

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

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JAIME COLLINS,

Plaintiff-Appellee,

v

STEVEN COLLINS,

Defendant-Appellant.

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UNPUBLISHED

November 14, 2013

No. 316537

Oakland Circuit Court

LC No. 2011-789907-DM

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We vacate the child-support order and remand for further findings consistent with this opinion. We affirm the remainder of the judgment of divorce.

**I. CHILD CUSTODY**

First, defendant argues that the trial court erred when it awarded sole physical custody of the parties' minor child to plaintiff, because the best-interest factors favored defendant. We disagree.

Orders relating to custody "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 great-weight-of-the-evidence standard applies to the trial court's findings concerning each best-interests factor and these findings "will be affirmed unless the evidence clearly preponderates in the opposite direction." *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006) (quotation marks and citations omitted).

"Above all, custody disputes are to be resolved in the child's best interests. Generally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001)

(internal citation omitted). Defendant claims that factor (c)<sup>1</sup> favored him because plaintiff was voluntarily unemployed despite her ability to work, and defendant was employed and received a comfortable income and a military pension. However, the record shows that plaintiff was training to be a massage therapist and was capable of working full time. The fact that she was voluntarily unemployed is not determinative. See *LaFleche v Ybarra*, 242 Mich App 692, 700-701; 619 NW2d 738 (2000). Regardless of whether defendant had the higher earning capacity, as he claims, there was evidence that both parties were able to provide the child with food, clothing, and medical care. Therefore, it cannot be said that the trial court's finding on this factor was against the great weight of the evidence.

Defendant also claims that the trial court erred when it found that factors (f)<sup>2</sup> and (k)<sup>3</sup> favored neither party because the evidence did not suggest that he made threats about plaintiff or his first wife. The trial court found that these factors favored neither party because there was evidence that both parties engaged in domestic violence. In making this finding, the trial court found the testimony regarding defendant's threats to be credible, and "[w]e defer to the trial court's credibility determinations given its superior position to make these judgments." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). Therefore, it cannot be said that the trial court's finding on these two factors were against the great weight of the evidence.

Defendant further claims that the court erred when it found factor (j)<sup>4</sup> favored plaintiff because the parties had an amicable relationship and there was no evidence that favored plaintiff over defendant. The trial court's finding that "[t]he parties have not worked well together during the separation with regard to parenting time," suggests that neither party was favored by factor (j). Despite this fact, the trial court determined that this factor favored plaintiff, without providing any justification. While the record is clear that the parties' separation was at times acrimonious, there was no evidence that one party was more willing and able than the other to encourage the minor child's relationship with the other parent. Defendant testified that he and plaintiff had "gotten along" in the several months preceding the trial, and would spend time together with the children. Plaintiff also testified that she and defendant "can kind of get along well for the children," and they have stayed overnight at each other's places on occasion. Accordingly, we find that the trial court's unsupported finding that factor (j) favored plaintiff was against the great weight of the evidence.

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<sup>1</sup> "The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . and other material needs." MCL 722.23(c).

<sup>2</sup> "The moral fitness of the parties involved." MCL 722.23(f).

<sup>3</sup> "Domestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k).

<sup>4</sup> "The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j).

However, because the trial court properly considered the factors enumerated in MCL 722.23 and provided sufficient factual support for its ultimate custody decision, we decline to remand this matter for further findings regarding factor (j). In its order denying defendant's motion for a new trial, the trial court stated that although only factor (j) favored plaintiff, it relied on several of defendant's actions in deciding to award plaintiff sole physical custody. Specifically, the court noted that it heard credible testimony of defendant stating that it would only take \$10,000 to have plaintiff "knocked off" and that he told his first wife to get plaintiff drunk in Detroit, walk her down an alley, and if she was raped he would not care. Thus, it appears that that factor (j) did not play much of a role in the trial court's decision to award plaintiff sole physical custody. Additionally, we note that "the overwhelmingly predominant factor is the welfare of the child," which the trial court appeared to consider when analyzing defendant's actions. Given that the trial court is not required to give equal weight to the factors, *Sinicropi*, 273 Mich App at 184, we cannot conclude that the trial court's decision to award plaintiff sole physical custody was against the great of the evidence.

## II. CHILD SUPPORT

Defendant next argues that the trial court erred in its calculation of the child-support award, because it failed to consider plaintiff's potential income. We agree.

Child-support orders are reviewed for an abuse of discretion, factual findings underlying the trial court's decisions are reviewed for clear error, and whether the trial court properly applied the Michigan Child Support Formula (MCSF) is a question of law that is reviewed de novo. *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012).

To determine child support, the trial court must use the MCSF. According to the MCSF, "When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the potential income that parent could earn, subject to that parent's actual ability." 2008 MCSF 2.01(G).<sup>5</sup> "Accordingly, before imputation is permitted, the trial court must determine if the parent is voluntarily unemployed, underemployed, or has an unexercised ability to earn." *Clarke*, 297 Mich App at 181. The MCSF provides a list of relevant factors the trial court is to use when determining "whether the parent has an actual ability to earn and a reasonable likelihood of earning the potential income." 2008 MCSF 2.01(G)(2). Further, the MCSF states that when imputing a parent's potential income, "[t]he amount of potential income imputed should be sufficient to bring that parent's income up to the level it would have been if the parent had not voluntarily reduced or waived income." 2008 MCSF(G)(1).

Here, the trial court ordered defendant to pay \$1,126 monthly in child support, based on his income of \$120,000. Despite evidence that plaintiff has the ability to earn income, the trial court made no findings of fact concerning defendant's allegation that plaintiff was voluntarily unemployed or underemployed. And the record contains no information on the method used to determine the amount of the child-support award, other than a statement on the child-support

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<sup>5</sup> The 2008 Michigan Child Support Formula Manual was effective from October 1, 2008 to December 31, 2012.

order to the effect that the support provisions did not deviate from the MCSF. Therefore, it cannot be determined whether the trial court found plaintiff was “voluntarily unemployed or underemployed, or has an unexercised ability to earn,” 2008 MCSF 2.01(G), and if she was, whether the court considered the relevant factors to determine if plaintiff “has an actual ability to earn and a reasonable likelihood of earning the potential income.” 2008 MCSF 2.01(G)(2). Accordingly, we vacate the child-support order and remand for further findings concerning plaintiff’s income or potential income, and if necessary, recalculation of the child-support award.

### III. PROPERTY DIVISION

Defendant next argues that the trial court failed to provide justification for ordering defendant to be responsible for the marital debt, which included the loss on the marital home, the remaining payments on plaintiff’s vehicle, and the credit card debt. We disagree.

“This Court reviews a property distribution in a divorce case by first reviewing the trial court’s factual findings for clear error, and then determining whether the dispositional ruling was fair and equitable in light of the facts.” *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). “The trial court’s dispositional ruling must be affirmed unless the appellate court is firmly convinced that it was inequitable.” *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008).

“The goal behind dividing marital property is to reach an equitable distribution in light of all the circumstances.” *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908 (2009). “However, an equitable distribution need not be an equal distribution, as long as there is an adequate explanation for the chosen distribution.” *Id.* When dividing the marital estate, trial courts may consider the following factors:

(1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties’ earning abilities, (8) the parties’ past relations and conduct, and (9) general principles of equity. [*Berger*, 277 Mich App at 717.]

Contrary to defendant’s argument, the trial court did justify the property division. The trial court cited the applicable law and noted that it must consider the factors previously discussed. With regard to the marital home, the trial court noted that defendant paid the closing costs associated with the sale of the home, and held defendant responsible for the remaining loss. With regard to plaintiff’s vehicle, the trial court held defendant responsible for the payments because there was testimony that he agreed to purchase the car for plaintiff. With regard to the credit card debt, the trial court found that although the credit cards were in plaintiff’s name, they were used for marital expenses, and defendant paid the balance on one of the cards until two months before the trial. Additionally, the trial court heard evidence that plaintiff was unemployed for over four years and was attending classes to obtain a massage-therapy license, owed \$4,950 in tuition, received government assistance for food, and borrowed money from

relatives and credit cards for living expenses, including food, gasoline, and utility bills. Defendant was employed as a weapons-system manager for TACOM<sup>6</sup> in Warren, earning annual income of approximately \$120,000. Given the contrast between the parties' earning capacities and actual income, the trial court's findings that defendant was responsible for the loss on the sale of the marital home, the debt owed on plaintiff's vehicle, and the credit card debt, were "fair and equitable in light of the facts." *Olson*, 256 Mich App at 622.

#### IV. SPOUSAL SUPPORT

Defendant also argues that the trial court's spousal-support award was excessive because the parties' marriage was short-term, plaintiff was voluntarily unemployed, and defendant was responsible for the majority of the marital debt. We disagree.

We review a spousal-support award for an abuse of discretion, and the trial court's factual findings regarding spousal support for clear error. *Loutts v Loutts*, 298 Mich App 21, 25-26; 826 NW2d 152 (2012). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

"The primary purpose of spousal support is to balance the parties' incomes and needs so that neither party will be impoverished, and spousal support must be based on what is just and reasonable considering the circumstances of the case." *Loutts*, 298 Mich App at 32. In deciding whether to award spousal support, the trial court should consider several factors, including

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

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Loutts*, 298 Mich App at 32.

Here, the trial court found that the spousal-support award was appropriate because plaintiff was currently in school and unemployed, and during the marriage, she was a stay-at-home mother. The trial court further found that plaintiff needed financial support to cover day-to-day expenses for herself and the couple's minor child. The trial court noted that defendant had a steady income, which provided him with the ability to pay spousal support, and based on the disparity in the parties' incomes the trial court awarded plaintiff \$1200 per month for two

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<sup>6</sup> Tank-automotive and Armaments Command.

years. The trial court referenced the relevant factors, and appeared to give thought to the needs of the parties. Given the difference in the parties' incomes and employment, the trial court's spousal-support award was just and reasonable under the circumstances, and the trial court did not abuse its discretion.

## V. ATTORNEY FEES

Defendant next argues that the trial court erroneously awarded plaintiff attorney-fees based on the parties' income disparity. We disagree.

“The decision to award attorney fees, and the determination of the reasonableness of the fees requested, is within the discretion of the trial court.” *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006).

Defendant does not contest the reasonableness of the attorney fees; he only contests the basis for awarding the fees. Plaintiff requested attorney fees based on her inability to pay. “A party who requests attorney fees and expenses must allege facts sufficient to show that . . . the party is unable to bear the expenses of the action, and that the other party is able to pay . . .” MCR 3.206(C)(2)(a). The record established that plaintiff lacked the financial resources to pay for her attorney fees. Plaintiff was currently in school, owed tuition, and was unemployed. She was a stay-at-home mother for four years, received government assistance for food, and used credit cards for living expenses. She also had to borrow money from her grandmother to pay for the previous divorce filing in 2010. The trial court also awarded her spousal support so she could pay for day-to-day expenses for herself and the couple's minor child. The trial court noted that the amount of attorney fees plaintiff owed was \$5,497.20. “[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees.” *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010). The record also established that defendant had the ability to pay the attorney fees, as he earned an annual income of approximately \$120,000. Moreover, contrary to defendant's argument, although plaintiff received spousal support, she is not required to invade those assets to pay for her attorney fees. See *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). Accordingly, the trial court did not err in awarding plaintiff attorney fees.

## VI. JUDICIAL BIAS

Defendant next argues that this case should be reassigned to a different judge on remand because the trial judge was biased against him.

Because this issue is raised for the first time on appeal, it is not preserved for appellate review. “Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights.” *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

“The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case.” *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). Remand is warranted “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.” *Id.* at 603. Defendant “must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views.” *Id.* “Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying.” *Id.*

The alleged instances of bias defendant raises amount to nothing more than rulings regarding evidence or involve the trial judge controlling the proceedings. Defendant points to nothing in the record that would indicate that “the trial judge could not put his previous rulings out of his mind.” *Id.* There were no comments made on the record that would indicate expressed bias. Further, given the length of the proceedings and the amount of testimony heard, reassignment to a different judge would entail waste. Therefore, remand to a different trial judge is not warranted.

## VII. CONCLUSION

We vacate the child-support order and remand for further findings concerning plaintiff’s income or potential income, and if necessary, recalculation of the child-support award. We affirm the remainder of the judgment of divorce. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens  
/s/ Kathleen Jansen  
/s/ Joel P. Hoekstra