

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PATRICK A. RUGIERO,

Plaintiff-Appellant,

v

ANTONIETTA M. DINARDO,

Defendant-Appellee.

UNPUBLISHED

June 19, 2012

Nos. 301829; 302192; 302228  
302936; 302963; 303259;  
303707; 307630

Wayne Circuit Court

LC No. 07-730628-DC

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Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals several orders arising from two separate child custody actions. In the first action, LC No. 07-730628-DC, the parties were awarded joint custody of their nine-month-old daughter pursuant to a May 2008 consent order. In June 2009, plaintiff moved for sole custody of this child, and filed a separate action in LC No. 09-108801-DC for sole custody of the parties' son, who was then approximately three months old. In December 2010, the trial court administratively consolidated the two cases under LC No. 07-730628-DC. Plaintiff now appeals as of right in Docket No. 302936, and by leave granted in Docket No. 302963, from the trial court's January 24, 2011, order awarding defendant sole legal and physical custody of both children and determining plaintiff's parenting time. In Docket No. 303707, plaintiff appeals as of right from the trial court's March 22, 2011, order establishing child support. In Docket No. 302192, plaintiff appeals by leave granted from the trial court's December 8, 2009, order requiring plaintiff to pay attorney fees of \$10,000 to defendant's counsel. In Docket No. 301829, plaintiff appeals as of right from a May 24, 2010, order requiring plaintiff to pay additional attorney fees of \$20,000, and in Docket No. 302228, plaintiff appeals as of right from a November 30, 2010, order requiring him to pay additional attorney fees of \$80,000. In Docket No. 303259, plaintiff appeals by leave granted from a February 14, 2011, order providing that the attorney fees awarded to defendant are not dischargeable in bankruptcy. Lastly, in Docket No. 307630, plaintiff appeals as of right from a November 22, 2011, order declaring plaintiff in contempt of court for not complying with prior attorney fee orders and requiring plaintiff to pay attorney fees and costs of \$1,393 to defendant's law firm. We decline to consider plaintiff's challenge to the contempt decision in Docket No. 307630 based on lack of jurisdiction. We affirm all other remaining appeals.

I. CHILD CUSTODY

In Docket Nos. 302936, 302963, and 303707, plaintiff challenges the trial court's decision to award sole legal and physical custody of the children to defendant.

#### A. STANDARD OF REVIEW

The Child Custody Act, MCL 722.21 *et seq.*, governs disputes involving the custody of a child. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "To expedite the resolution of a child custody dispute by prompt and final adjudication, 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 a clear legal error on a major issue." MCL 722.28. The trial court's findings of fact should be affirmed on appeal unless the evidence clearly preponderates in the opposition direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). Deference is given to the trial court's determinations of credibility. *Berger*, 277 Mich App at 705. The trial court's discretionary rulings are reviewed for an abuse of discretion. *Id.* "An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.*; see also *Dailey v Kloenhamer*, 291 Mich App 660, 664-665; \_\_\_ NW2d \_\_\_ (2011). Clear legal error occurs where the trial court incorrectly chooses, interprets, or applies the law. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). An error in a custody determination is subject to a harmless error analysis. See *Ireland v Smith*, 451 Mich 457, 468-469; 547 NW2d 686 (1996); *Fletcher* 447 Mich at 889.

#### B. ESTABLISHED CUSTODIAL ENVIRONMENT

Before considering plaintiff's challenges to the trial court's custody decision, it is first necessary to consider the statutory framework applicable to each child because the circumstances differ for each child. Custody of the parties' daughter was originally established by a consent order in May 2008. While this type of custody order does not require a court to conduct a hearing or engage in intensive fact-finding, it must still be satisfied that the custody arrangement is in the child's best interests. *Harvey v Harvey*, 470 Mich 186, 192-193; 680 NW2d 835 (2004). "[W]hen the court signs the order, it indicates that it has done so." *Id.* at 193. The May 2008 consent order in this case awards the parties joint legal and physical custody of their daughter. Ordinarily, joint physical custody means that the "child shall reside alternately for specific periods with each of the parents." MCL 722.26a(7)(a); *Dailey*, 291 Mich App at 670. Here, however, the order substantively placed primary physical custody of the child with defendant, with parenting time for plaintiff on each Sunday from noon to Monday evening, certain holidays, alternating periods for Christmas and breaks, and four weeks in the summer.<sup>1</sup>

Regardless of whether the custodial arrangement established by the May 2008 order is properly treated as joint physical custody, MCL 722.27(1)(c) provides the framework for a change in the custody order. Accordingly, the trial court could only modify or amend the order

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<sup>1</sup> A separate custody order was later entered in Canada, which added one additional overnight period of parenting time for plaintiff each week.

for proper cause or a change of circumstances. MCL 722.27(1)(c). The party requesting a change in custody has the burden of establishing either proper cause or a change of circumstances. *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). If this threshold showing is not made, a trial court may not hold a custody hearing to reevaluate the child's best interests. *Id.* at 603-604. If the threshold showing is made, the appropriate burden of proof depends on whether an established custodial environment exists.

If a child has an established custodial environment, that environment may not be changed unless clear and convincing evidence, as opposed to a preponderance of the evidence, establishes that a change in custody is in the child's best interests. MCL 722.27(1)(c); *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). A trial court must expressly evaluate the best-interest factors in MCL 722.23. *Dailey*, 291 Mich App at 667. In addition, when considering joint custody, the trial court must consider the parties' general level of cooperation and agreement with respect to important decisions affecting the welfare of the child. MCL 722.26a(1)(b); see also *Dailey*, 291 Mich App at 667. The trial court's findings with respect to each factor are reviewed under the great weight of the evidence standard. *McIntosh*, 282 Mich App at 475; *Berger*, 277 Mich App at 705. The court's ultimate custody decision is a discretionary one that is reviewed for an abuse of discretion. *Id.*

After the parties' son was born, and before a custody action was filed, the parties executed an affidavit of parentage, which specified that defendant "has initial custody of the child, without prejudice to the determination of either parent's custodial rights." Under the Acknowledgment of Paternity Act, MCL 722.1001 *et seq.*, an affidavit of parentage serves as a basis for a court to order child support, custody, or parenting time, but is not equivalent to a court order. *Foster v Wolkowitz*, 486 Mich 356, 366-367; 785 NW2d 59 (2010). A validly executed affidavit establishes paternity. *Id.* at 363. The male signor becomes a legal parent for purposes of the Child Custody Act. *Sinicropi v Mazurek*, 273 Mich App 149, 160; 729 NW2d 256 (2006). The initial grant of custody to the mother "shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time." MCL 722.1006. Where a circuit court has continuing jurisdiction over a child because of a prior action, a new action for support, custody, or parenting time of a different child having the same parents must generally be filed as a supplemental complaint in the earlier action. MCR 3.204(A)(2).

Here, plaintiff filed his complaint for custody of the parties' son as a separate action on June 30, 2009, but the case was later consolidated with the original action. On July 1, 2009, the trial court granted defendant's emergency ex parte motion and awarded defendant temporary sole legal and physical custody of both children pending further proceedings. Following an evidentiary hearing, the trial court issued an oral opinion on December 22, 2009, in which it found that defendant, and not plaintiff, had made the requisite showing of proper cause or a change of circumstances sufficient to modify the May 2008 custody order with respect to the parties' daughter. An order was thereafter entered on February 18, 2010, continuing the children's temporary placement with defendant pending a custody hearing. Following that hearing, the trial court found that both children had an established custodial environment with defendant and, accordingly, imposed a burden on plaintiff to show by clear and convincing evidence that it should be changed. After considering the statutory best-interest factors, the trial court concluded that sole custody of the children should remain with defendant.

Plaintiff seeks relief from the trial court's custody decision with respect to both children, first by arguing that the trial court erred in entering the July 1, 2009, ex parte order that awarded defendant sole legal and physical custody of the parties' daughter, and allowed defendant's sole custody of the parties' son to continue. Although plaintiff argues that the ex parte order itself should be reversed, because that order was superseded by the trial court's subsequent temporary custody order and then by its final order determining custody, the validity of the ex parte order is now moot. "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). This Court generally will not decide moot issues. *Id.* at 359. Plaintiff has not established any reason for considering this moot issue. See *Mead v Batchlor*, 435 Mich 480, 486-487; 460 NW2d 493 (1990), abrogated on other grounds *Turner v Rogers*, \_\_\_US \_\_\_; 131 S Ct 2507; 180 L Ed 2d 452 (2011).

We also reject plaintiff's argument that any error in entering the ex parte order affords plaintiff a basis for challenging the trial court's finding that both children had an established custodial environment with defendant. Whether an established custodial environment exists is a question of fact. *Berger*, 277 Mich App at 706. "[T]he focus is on the circumstances surrounding the care of the children in the time preceding trial, not the reasons behind the existence of a custodial environment." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Plaintiff has not established any basis for disturbing the trial court's finding that an established custodial environment existed with defendant, and it is immaterial whether the ex parte order contributed to the existence of that environment. *Berger*, 277 Mich App at 706-707. Therefore, we uphold the trial court's finding that an established custodial environment existed with defendant and, accordingly, that plaintiff had the burden to show by clear and convincing evidence that a change of custody was in the children's best interests.

### C. BEST INTERESTS FACTORS

Plaintiff also challenges the trial court's findings regarding several of the statutory best-interest factors in MCL 722.23.

There is some natural overlap between the various best-interest factors. *Fletcher*, 229 Mich App at 25. In considering the factors, the trial court is not required to comment on every item of evidence that might be potentially relevant to each factor. *McIntosh*, 282 Mich App at 474; see also *Kessler v Kessler*, 295 Mich App 54, 65; 811 NW2d 39 (2011). The court's findings need only be sufficient to enable this Court to determine whether the evidence clearly preponderates in the opposite direction. *McIntosh*, 282 Mich App at 474.

We disagree with plaintiff's argument that the trial court made insufficient findings with respect to factor (b), which concerns the parties' capacity and disposition "to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). While the trial court did not comment on the evidence of defendant's suicide attempt when addressing the guidance portion of this factor, the court considered that evidence when evaluating defendant's mental health under factor (g). Similarly, the trial court considered plaintiff's attentiveness to the children when addressing factor (a), and considered changes in the parties' employment when evaluating factor (c). The trial court also considered where the children might attend school in the future when evaluating

the education portion of this factor, but ultimately found that factor (b) favored defendant because she had been the children's primary caretaker even before the custody dispute arose. As a whole, the trial court's findings regarding factor (b) are sufficient and the evidence does not clearly preponderate against its finding that factor (b) favors defendant.

We also are not persuaded that the evidence clearly preponderates against the trial court's finding that the parties were equal with respect to factor (c), which looks to the future to evaluate the parties' capacity and disposition to provide the children with food, clothing, and medical care. MCL 722.23(c). Although there was evidence that plaintiff had substantially greater financial resources than defendant, who was working part time while attending college for a nursing degree, given the evidence of plaintiff's difficulty in controlling his expenses and the steps taken by defendant to improve her financial circumstances, the trial court could reasonably infer that the parties were equal with respect to their capacity and disposition to provide the children with food, clothing, and medical care.

The next two factors challenged by plaintiff, MCL 722.23(d) and (e), have some natural overlap. *Ireland*, 451 Mich at 465. Factor (d) "calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ('the desirability of maintaining continuity')." *Id.* n 8. Factor (e) focuses on the child's prospects for a stable family environment. *Id.* at 465. The acceptability of the existing or proposed custodial home is not relevant. *Fletcher*, 447 Mich at 884-885.

In light of the trial court's findings that both parties presently have suitable homes for the children and planned to continue residing in those homes, we reject plaintiff's argument that these factors should have been weighed in his favor. The evidence does not clearly preponderate against the trial court's assessment of the parties' respective homes and plans for the children.

With respect to the moral fitness factor in MCL 722.23(f), the material question is "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Fletcher*, 447 Mich at 887. The type of morally questionable conduct relevant to this factor may include "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors" *Id.* at 887 n 6. We reject plaintiff's argument that the trial court made insufficient findings regarding this factor. In addition, we find no basis for disturbing the trial court's decision to consider the parties' involvement in premarital sexual relationships to be a neutral factor. Overall, the trial court's decision indicates that the court weighed this factor in favor of defendant based on a comparison of the parties' entire criminal history, including plaintiff's involvement in youth crime diversion programs following his release from prison. Considering the evidence that defendant had no history of convictions or arrests, the trial court's finding is not against the great weight of the evidence. The remoteness of plaintiff's prior convictions did not preclude the trial court from weighing this factor in defendant's favor. Further, the fact that

plaintiff's federal conviction was vacated<sup>2</sup> did not preclude a finding of questionable conduct, inasmuch as plaintiff admitted that he had made past mistakes.

Next, with respect to the trial court's assessment of the parties' mental and physical health under MCL 722.23(g), the trial court's finding that this factor weighs in favor of defendant is not against the great weight of the evidence. The evidence supports the trial court's determination that defendant's suicide attempt was isolated, whereas plaintiff suffers from a personality disorder that is chronic in nature, even without considering the inferences drawn by the trial court regarding plaintiff's conduct in this case. The evidence regarding plaintiff's criminal history, which included a conviction for resisting arrest, and plaintiff's conduct toward defendant supports the assessment by the court-appointed psychologist, Jack Haynes, that plaintiff had a manipulative personality and that persons with his personality disorder tend to rebel against authoritative figures.<sup>3</sup> While plaintiff's expert witness, Dr. Gerald Shiener, was critical of Haynes's evaluation, we defer to the trial court's assessment of the credibility of the witnesses. *Berger*, 277 Mich App at 705.

With respect to the domestic violence factor in MCL 722.23(k), it is clear that the trial court's decision to weigh this factor in favor of defendant depended on its assessment of the credibility of witnesses. The trial court found that neither party was entirely credible. But examining the trial court's findings as a whole, we do not agree with plaintiff's argument that the trial court only found indications of domestic violence. While the trial court did not find a clear picture of the repeated physical abuse described by defendant in her testimony, it is apparent that the trial court was satisfied that there were instances of actual physical and emotional abuse. The trial court's finding that factor (k) favored defendant is not against the great weight of the evidence.

Regarding factor (j), plaintiff does not dispute the trial court's determination that the parties should be weighed equally with respect to this factor, which evaluates "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). Nonetheless, the trial court's specific finding was that the parties could not realistically facilitate a close relationship at this time, and that some sort of mechanism should be put in place for the

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<sup>2</sup> Plaintiff's conviction was vacated pursuant to 28 USC 2255 because plaintiff's former attorney had a personal interest conflict that adversely affected his representation of plaintiff. *Rugiero v United States*, 330 F Supp 900 (ED Mich 2004).

<sup>3</sup> Although not raised by either party, we take this opportunity to encourage trial courts to seal and make unavailable sensitive and private information such as psychological evaluations. Much like the enactment of the Health Insurance Portability and Accountability Act in 1996 recognizes the sensitive nature of medical records and corresponding need for confidentiality, this Court notes that psychological records should likewise be treated with the same level, if not elevated, degree of care, particularly in cases involving domestic relations and child custody. This is especially true in the age of ever-expansive technology and the availability of information on-line.

parties to exchange information regarding the children. To the extent that plaintiff argues that he and defendant can work together and, therefore, joint custody was an appropriate consideration, we find no basis for relief because the trial court's findings regarding the parties' inability to cooperate are not against the great weight of the evidence. In addition, where joint custody is a consideration, the pertinent additional factor is the parties' general level of cooperation and agreement with respect to important decisions affecting the welfare of the child. MCL 722.26a(1)(b); see also *Dailey*, 291 Mich App at 667.<sup>4</sup> The trial court did not specifically address this factor, but clearly found when addressing factor (1) that the arrangement previously contemplated by the parties was no longer feasible. Factor (1) is a catch-all provision. *Ireland*, 451 Mich at 464 n 7. It is appropriate to use factor (1) to comment on various matters or arguments raised at trial, without expressly weighing it in favor of either party. *McIntosh*, 282 Mich App at 482-483. Considering that the parties' prior arrangement involved an attempt to have some form of joint custody of their daughter, and the trial court's focus on determining whether that prior arrangement was feasible, plaintiff has not established any error in the trial court's application of factor (1) to, in essence, find that the prior custodial arrangement was no longer feasible.

In sum, plaintiff has not established any error requiring reversal in the trial court's consideration of the best-interest factors. In light of the evidence presented below, the trial court did not abuse its discretion in awarding sole legal and physical custody of the children to defendant.

## II. ALLEGED EVIDENTIARY ERRORS

Plaintiff also raises evidentiary issues regarding his vacated federal conviction and his proposed expert and lay witnesses.

### A. PLAINTIFF'S CONVICTION

Regarding the admission of the vacated federal conviction at the custody hearing, we review a trial court's decision to admit evidence for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005). Plaintiff's reliance on *Hackley v Hackley*, 426 Mich 582; 395 NW2d 906 (1986), in support of this claim of error is misplaced because that case concerns the doctrine of collateral estoppel. We find no merit to plaintiff's argument that the doctrine applies in this case to bar evidence relating to events that occurred before entry of the original May 2008 consent order with respect to the parties' daughter.

Further, the record does not support plaintiff's argument that a presentence report regarding the vacated federal conviction was admitted by the trial court. While the record indicates that the trial court allowed a transcript from the sentencing proceeding to be admitted,

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<sup>4</sup> We reject plaintiff's argument that he is entitled to relief because he did not receive notice under MCL 772.26a regarding the possibility for joint custody. Considering that both parties were trying to modify an existing joint custody order for their daughter, plaintiff has not established the relevancy of the alleged deficient notice.

subject to further briefing by the parties, there is no indication in the trial court's custody decision that it considered that transcript. The court noted only that a 12-year prison sentence had been vacated and that plaintiff admitted to making past mistakes, as established by plaintiff's own testimony.

Considering plaintiff's failure to show that the presentence report was admitted at trial, plaintiff's failure to show that evidence regarding the vacated conviction itself was inadmissible, the conditional nature of the trial court's ruling to admit the sentencing transcript at trial, and the absence of any indication in the record that the trial court used information from the sentencing transcript to resolve the parties' custody dispute, this claim of evidentiary error fails.

## B. INABILITY TO CALL WITNESSES

We also reject plaintiff's argument that reversal is required because of his inability to call certain nonexpert witnesses at the custody trial. Contrary to plaintiff's argument on appeal, the record contains an order entered by the trial court on August 20, 2010, which lists the witnesses that each party could call at trial. Because plaintiff's offer of proof filed on the last day of trial in October 2010 was insufficient to satisfy MCR 2.401(I)(2),<sup>5</sup> the trial court did not abuse its discretion in denying that motion. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 164-165; 792 NW2d 749 (2010).

While the trial court refused to allow any expert witnesses at trial other than Haynes or Dr. Shiener, it considered the offer of proof filed by plaintiff on the last day of trial with respect to Dr. Werner Spitz. Considering that Dr. Shiener provided general testimony regarding the formation of bruises, and Dr. Spitz's failure to take into account evidence that defendant did not have a black eye during a follow-up visit with Dr. Dhulam Qadir on June 26, 2009, in forming his proposed opinion that defendant sustained her black eye during her suicide attempt on June 17, 2009, any error in not allowing Dr. Spitz to testify was harmless. *Ireland*, 451 Mich at 468; *Fletcher*, 447 Mich at 889; see also MRE 103(a)(2) (error may not be predicated upon a ruling that excludes evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the trial court by way of offer of proof).

Any error by the trial court in not allowing Lyle Danuloff to testify was also harmless, considering that the offer of proof filed by plaintiff on the last day of trial indicated that Danuloff only intended to testify regarding the probative value of Haynes's testimony and that plaintiff was afforded an opportunity at trial to impeach Haynes's psychological evaluation through Dr. Shiener. Further, as explained in *McIntosh*, 282 Mich App at 475, "psychological evaluations are not conclusive on any issue or child custody factor." Instead, the trial court must make an independent determination of the children's best interests. *Id.* There is nothing in the record to indicate that additional criticism of Haynes's evaluation would have caused the trial court to

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<sup>5</sup> MCR 2.401(I)(2) provides: "The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown."

reach a different decision regarding whether defendant should be awarded sole custody of the children.

### III. JUDICIAL DISQUALIFICATION/BIAS

The trial judge recused herself in April 2012 and plaintiff's claim is moot. Absent a showing of personal bias or prejudice the trial judge's order of recusal does not affect the validity of its prior orders. See *Hull & Smith Horse Vans, Inc v Carras*, 144 Mich App 712, 719; 376 NW2d 392 (1985). Further, to the extent that plaintiff purports to challenge an earlier October 23, 2009, decision of the chief judge denying his motion to disqualify the trial judge, this Court's prior decision denying plaintiff's application for leave to appeal the chief judge's decision "for lack of merit in the grounds presented," see *Rugiero v Dinardo*, unpublished orders of the Court of Appeals, entered July 27, 2010 (Docket Nos. 299071 and 299072), precludes further consideration of this issue under the law of the case doctrine. *People v Douglas*, 122 Mich App 526, 529; 332 NW2d 521 (1983).

To the extent that plaintiff argues that disqualification was warranted because the trial judge co-taught a class with defendant's counsel after the trial judge rendered its custody decision, we note that the trial judge denied disqualification on this ground under MCR 2.003(B) pursuant to an order entered on March 8, 2011. Plaintiff did not further preserve consideration of this claim by raising it in a motion before the chief judge. *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996), see also MCR 2.003(D)(3)(i).

Lastly, to the extent that plaintiff claims that the trial judge's custody decision was the product of "predisposition," we have considered this argument to the extent that it implicates his right to due process and the record is factually sufficient for our review. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). A judge's repeated rulings against a party, "no matter how erroneous, or vigorously expressed, are not disqualifying." *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). After carefully reviewing the record, we conclude that plaintiff has not overcome the heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). To the contrary: our review of the record reveals that the trial court judge engaged in thoughtful consideration of the volumes of evidence. She demonstrated patience during a very lengthy and highly contentious "battle" and then applied legal principles in an even-handed manner. Plaintiff's allegations of judicial bias are simply without any merit whatsoever.

### IV. PARENTING TIME

In Docket Nos. 302936, 302963, and 303707, plaintiff challenges the trial court's decision regarding his parenting time. We first consider the finality of the trial court's January 24, 2011, order with respect to parenting time. In granting plaintiff's application for leave to appeal in Docket No. 302963, this Court directed the parties "to specifically address in their appellate briefs the issue of the finality of the orders with regard to parenting time." *Rugiero v Dinardo*, unpublished order of the Court of Appeals entered April 25, 2011 (Docket No. 302963). Both parties treat this issue as affecting only the postjudgment parenting-time orders pertaining to their daughter.

MCR 7.203(A)(1) provides for an appeal by right from a “final judgment or final order of the circuit court . . . as defined in MCR 7.202(6),” but “[a]n appeal from an order described in MCR 7.202(6)(a)(iii) - (v) is limited to the portion of the order with respect to which there is an appeal of right.” MCR 7.202(6)(a)(iii) defines a “final judgment” or “final order” in a domestic relations case as “a postjudgment order affecting the custody of a minor.” In *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010), this Court treated a parenting-time determination as part of the custody decision based on the definition of “[c]hild-custody determination” in the Uniform Child-Custody Jurisdiction and Enforcement Act, which provides:

[A] judgment, decree, or other court order providing for legal custody, physical custody, or *parenting time* with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual. [MCL 722.1102(c) (emphasis added).]

Following the reasoning in *Shade*, we conclude that in this case, the postjudgment order affecting parenting time was an order affecting custody because it was considered in the context of the entire child-custody determination. Therefore, the parenting-time provision with respect to the parties’ daughter in the January 24, 2011, order was appealable as of right, notwithstanding this Court’s grant of plaintiff’s application for leave to appeal.

Turning to plaintiff’s challenge to the substantive merits of the trial court’s decision with respect to both children, our review is governed by the standards in MCL 722.28. That is, “[o]rders concerning parenting time must be affirmed on appeal unless the trial court’s findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.” *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). Parenting time is awarded in accordance with the child’s best interests and “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). While MCL 722.27a(6) lists relevant factors to consider, the overriding consideration is the child’s best interests. *Shade*, 291 Mich App at 31. Unlike a custody decision, a trial court need only make findings on contested issues when deciding parenting time. *Id.* at 31-32. But where a change in parenting time amounts to a change in the child’s established custodial environment, it should not be granted unless the trial court determines by clear and convincing evidence that it is in the child’s best interests to change the child’s established custodial environment. *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008); *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004). “If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed.” *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010).

Here, plaintiff does not argue that the changes made by the trial court with respect to parenting time amounted to a change in the children’s established custodial environment. In addition, it is apparent from the record that the trial court considered the children’s best interests in determining the amount and frequency of plaintiff’s parenting time. The court also considered plaintiff’s objections to the parenting time schedule initially set forth in the court’s November

30, 2010, opinion and made modifications to that order by adding opportunities for regular telephone contact between the children and plaintiff, and to allow parenting time for plaintiff on Mother's Day weekend during alternating years.

In challenging the trial court's parenting time decision, plaintiff inappropriately focuses on the sheer number of hours awarded to him for parenting time. *Berger*, 277 Mich App at 716. Notwithstanding the children's young ages, the change to biweekly parenting time that allows the children to spend two nights with plaintiff, coupled with the telephone contact and other provisions in the January 24, 2011, order, provide for parenting time in "a frequency, duration, and type reasonably calculated to promote a strong relationship" between the children and plaintiff. MCL 722.27a(1). We find no palpable abuse of discretion in the trial court's award of parenting time and, therefore, affirm the trial court's order.

Lastly, for the reasons previously discussed, we reject plaintiff's argument that the trial judge should have been disqualified from deciding his parenting time.

## V. CHILD SUPPORT

In Docket No. 303707, plaintiff challenges the trial court's decision that he had a gross income of \$88,000 for purposes of calculating child support. Plaintiff argues that the trial court erred in treating various bank deposits as income. We disagree.

We review a trial court's findings of fact underlying an award of child support for clear error, and review the court's discretionary rulings, such as whether to impute income to a party, for an abuse of discretion. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). We review de novo whether the trial court properly reached its decision within the framework of the Michigan Child Support Formula (MCSF) or statutory deviation criteria. *Berger*, 277 Mich App at 723. In this case, the trial court applied the 2008 MCSF in determining plaintiff's gross income for purposes of calculating child support. As set forth in the uniform child support order dated April 22, 2011, the child support order was effective November 1, 2009.<sup>6</sup>

The first step in determining each parent's support obligation under the 2008 MCSF is to determine the parties' individual incomes. "[N]et income" is defined, in part, as "all income minus the deductions and adjustments permitted by this manual." 2008 MCSF 2.01(A). All relevant aspects of a parent's financial status are considered in determining how much money the parent should have available for support. 2008 MCSF 2.01(B). Income includes items such as wages or other monies from all employers or as a result of employment. 2008 MCSF 2.01(C).

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<sup>6</sup> Pursuant to MCR 3.211(D)(2), a judgment or order concerning a minor shall not be entered unless it incorporates a uniform support order or states that a uniform support order is not required because support is reserved. This type of reservation is appropriate where, at the time of entry of the judgment or order, one parent is not required to pay support, but may be determined to have the ability to pay the support in a later proceeding. See generally *In re SMNE*, 264 Mich App 49, 56; 689 NW2d 235 (2004) (discussing the effect of a reservation of support in a divorce judgment).

“Income also includes the market value of perquisites (perks) received as goods, services, or other noncash benefit for which the parent did not pay, if they reduce personal expenses, and have significant value or are received regularly.” 2008 MCSF 2.01(D).

In this case, the trial court initially imputed additional personal income to plaintiff of \$6,000 (i.e., 50 percent of \$12,000) for car expenses and other perks that plaintiff received from the family restaurant business that he managed. The trial court also found that plaintiff failed to adequately explain various deposits to his bank account that were largely made in cash form, and that plaintiff’s withdrawals from the bank account regularly exceeded his net deposits from his paychecks through the end of 2009. Using the withdrawals to determine the gross income needed to cover the expenses, the trial court multiplied by 12 months its determination that the average monthly withdrawals from the bank account were \$6,500 to arrive at an annual “net” income amount of \$78,000. The trial court then deducted \$12,000 for payments related to the car perk, resulting in a “net” income amount of \$66,000 a year and a computed gross income, using a tax rate of 25 percent, of \$88,000. The trial court did not add the previously determined imputed income to this total.

Whether a parent’s actual income is higher than what he or she reports to the court is a factual determination. See *Stallworth v Stallworth*, 275 Mich App 282, 285; 738 NW2d 264 (2007) (addressing a trial court’s findings under the 2004 MCSF). It was reasonable for the trial court to infer from the evidence that plaintiff’s expenses were higher than his actual income. Further, we defer to the trial court’s assessment of the credibility of plaintiff’s explanations for various deposits. Based on the evidence presented, plaintiff has not established that the trial court erred in its determination of his gross income under the 2008 MCSF. Indeed, the record indicates that the trial court took a conservative approach in attempting to quantify plaintiff’s gross income by using the withdrawal information, rather than imputing income from the deposit information in the bank records. This Court will not second-guess a trial court’s determination that a parent provided a less than credible accounting of his finances. *Id.* at 286.

Lastly, for the reasons previously discussed, we reject plaintiff’s argument that the trial judge should have been disqualified from deciding the issue of child support.

## VI. ATTORNEY FEES

### A. \$10,000 AWARD

In Docket No. 302192, plaintiff argues that the trial court erred by failing to conduct an appropriate evidentiary hearing, and by failing to make sufficient findings of fact, to support its December 8, 2009, order requiring him to pay \$10,000 of defendant’s attorney fees. We disagree.

The trial court was authorized to award attorney fees under MCR 3.206(C)(1), which provides that “[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.” We review the findings of fact upon which a trial court awards attorney fees for clear error. *Stallworth*, 275 Mich App at 288. Questions of law are reviewed de novo. *Id.* The trial court’s ultimate award of attorney fees is reviewed for an abuse of

discretion. *Id.* “An abuse of discretion occurs when the trial court’s decision falls outside of the range of reasonable and principled outcomes.” *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008).

In September 2009, defendant moved for attorney fees of approximately \$39,000 under MCR 3.206(C)(2)(a), which required that she allege facts sufficient to show that she was unable to bear the expense of the action and that plaintiff was able to pay. The trial court had received some testimony regarding the parties’ respective incomes before awarding attorney fees of \$10,000 on December 8, 2009. Although the trial court did not then have detailed billing information regarding defendant’s requested attorney fees, the order established only an interim amount and reserved the “overall issue of any additional attorney fees to either party.” The trial court revisited the \$10,000 award in February and March 2010, when addressing both a second motion for attorney fees by defendant and whether plaintiff should be held in contempt for not complying with the December 8, 2009, order. During these proceedings, the trial court received additional testimony and documentation from plaintiff concerning his income, expenses, credit report, and own liability for attorney fees. In addition, defendant submitted an itemized billing statement to support her request for attorney fees and costs, which then totaled approximately \$98,000.

During the contempt proceedings, the trial court found that plaintiff had the ability to pay the \$10,000 at the time that amount was ordered, but modified the payment to allow plaintiff to pay the sum in monthly installments. In its May 24, 2010, decision, the trial court ordered plaintiff to pay defendant additional attorney fees of \$20,000, noted that plaintiff had not disputed the reasonableness of the billing information submitted by defendant’s counsel, and also stated:

Further, based upon the length of litigation, the high volume of pleadings filed, the difficulty of the proceedings, and upon review of the itemized billing submitted by Defendant and considering the amount paid by Plaintiff for his own legal representation for the same proceedings, the Court finds that the initial attorney fees requested in the amount of \$10,000 was reasonable, as well as the additional attorney fees of \$20,000 requested by Defendant’s counsel.

Because the trial court’s December 8, 2009, order awarding attorney fees of \$10,000 was not based on plaintiff’s failure to comply with a court order, see MCR 3.206(C)(2)(b), it is only necessary to consider whether the trial court erred in ordering the payment of \$10,000 under MCR 3.206(C)(2)(a). We reject plaintiff’s argument that the trial court erred by failing to conduct an evidentiary hearing to determine what services were actually rendered by defendant’s counsel or the reasonableness of the attorney fees. An evidentiary hearing is not required if the trial court has sufficient evidence to review this issue. *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005).

While plaintiff contested the amount of defendant’s initial request for attorney fees, considering that the trial court only awarded \$10,000, which was approximately 25 percent of the requested amount, and which the trial court stated was only an interim amount that would be subject to later modification, the trial court did not abuse its discretion in entering the December 8, 2009, order without conducting an evidentiary hearing. Even if the trial court should have at

least required an itemized billing statement before entering the December 8, 2009, order, this deficiency was remedied on May 24, 2010, when the trial court revisited the reasonableness of the attorney fees in light of the itemized billing statement and other factors. Therefore, remand for the trial court to conduct such a review is unnecessary.

We also reject plaintiff's argument that the trial court made insufficient findings under *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), to determine a reasonable fee. The approach outlined by Justice Taylor in that case was specifically crafted to address how reasonable fees should be determined for purposes of awarding case evaluation sanctions under MCR 2.403(O)(6)(b). See *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008). This approach, which begins with the determination of a baseline reasonable fee derived from the fee customarily charged in the locality for similar legal services, *Smith*, 481 Mich at 530, has also been found appropriate for determining statutory attorney fees. *Augustine v Allstate Ins Co*, 292 Mich App 408, 429 n 2; 807 NW2d 77 (2011). The approach requires a trial court to multiply this number by a reasonable number of hours expended in the case, and to then make up-or-down adjustments using the factors listed in Rule 1.5(a) of Michigan Rules of Professional Conduct (MRPC) and *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), and any additional relevant factors. *Smith*, 481 Mich at 530-531.

While the trial court here did not follow the approach in *Smith*, 481 Mich at 530-531, MCR 3.206(C)(2)(a) does not require that the court compute the amount of attorney fees using an hourly rate and applying it to specific hours. Further, it is clear that the trial court did not do so when it awarded what it considered to be a nominal amount of \$10,000 instead of the much larger amount requested by defendant. Although the trial court was still required to determine that the attorney fees awarded were reasonable, the record sufficiently demonstrates that the trial court recognized the appropriate factors. The court was not required to issue detailed findings for each factor under *Wood* or MRPC 1.5(a). *John J Fannon Co*, 269 Mich App at 172; *In re Attorney Fees & Costs*, 233 Mich App 694, 705; 593 NW2d 589 (1999).

We also reject plaintiff's argument that defendant failed to make a sufficient showing under MCR 3.206(C)(2)(a) that he had the ability to pay the attorney fees. The party requesting attorney fees has the burden of showing facts sufficient to justify the award. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). Given the financial information considered by the trial court before entering the December 8, 2009, order and when revisiting plaintiff's ability to pay that order in 2010, plaintiff has not established clear error in the trial court's assessment of his ability to pay attorney fees of \$10,000; plaintiff clearly had the ability to pay. The additional and updated information considered by the trial court to determine child support in 2011 does not affect our decision. Our review is limited to the record presented to the trial court at the time it decided the issue of attorney fees. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

We also reject plaintiff's argument that he was deprived of procedural due process relative to the award of \$10,000 in attorney fees. Due process is a flexible concept, but its essence is to ensure fundamental fairness. *Reed*, 265 Mich App at 159. "Procedure in a particular case is constitutionally sufficient where there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id.* Even an

opportunity to move for rehearing may provide a party with procedural due process. See *Paschke v Retool Indus (On Rehearing)*, 198 Mich App 702, 706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich. 502 (1994). The record in this case shows that plaintiff had an opportunity to present a complete view of his income to the trial court, and the information provided by the parties through testimony and documentary proofs was sufficient for the trial court to decide the matter. Thus, plaintiff was afforded due process. As indicated previously, any deficiency in the proceedings conducted before entry of the December 8, 2009, order was remedied when the trial court revisited this issue in 2010.

Plaintiff has not shown that an award of \$10,000 under MCR 3.206(C)(2)(a) constituted an abuse of discretion. Therefore, we uphold the trial court's order directing plaintiff to pay \$10,000 of defendant's attorney fees.

## B. \$20,000 AND \$80,000 AWARDS

In Docket No. 301829, plaintiff challenges the trial court's May 24, 2010, order requiring him to pay additional attorney fees of \$20,000 to defendant. In Docket No. 302228, plaintiff challenges the trial court's grant of additional attorney fees of \$80,000, pursuant to defendant's request at trial.

### 1. SUBJECT MATTER JURISDICTION

Initially, we address plaintiff's argument in his reply brief in Docket Nos. 301829 and 302228, and in his brief in Docket No. 302192, concerning the trial court's subject-matter jurisdiction to issue the May 24 and November 30, 2010, orders. An issue of subject-matter jurisdiction may be raised at any time. *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996). Subject-matter jurisdiction concerns "a court's power to hear and determine a cause of action or matter." *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 291; 698 NW2d 879 (2005). Plaintiff has not alleged, let alone established, that the trial court lacked the authority to order him to pay the attorney fees listed in the May 24 and November 30, 2010, orders. Plaintiff argues only that the orders were voided by subsequent judicial acts. "There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which the action of the trial court is not void although it may be subject to direct attack on appeal." *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935). Accordingly, we reject plaintiff's attack on the trial court's subject-matter jurisdiction to issue the attorney fee orders.

### 2. MOOTNESS

Plaintiff's mootness argument is more pertinent to his claim that the attorney fee orders were voided by subsequent judicial acts. But we disagree with plaintiff's argument that the trial court's May 24 and November 30, 2010, orders were voided under MCR 3.207(C)(6) because he failed to pay the attorney fees and the trial court did not include a provision for attorney fees in its January 24, 2011, "final order regarding custody, parenting time and child support."

We review issues involving the interpretation of court rules de novo. *Estes*, 481 Mich at 578-579. The interpretation of the meaning of a court order also involves a question of law that

we review de novo. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). MCR 3.207(C)(6) provides that “[a] temporary order not yet satisfied is vacated by the entry of the final judgment or order, unless specifically continued or preserved.” Even assuming that the January 24, 2011, order constituted a final order for each child for purposes of MCR 3.207(C)(6), the earlier attorney fee orders were not temporary orders. The use of the word “interim” in the trial court’s orders is not controlling because it is the substance of the order and the effect of the judicial act, and not its form, that determines its meaning. See *Quinton v Gen Motors Corp*, 453 Mich 63, 92 n 51; 551 NW2d 677 (1996) (opinion by LEVIN, J.) The substance of the trial court’s orders indicate that the court reached a final decision regarding plaintiff’s responsibility for attorney fees for the period requested by defendant through September 30, 2010. Thus, the May 24 and November 30, 2010, attorney fee orders were not voided by operation of law under MCR 3.207(C)(6). According, plaintiff’s mootness claim fails.

### 3. ADEQUACY OF THE TRIAL COURT’S FINDINGS

Defendant filed her motion for additional interim attorney fees of \$20,000, along with a request for an evidentiary hearing regarding her overall fees, on January 15, 2010. In a supporting affidavit, Jeanne Wong, the director of the law firm representing defendant, claimed that the attorney fees incurred through the conclusion of the hearing regarding temporary custody were \$83,774.45. In a response filed on February 8, 2010, plaintiff joined defendant’s request for an evidentiary hearing. He further argued that the court should not presume that defendant’s attorney fees are reasonable simply because they were less than plaintiff’s attorney fees.

The trial court instructed the parties to provide additional information and received testimony from plaintiff at hearings on February 18 and March 25, 2010, and at a telephone conference on March 18, 2010. The trial court found the requested attorney fees of \$20,000 to be reasonable based on the same reasoning it used in finding that the earlier award of \$10,000 was reasonable. In its May 24, 2010 opinion and order, the trial court acknowledged that “[t]his case has been a contentious and heavily litigated custody action involving multiple motions, responses, and extensive pleadings.” To date, defendant had incurred \$98,235.33 in attorney fees, having paid \$36,939.85 from “funds received from family members or using her child support checks.” The trial court concluded that defendant had only meager funds with which to pay her fees whereas plaintiff’s monthly expenses far exceeded his claimed income of only \$55,000 a year. The trial court noted that it was “startling” to view the contrast between plaintiff’s stated income and the huge bank deposits. Even accepting that the large deposits indicated that several loans plaintiff had made were repaid, “[t]he numbers do not appear to add up.” The trial court determined that plaintiff had the ability to pay defendant’s fees as previously ordered and further found that the fees were reasonable.

Plaintiff’s counsel does not dispute the reasonableness of Defendant’s counsel’s billing. Further, based upon the length of the litigation, the high volume of pleadings filed, the difficulty of proceedings, and upon review of itemized billing submitted by Defendant and considering the amount paid by Plaintiff for his own legal representation for the same proceedings, the Court finds that the initial attorney fees requested in the amount of \$10,000.00 was reasonable, as well as the additional attorney fees of \$20,000.00 requested by Defendant’s counsel.

The trial court had no trouble making such a determination without the benefit of an evidentiary hearing given the parties' billing and financial documentation, detailed briefs, and oral arguments.

Plaintiff moved for reconsideration on June 15, 2010. The trial court addressed plaintiff's motion for reconsideration at the same time it awarded an additional \$80,000 in attorney fees upon oral motion by defendant. In the trial court's November 30, 2010, opinion denying plaintiff's motion for reconsideration, the trial court noted that, "the large amounts of insufficiently explained deposits into Plaintiff's checking account . . . were actually even larger." The trial court was not persuaded that it had committed a palpable error:

Plaintiff's testimony, and the explanations given by his former counsel, regarding his income, his borrowing from credit cards, and friends' repayment of loans, do not account for the large deposits seen. The Court gave Plaintiff and his counsel opportunities to explain these deposits in the evidentiary hearing held on Defendant's motion for attorney fees, in the subsequent telephone conference, and in the subsequent hearing to show cause. Despite the multiple opportunities given by the Court, neither Plaintiff nor his counsel gave a satisfactory or credible explanation for the substantial deposits until the time of trial when it was then proffered that Plaintiff's mother gave him all the cash to cover his expenses [sic]. Absent any other explanation, the Court could logically conclude that Plaintiff had additional, unreported income. The Court has no reason to reconsider its conclusion in the 5/24/2010 Order that Plaintiff has the ability to pay \$20,000 for Defendant's interim attorney fees. In fact, Defendant's Exhibit 16, presented in the trial in this matter, details cash deposits into Plaintiff Rugiero's account from April 2009 through December 2009 or over \$98,000. In fact, in the three months preceding the commencement of the 2009 action, there are average deposits of approximately \$8,600 per month.

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Plaintiff's claims regarding the reasonableness of Defendant's attorney fees are without basis. The allegations made in the Plaintiff's Response to Defendant's Motion for Additional Interim Attorney Fees were made prior to the hearings and telephone conferences held in this matter. By the time of the telephone conference, Defendant had presented her detailed attorney fees, with redactions for attorney-client privileged information. At that point, Plaintiff had yet to present such detailed and redacted billings from his prior counsel, but his then-counsel committed to having his prior counsel produce them. Plaintiff's then-counsel did not dispute the reasonableness of Defendant's attorney fees. The Court's review of Defendant's attorney fees showed that, on an interim basis, those fees were reasonable.

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The interim nature of the attorney fee award is significant. There has been no outright award of attorney fees. Instead, the Court will revisit the interim attorney

fee awards it has made upon the request of either party after entry of a final order or judgment in this case. A full evidentiary hearing will be held at that time, and any modifications to the interim awards that are shown to be appropriate by the evidence that is presented will then be made by the Court, including any changes that might be warranted due to Defendant's recent employment.

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In reaching its final attorney fee award, the Court will also consider whether either party has engaged in unreasonable conduct during the course of this litigation, such that an award of legal fees to the other party is appropriate under *Stackhouse*, in addition to considering the factors under MCR 3.206(C) for shifting attorney fees.

In the proposed findings filed on October 22, 2010, defendant claimed that her attorney fees through September 30, 2010, totaled \$184,697. In support of this claim, defendant filed an affidavit of Ann Klein, the chief operating officer of the law firm representing defendant, along with copies of invoices and itemized billings. The additional amount claimed for the period between the March and October 2010 invoices was \$86,372.11. Defendant sought attorney fees under MCR 3.206(C) and because of plaintiff's unreasonable conduct during the proceedings. She requested an additional \$130,000 in attorney fees.

Plaintiff's proposed findings were also filed on October 22, 2010. He summarily requested that the trial court vacate the prior orders totaling \$30,000, and award attorney fees in his favor based on defendant's alleged fraudulent filings.

In its November 30, 2010, opinion and order granting defendant's oral motion for additional interim attorney fees and costs, the trial court ordered plaintiff to pay an additional \$80,000 for defendant's attorney fees, payable in monthly installments of \$5,000. The court stated:

Ann Klein, the Chief Operating Officer of the law firm representing Defendant presented an Affidavit indicating that billing from March 2010 through September 30, 2010 totalled [sic] an additional \$86,372.11 for total fees incurred by Plaintiff of approximately \$184,697 through September 30, 2010. Numerous motions have been filed in this case and the trial in this matter has taken place. The trial spanned 10 days, which were: July 13, 2010; July 19, 2010; July 21, 2010; August 20, 2010; August 25, 2010; September 2, 2010; September 9, 2010; September 29, 2010; October 4, 2010; and October 8, 2010. Three of the motions were filed by Plaintiff on the last day of trial.

Given the additional costs and attorney fees the Court determines that it is appropriate to award Defendant further attorney fees. The reasoning in this Court's Opinion Denying Plaintiff's Motion for Rehearing and Reconsideration of Order Granting Defendant's Motion for Interim Attorney fees is adopted in its entirety as the legal basis for the attorney fee award as well as it's [sic] Opinion and Order Re: Parenting Time. Further, because of several exhibits introduced at

trial, specifically Defendant's Exhibit 15 (DFCU Account Statement detailing deposits of \$137,000 occurring between 3/21/2009 and 1/15/2010) and 16 (DFCU Deposit Slips showing cash deposits of \$102,000 in cash from 4/9/2009 through 12/30/2009), the Court is even more convinced that Plaintiff can bear the expenses of paying Defendant's attorney fees, while Defendant can not. Contrary to Plaintiff's assertions that he was given the money reflected in the deposits to help pay the costs of this litigation, a number of the deposits made into the DFCU accounts were made well prior to Plaintiff's initiation of litigation. The Court concludes that those deposits were not for payment of litigation costs and were available for Plaintiff to spend. Additionally, for the same reasons discussed in the Court's Opinion Denying Plaintiff's Motion for Rehearing or Reconsideration of Order Granting Defendant's Motion for Interim Attorney Fees and Costs, the Court finds that Plaintiff is able to pay Defendant's attorney fees.

Further, although Defendant has now begun working, her income is very low. As presented at trial, Defendant makes approximately \$700 per month at Chrysler. She also receives \$1300 per month in child support from Plaintiff, and she receives cash assistance and medical benefits from the Canadian government. This is a meager amount of money to live on for a woman with two very young children, and it is not sufficient to pay her attorney fees as well. Accordingly, the Court shall order Plaintiff to pay further attorney fees in the amount of \$80,000, bringing the total attorney fees that Plaintiff has been ordered to pay to \$110,000. [P/301829-ex. F.]

On December 22, 2010, plaintiff moved for reconsideration of the November 30, 2010, order on the ground that he was not afforded an opportunity to respond to defendant's "oral argument" regarding attorney fees. Plaintiff also challenged the trial court's evaluation of the parties' abilities to pay the attorney fees, and asserted that the amount requested by defendant was excessive. The trial court denied the motion on January 5, 2011, without expounding on plaintiff's specific claims.

Given this record, we find no merit to plaintiff's argument that the trial court's \$20,000 and \$80,000 awards warrant appellate relief. On more than one occasion, the trial court painstakingly reviewed the evidence, including the reasonableness of the fees in light of the protracted litigation, as well as plaintiff's ability to pay. The May 24, 2010, order indicates that the court planned to apply both MCR 3.206(C) and an "unreasonable conduct" standard (applicable to both parties) under *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992), in evaluating the "final" amount of attorney fees. Although *Stackhouse*, 193 Mich App at 437, is a divorce action, this Court has also applied the "unreasonable conduct" in conjunction with MCR 3.206(C) in a custody dispute involving unmarried parents. See *Schoensee v Bennett*, 228 Mich App 305, 315-316; 577 NW2d 915 (1998) (where "the unusually high attorney fees incurred in this case were due in large part to plaintiff's attempts to overwhelm defendant with his greater financial resources.") At the time *Schoensee* was decided in 1998, MCR 3.206(C) did not contain the provision in subsection (2)(b) that authorizes attorney fees based on a party's failure to comply with a court order. That provision was added in 2003. Nonetheless, this Court has continued to recognize unreasonable conduct as a common-law basis for attorney fees. As set forth in *Reed*, 265 Mich App 164-165, attorney fees may be

based solely on financial need. In addition, attorney fees may also be awarded based on a party's unreasonable conduct if the unreasonable conduct caused the opposing party to incur additional fees. *Id.*

Plaintiff argues that the trial court's November 30, 2010, opinion regarding attorney fees determined plaintiff's ability to pay attorney fees in a manner that conflicts with its approach to child support reflected in its November 30, 2010, opinion regarding custody, child support, and parenting time.

In the opinion regarding attorney fees, the trial court was convinced that plaintiff could bear the expenses of defendant's attorney fees because he had substantial deposits, including cash deposits between April and December 2009, to a DFCU bank account. Plaintiff's explanation for the substantial deposits was found to lack credibility. In the opinion regarding custody, parenting time, and child support, the trial court found, consistent with its findings regarding attorney fees, that plaintiff's testimony regarding his earnings did not appear credible. This concern apparently prompted the court to order plaintiff to produce additional bank statements for the period from January to April 2009 and a current "TRW report" for consideration in determining child support. The trial court conducted an additional evidentiary hearing at which it computed plaintiff's gross income at \$88,000 for purposes of determining child support by quantifying the cash resources needed to cover his expenses.

Judges are generally held to rules of logic when sitting as the trier of fact. *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003). We are not convinced that the trial court's findings are inconsistent. The record reflects that the trial court might have taken a conservative approach in estimating gross income for purposes of determining child support by attempting to quantify the cash needed to cover expenses. But plaintiff has failed to establish that the trial court's decision not to order another evidentiary hearing regarding his ability to pay attorney fees following the trial constituted an abuse of discretion. *John J Fannon Co*, 269 Mich App at 171. In addition, plaintiff has not established that the trial court clearly erred in finding that he had the ability to pay the amount ordered. *Stallworth*, 275 Mich App at 288.

The purpose of a trial court indicating its brief view of various factors considered in determining the reasonableness of an award is to aid appellate review. *Smith*, 481 Mich at 537. Our review of the record clearly demonstrates that the trial court recognized and applied appropriate factors in determining a reasonable fee. The trial court was presented with detailed billing statements. Although defendant requested \$130,000 in fees, the trial court awarded a modest sum of \$80,000, considering the fact that there was a ten-day trial and various motions filed by plaintiffs near the end of trial. Defendant had only recently started working part-time. She was also attending nursing school. Her meager income would hardly cover the extraordinary amount of fees. In contrast, plaintiff was fully employed and, notably, had access to funds beyond his stated income. Moreover, although the trial court did not specifically order plaintiff to pay fees based on his conduct, we note that plaintiff appeared to engage in a campaign of attempting to overwhelm defendant with his greater financial resources. Accordingly, plaintiff has failed to show that the awards of \$20,000 and \$80,000 in attorney fees constituted an abuse of discretion.

Lastly, it is unnecessary to consider plaintiff's request that the case be remanded to a different judge, given that the assigned judge has since recused herself from the case.

## VII. BANKRUPTCY STAY

In Docket No. 303259, plaintiff challenges the trial court's February 14, 2011, order holding that it has jurisdiction to determine whether the attorney fees awarded in the May 24 and November 30, 2010, orders qualified as domestic support obligations that were nondischargeable in bankruptcy, without obtaining relief from the bankruptcy court with respect to the automatic stay that became effective when plaintiff filed for bankruptcy protection on January 28, 2011. Plaintiff also reiterates his argument that the May 24 and November 30, 2010, attorney fee orders were voided by entry of the January 24, 2011, final order, and asserts that the trial court violated MCR 7.208(A) by designating the attorney fee orders as domestic support obligations. We disagree.

For the reasons stated above, the May 24 and November 30, 2010, attorney fee orders are not temporary orders. Therefore, we reject plaintiff's jurisdictional and mootness claims on this basis. Further, plaintiff's reliance on MCR 7.208(A)<sup>7</sup> to challenge the trial court's jurisdiction is misplaced because the trial court's February 14, 2011, order holding that it has concurrent jurisdiction with the bankruptcy court to determine whether the attorney fee debts are dischargeable did not involve either amending or setting aside the attorney fee orders.

We review de novo whether the trial court had jurisdiction to determine the dischargeability of the attorney fee debts. *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App at 290. Federal authority supports the trial court's decision that it had jurisdiction to determine whether the attorney fee orders were nondischargeable debts. Federal district courts have original and exclusive jurisdiction of bankruptcy cases under 28 USC 1334(a), but may refer cases to bankruptcy judges under 28 USC 157 to hear and determine the core proceedings. See *In re Daniel*, 404 BR 318, 320 (ND Ill, 2009). Core proceedings include "motions to terminate, annul, or modify the automatic

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<sup>7</sup> MCR 7.208(A)(1)-(4) provides:

After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

- (1) by order of the Court of Appeals,
- (2) by stipulation of the parties,
- (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
- (4) as otherwise provided by law.

stay.” 28 USC 157(2)(G). Federal district courts have original, but not exclusive, jurisdiction of all civil proceedings arising under the Bankruptcy Code, or arising or related to cases under the Bankruptcy Code, but the federal district court has exclusive jurisdiction “of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” 28 USC 1334(b) and (e)(1).

Automatic stays in bankruptcy actions are governed by 11 USC 362. See *Lopez v Lopez*, 191 Mich App 427, 428; 478; 478 NW2d 706 (1991). In general, the purpose of an automatic stay in a bankruptcy case is “to preserve the status quo of the estate in an effort to effectuate a successful reorganization or liquidation.” *Stackpoole v Dep’t of Treasury*, 194 Mich App 112, 116; 486 NW2d 322 (1992). While subsection (a) of 11 USC 362 lists broad prohibitions, subsection (b) contains exceptions. *Stackpoole*, 194 Mich App at 116. The pertinent exceptions in this case are “the commencement or continuation of a civil proceeding . . . for the establishment or modification of an order for domestic support obligations” and “the collection of a domestic support obligation from property that is not property of the estate.” 11 USC 362(b)(2)(A)(ii) and (B).

As discussed in *Chao v Hosp Staffings Servs, Inc*, 270 F3d 374, 383-384 (CA 6, 2001), federal courts have found that the bankruptcy court’s exclusive jurisdiction extends only as far as the automatic stay provision provides and, accordingly, a nonbankruptcy court has concurrent jurisdiction to determine whether an exception to the automatic stay applies, without waiting for the bankruptcy court to rule on this issue. Because we find the reasoning in *Chao*, 270 F3d at 384-385 persuasive, see *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004), and pertinent exceptions in this case require a determination that there is a “domestic support obligation,” we conclude that the trial court had jurisdiction to decide the matter.

Whether a conflicting decision by the bankruptcy court on this same issue would take precedence presents a distinct issue from whether the trial court had jurisdiction to decide the matter in the first instance. As set forth in *Chao*, 270 F3d at 384, “[i]f a state court and the bankruptcy court reach differing conclusions as to whether the automatic stay bars maintenance of a suit in the non-bankruptcy forum, the bankruptcy forum’s resolution has been held determinative, presumably pursuant to the Supremacy Clause.” But there is no conflicting decision in this case. Indeed, both parties acknowledge that the federal district court addressed this issue subsequent to the trial court’s decision in a manner consistent with the trial court’s decision. See *In re Rugiero*, \_\_\_ F Supp 2d \_\_\_ (ED Mich, 2011) (Docket No. 11-cv-11549, issued November 30, 2011). The federal district court’s decision does not affect our determination that the trial court had jurisdiction to determine whether the debts created by the attorney fee orders constituted domestic support obligations.

A more significant question is whether the trial court also had jurisdiction to decide, after determining that the orders awarding attorney fees to defendant constituted domestic support obligations, that they were nondischargeable debts. 11 USC 523(a)(5) establishes an exception to dischargeability under several sections of the Bankruptcy Code for a “domestic support obligation.” Because a nonbankruptcy court with sound jurisdiction may enter orders consistent with the terms of the bankruptcy stay, *Chao*, 270 F3d at 384, and the trial court in this case had jurisdiction to decide whether the awarded attorney fees were domestic support obligations, we hold that the trial court also had jurisdiction to rule that the domestic support obligations were

nondischargeable in bankruptcy under 11 USC 523(a)(5). See also *In re Hamilton*, 540 F3d 367, 373 (CA 6, 2008). Thus, plaintiff has failed to establish any jurisdictional defect.

We also reject plaintiff's challenge to the trial court's determination that the May 24 and November 30, 2010, attorney fee orders constitute domestic support obligations. As indicated previously, the interpretation of the meaning of a court order involves a question of law that we review de novo. *Silberstein V Pro-Golf America Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). We also review de novo issues involving statutory interpretation. *Estes*, 481 Mich at 578-579. "The term 'domestic support obligation' ('DSO') is a newly defined term in the Bankruptcy Code, as updated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA')." *In re Smith*, 586 F3d 69, 73 (CA 1, 2009). The attorney fee orders in this custody dispute satisfy all four parts of the definition of "domestic support obligation" in 11 USC 101(14A) because they were established by an order of a court of record for debt owed to a child's parent, were not assigned to anyone, and are in the nature of support. The fact that the attorney fees are payable directly to the attorney or law firm representing defendant does not preclude a determination that they are domestic support obligations. See *In re Johnson*, 445 BR 50, 58 (D Mass, 2011).

Indeed, attorney fees incurred in connection with custody proceedings that benefit a child were considered support even before the Bankruptcy Code was amended in 2005. See *In re Maddigan*, 312 F3d 589, 594-595 (CA 2, 2002) (attorney fees incurred by nonspouse mother of child were in the nature of support where the proceeding was concerned with the welfare of the child and the affordability of attorney fees by the child's care provider was considered); see also *In re Dvorak*, 986 F2d 940 (CA 5, 1993). Given that the proceedings in this case concerned the welfare of the children and the affordability of the attorney fees was considered by the trial court in determining the amount of attorney fees, the orders are "in the nature of . . . support of such . . . child of the debtor or such child's parent, without regard to whether such debt is expressly so designated." 11 USC 101(14A)(B). Therefore, we uphold the trial court's determination that the May 24 and November 30, 2010, orders constitute domestic support obligations and, accordingly, are nondischargeable debts under 11 USC 523(a)(5).

#### VIII. NOVEMBER 22, 2011, CONTEMPT PROCEEDINGS

In Docket No. 307630, plaintiff raises several issues concerning the trial court's determination on November 22, 2011, that he was in contempt for not complying with the May 24 and November 30, 2010, attorney fee orders. We previously rejected plaintiff's claim that the May 24 and November 30, 2010, orders should be voided by operation of law. We also find no merit to plaintiff's argument in his reply brief in Docket No. 307630 that the trial court's finding in its November 22, 2011, order regarding defendant's motion for an order to show cause that the May 24 and November 30, 2010, orders were final orders was intended to "reinstate" the May 24 and November 30, 2010, orders.

We do not consider plaintiff's additional arguments concerning the trial court's determination that he was in contempt of court, the 45-day jail sanction, or his obligation to make reasonable regular payments. While the portion of the trial court's postjudgment order awarding defendant additional attorney fees and costs of \$1,393 incurred in filing the motion for an order to show cause is appealable as of right pursuant to MCR 7.203(A)(1) and MCR

7.202(6)(a)(iv), plaintiff does not raise any issue challenging that award and this Court's jurisdiction is limited to "the portion of the order with respect to which there is an appeal of right." "[C]ivil contempt of court is not a final order for purposes of appellate review." *In re Moroun*, 295 Mich App 312; 329; \_\_\_ NW2d \_\_\_ (2012) (lead opinion by K. F. Kelly, J.). This case involves civil contempt because the trial court was using its contempt power in the November 22, 2011, order to coerce compliance with at least part of the attorney fee orders by requiring a present payment of \$15,000 to avoid a 45-day jail term. *Porter v Porter*, 285 Mich App 450, 455; 776 NW2d 377 (2009). Therefore, we lack jurisdiction to consider the trial court's civil contempt ruling.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ David H. Sawyer  
/s/ Amy Ronayne Krause