very normal."

[9] Father works at a landscaping company and possesses no degrees or training in any relevant mental health discipline. He has insisted throughout the proceedings (without expert support of any kind) that Mother suffers from "borderline personality disorder," cannot "control her temper in any way," "there's some type of personality disorder that causes her not to be rational and react in ways that are frightening," and that she needs a new psychiatrist and a different therapeutic approach. Based on these perceptions, he believes that his children's "fears" of their mother are "rational." None of the professionals who have examined Mother share his views or his "diagnoses."

III

The 1,000 pages of transcript detail (among other things) virtually every disagreement between IDO and her mother between August and November 2017. The record is replete with copies of emails and text messages between the parties and the therapists. Multiple motions flew back and forth, one more histrionic than the last. Several expert witnesses from various disciplines became involved.

There can be no doubt that Mother occasionally lost her temper and shouted at IDO. Their relationship was strained, largely due to their conflict over cell phone and social media use. Parents should not yell, scream, or swear at their children. But sometimes, they do. Good parents, overwhelmed with the stress of parenting, may yell, scream and swear. But occasional episodes of yelling, screaming and swearing do not provide a rational basis to deprive a parent of her child's custody. Period. As this Court put it recently:

> A parent that yells and swears at his or her child, stands over them, and invades their personal space, can fairly be characterized as a less than ideal parent. But that fact standing alone does not prove a parent's unfitness under MCL 712A.2(b) because it is insufficient to show that there is "a substantial risk of harm to [the child's] mental well-being." Nor does it establish that the child's home environment is an unfit place because of the parent's neglect, cruelty, drunkenness, criminality, or depravity so as to allow the court to assume jurisdiction under MCL 712A.2(b)(2). Something more than yelling and swearing is necessary to prove parental unfitness. [*In Re Kellogg*, __ Mich App __; __ NW2d __ (Docket No. 349930, 2020), slip op at 4.]

Mother never physically harmed her children in any way. More importantly, none of the therapists who actually examined Mother supported that she posed any danger to her children. This central fact was utterly ignored by the trial court, which found to the contrary despite that the evidence did not support denying mother all parenting time. And here is the larger point. Mother yelled, screamed, and appeared to her daughter as insensitive. In retrospect, she may have said things she should not have—what mothers haven't? But none of Mother's parenting "crimes" (most of which stemmed from her desire to police her children's use of their devices) warrant the punishment she has endured.[10]

The trial court determined that Mother was emotionally unstable and that due to her instability, she is "physically and emotionally abusive." These findings serve as the unifying theme of the court's best-interest findings. The court further determined that any parenting time with Mother would "endanger the [children's] physical, mental, or emotional health." The testimony does not support these conclusions. Further, the trial court's recapitulation and summary

[10] For example, I find it incomprehensible that Mother could be faulted for following her daughter by car as the child fled Mother's home. There is no evidence whatsoever that this endangered the child. I can only imagine how Mother would have been punished if the child had been injured or harmed in her flight and Mother had done nothing to stop her.

of the evidence was disingenuous at best. A review of the evidence supports that the trial court made up its mind at the outset of the proceeding and simply disregarded that the bulk of evidence—particularly that provided by professionals—contradicted the court's preferred narrative.

My review focuses on two areas: the evidence that would have been available had the trial court conducted an evidentiary hearing when it should have, and the evidence subsequently gathered by mental health professionals.

A

The three somewhat disinterested witnesses who could have enlightened the court before it took peremptory action were Aaron Sparks, the police officer involved in IDO's running-away escapade, Kari Sweeny, who responded after several other police contacts, and the CPS worker who investigated the situation shortly thereafter.

The trial court's review of Sparks' testimony recites that Father had called for police assistance, reporting to the dispatcher that a child "had walked away from their mother's home." When he arrived at the home of one of IDO's friends, Sparks found IDO crying and concluded "that she was upset with mother to the extent that [IDO] needed to walk away to deescalate the situation." The two had engaged in a " 'brief struggle' over a phone," the court wrote, and Mother had "closely followed behind [IDO] while she walked away from mother's home." According to the trial court's summary, Sparks expressed that IDO's "fear seemed rational given the circumstance."

The information the trial court omitted included Sparks' opinion that: this was "just an argument;" there was no cause to report anything to CPS he never saw Mother "act in a way that would give me any type of impression that she is crazy;" she was "respectful;" and that all of Sparks' "opinions" about what had happened that day were drawn solely from talking to Father (who was not present and did not witness the events) and IDO. In Sparks' estimation there was no reason that the other child, GDO, could not remain with his mother.

It is difficult to understand why the police were called to respond to an argument between a mother and her 13-year-old daughter. It is even more difficult to understand how this event could generate a legal basis to deprive a mother of her child's custody, given that parents have a right (and a duty) to follow their runaway children. That IDO was upset after an argument is understandable, but nothing in Sparks' testimony supports that IDO's decision to run away was either justified or deserving of official approval.

A second police officer, Kari Sweeney, was involved in three other police contacts that Fall: one initiated by Father, and two by Mother. The trial court's opinion discusses the first, initiated by Mother after IDO ran away a second time following an argument about cell phones (and given that there were no negative consequences for IDO the first time, why not run away again?). When Sweeny located the children at Father's home and spoke with IDO, the court's opinion declares, Sweeny "stated that [IDO] appeared upset, and seemed fearful of mother, during her interview. Officer Sweeny stated that [IDO]'s fears seemed rational."

On cross-examination, however, Sweeny admitted that she observed no reason that IDO should have felt unsafe with her mother, and that based on her investigation she had no reason to credit IDO's fear with any "veracity," despite Father's statement that "something could be off mentally" with Mother. The trial court also neglected to mention that Sweeny testified that Mother was never rude, her emotions were appropriate, and that during their interactions Sweeny never had a reason to question Mother's mental health. Sweeny also agreed that she detected no reason for the children to fear that their mother would physically harm them, and discerned no basis to contact CPS. Rather, Sweeny affirmed that Mother always presented as "a concerned mother" who "loved her children." Sweeny testified that she had no concerns that Mother's "reactions to the situations were inappropriate."

The next person who could have weighed-in during a timely hearing was Jessica Spigner, the CPS worker who responded to a complaint for investigation received in October 2017. Here is what the trial court wrote regarding Spigner's testimony:

> She stated that the allegations against mother involved physical abuse, such as using her vehicle to run over [IDO], improper supervision, and emotional abuse. Ms. Spigner testified that she did not substantiate the physical abuse or improper supervision allegations, because the children were placed with father at that point, **but that she would have substantiated the emotional abuse allegations had the children stayed with mother**. [Emphasis in original.]

Spigner's actual testimony does not comport with this portrayal:

> *Q.* And did you interview the minor children?
>
> *A.* I did.
>
> *Q.* And did you observe the conditions of mom's household?
>
> *A.* Yes, both parents' household.
>
> *Q.* Okay. And how was mom's household?
>
> *A.* Mom's household was appropriate.
>
> *Q.* Okay. Do you know specifically what the allegations were with regard to mom?
>
> *A.* They were [sic] a cell phone was involved. Mom was going to run the daughter over with the vehicle. Trying to jog my memory completely back. I did review.
>
> *Q.* What --
>
> *A.* And that there was like a physical abuse that mom pushed her daughter about a few months ago.

Q. Okay. And when – after you're completing your investigation were you able to substantiate any of the complaints?

A. I was not able to due to that the children were placed with dad.

Q. Okay. Did you . . . make a finding that . . . mom had tried to run over the child with a car?

A. I did not.

Q. Did you make a finding that mom had perpetrated any physical abuse against the child?

A. No.

* * *

Q. And just to clarify, you're not saying that if the children had remained with mom that you were going to substantiate, is that what you're testify to today?

A. If they were to remain with mom we would have had an open case, so yes we would.

Q. You would have substantiated?

A. Yes.

Q. And what would you have substantiated for?

A. More so of a mental injury, emotional abuse.

Q. But isn't it true that the child's treating counselor would not sign off on there being a mental injury in this case?

A. She would not send the paperwork, but she did a verbal, but yes.

Q. Isn't it true though she would not?

A. She would not.

Q. She would not. So what would be the basis for your, your report then?

A. For to have – to be with mom it would just basically have services put in so that it would be able to benefit mom and the children so they can communicate better.

Q. Okay.

A. So there's not another issue.

Q. Okay. So you were – your conclusion was that the parent, that mom and the child were having – and the children were having communication issues?

A. Yes, it seemed like that.

* * *

Q. Were the communication issues only mom's fault?

A. I can't say yes or no to that. I'm sorry.

Q. What would have been your recommendations if the children had still been placed with [Mother]?

A. We would have provided services.

Q. What kind of services are you speaking of?

A. In-home services, parenting, have providers come to the home once a week to work on communication and basically keep the children in therapy.

Notably, Spigner did *not* testify that she found any ground for removing the children from their mother's care and custody, and nothing in her testimony is consistent with her having so recommended. Rather, Spigner offered that if the children had stayed with Mother, she would have recommended "services" to improve "communication." Obviously, Spigner had no concern that the children would be in any danger in Mother's home. Moreover, the trial court's characterization of this testimony as "substantiation" of "mental abuse" is legally incorrect.[11]

The CPS Field Guide provides that "[a] preponderance of evidence of mental injury can only be found if a mental health practitioner outside of DHS either diagnoses a psychological condition or determines that the child is at significant risk of being psychologically or emotionally injured/impaired resulting from the parent or person responsible's actions." Department of Human Services, *Field Guide: Children's Protective Services Investigations*, DHS Pub 108 (October 2008), p 27. Spigner's admission that the "child's treating counselor would not sign off" means that Spigner could not have substantiated mental abuse even if she had wanted to do so.[12]

Given the testimony of these three witnesses, I am hard pressed to find any evidence, let alone clear and convincing evidence, that Mother posed a danger to her children. It is certainly

[11] Remarkably, the trial court understood this point at the hearing. In response to an objection to a question posed by Mother's counsel, the trial court stated: "Well I think she testified that . . . she didn't substantiate and they put no services in the home[.]"

[12] Spigner's notes, which she read into the record, reference a conversation Spigner had with the children's then-therapist, Dr. Sucher. Spigner claimed that Dr. Sucher verified mental abuse on the phone, but admitted that Dr. Sucher refused to do so in writing. Dr. Sucher never testified, and her notes are not part of the appellate record.

apparent that Mother and IDO did not get along. Therapy and communication "services" were warranted. Their disagreements, however, did not give rise to a legitimate basis for stripping Mother of both physical and legal custody and all parenting time.

B

The trial court's final opinion and order reflect a conclusion that Mother is seriously mentally ill. Indeed, the court expressed that any parenting time with her would "endanger the children's physical, mental or emotional health." The trial court reached these conclusions by disregarding the testimony of the mental health professionals who actually evaluated Mother. The great weight of the evidence preponderates in the other direction: that Mother's psychiatric diagnoses do not call into question her ability to safely parent her children.

Two mental health professionals provided testimony regarding their evaluations of Mother. Dr. Bering, the children's pediatrician, also testified as an expert, although he has never formally evaluated Mother psychologically. For years, however, he observed first-hand her interactions with her children.[13] The testimony of the other professionals is important for two reasons. First, the experts who have examined Mother provided the most reliable evidence of her mental and emotional conditions. Second, a prodigious amount of testimony was supplied by the children's therapist, Katrina Popovic. Popovic admitted that she never established a therapeutic relationship with Mother. She ultimately admitted that she harbors a bias against Mother, believes Mother to be mentally unfit, and confirmed that the children share that view. Popovic recounted that the children "have made it quite clear that [IDO] was pretty vocal about it in our last session that if [Mother] were to agree to pretty intensive therapy and possible medication, anything to help her that help them [sic] that she would be more open to establishing a relationship with her."

Although Popovic agreed under cross-examination that she did not think it was "right" for the children to "dictat[e]" their mother's therapy, the trial court embraced the underlying concept. The court opined that Mother has "little desire to be a parent," and that her "intentionally antagonistic, spiteful, and emotionally damaging behavior inflames the interpersonal conflict she has with father and also the relationship she has with the children." The court's opinion quotes at great length from Popovic's notes, concluding: "[t]he court simply cannot find mother's bizarre actions to be logical or designed to further the best interests of her children." The court concluded that mother's future parenting time is contingent on the *children's* desire "to reinstate contact" and whether reinstating contact would be in their best interests.

[13] Dr. Bering also evaluated the children at the request of CPS. Almost a year later when he testified, Dr. Bering emphasized that his notes did *not* reflect that Mother had caused a mental injury to her children. Dr. Bering advised the court that if he had detected a mental injury, he would have noted it. He explained that it is common for 13-year-old girls to have disputes with their mothers, particularly over cell phone use, and affirmed that after examining the children he had no reason to believe that contact between Mother and her children would have endangered their mental or physical health.

The testimony of the mental health experts best positioned to evaluate Mother's mental health paints an entirely different picture.

Dr. Scott Allen has been Mother's treating psychiatrist since 2013, and has seen her on a regular basis since then. He testified that Mother has attention deficit/hyperactivity disorder, major depression recurrent and in partial remission, and post-traumatic stress disorder (it bears mention that Mother was undergoing treatment for Stage III breast cancer throughout the time of these events). Dr. Allen's treatment consists of psychotherapy and several medications. He testified that he has observed in Mother "no evidence of physical violence or intent to do or wish to do so to any other person," and never detected that she would pose a threat "either emotionally or physically to her children." Although Mother has a "strong personality" and sometimes speaks "intently and intensely," she has never come "close" to yelling at him. His impression of her parenting style is that "she sets limits and that there are consequences when the boundaries or limits are overstepped." Dr. Allen never detected any fabrication on Mother's part and concluded that she had no psychiatric impairment that would affect her ability to parent her children.

Pursuant to a court order, Mother was also evaluated by Dr. Linda Green, a psychologist employed by the Oakland County FOC. Dr. Green testified that she found Mother "well controlled, motivated, [and] invested" during the evaluation. She never raised her voice, did not express anger, and Dr. Green found Mother to have been "honest" with her. Dr. Green administered a number of tests and interviewed Mother at length. She testified that she did not diagnose any mental illness.

In Dr. Green's view, Mother sometimes "has difficulty modulating her response to conflict particularly when it involves her family and her children," and "at those times has been known to have exaggerated responses." That information, Dr. Green explained, derived from reports written by other people, and was not based on her own evaluation. Dr. Green herself did not observe any behavior outside the norm, and agreed with Dr. Allen that Mother suffered from no psychiatric impairment in her ability to parent her children. According to Dr. Green, Mother is motivated to resolve the conflict with her children. While the trial court concluded that virtually every child custody factor favored or strongly favored Father, Dr. Green determined that the factors only "slightly favor the father." Nothing in her testimony supports that immediate efforts at reunification, conducted by a professional, would be dangerous or unwarranted.

IV

Because Mother's parental rights have not been terminated and there exist no grounds to even seek court jurisdiction, immediate efforts should be made to reunify her with her children. According to the trial court's order, periodic "review hearings" may be scheduled " 'to determine whether the children wish to reinstate contact with defendant and whether resumption of parenting time would be in their best interests.' "

Conditioning reunification on the children's willingness to "reinstate contact" is, in my view, plain error. Children are not emotionally or intellectually capable of being assigned the role of parenting-time gatekeepers and under no circumstances should be granted this power.[14]

The record before this Court substantiates that neither child currently has any relationship with Mother of any kind. IDO expresses loathing, anxiety and fear toward her. Although the trial court found that Father is willing to facilitate a relationship, neither of the children has reached out to Mother in more than two years. This is unsurprising, at Father's trial testimony substantiates that on several occasions before the court's order entered he deliberated withheld the children from court-ordered visits because they allegedly did not want to go, and has never told them that they should reach out to their mother. The record reflects that Father is not facilitating anything except maintaining the distance, physical and emotional, between Mother and her children.

At this point, the children are allied with Father and both are alienated and estranged from Mother. Continuing on this path will only worsen the situation. The trial court refused to appoint a new family reunification therapist in February 2019, and nothing in the court's opinion suggests that it would be willing to do so now. Because the trial court has repeatedly expressed its view that Mother is incapable of parenting her children safely and has conducted these proceedings with no apparent respect for rules protecting Mother's rights, reassignment is required:

> When determining whether remand to a different judge is required, we examine the following factors:
>
> > (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Walker*, 504 Mich 267, 285-286; 934 NW2d 727 (2019), quoting *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citations omitted in original).]

Here, reassignment is required both to preserve the appearance of fairness and to provide the children and their Mother an opportunity for reunification.

In its haste to punish Mother, the trial court wound up worsening a bad situation. Following the rules may not have automatically healed the parties' problems, but based on the evidence that ultimately emerged, Mother's relationship with her children would have been preserved. The goal

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[14] See also our Supreme Court's order in *Ludwig v Ludwig*, 501 Mich 1075; 911 NW2d 462 (2018), wherein the Court struck down an order leaving to "the unfettered discretion of the [children's] therapists the 'frequency, duration, and method' of any contact" between the children and their father. Placing that power in the hands of the children at the center of this case, or their father, is even more improper.

at this point should be immediate and aggressive efforts at reconciliation and reunification. Given the lead opinion's willingness to simply overlook the trial court's many errors and its endorsement of the status quo, I hold out no hope that will occur.

/s/ Elizabeth L. Gleicher