

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

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ERIC HARTER,

Plaintiff-Appellee,

v

SHAWN HARTER,

Defendant-Appellant.

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UNPUBLISHED

June 28, 2002

No. 237592

Ingham Circuit Court

Family Division

LC No. 00-023550-DM

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, which, apart from dividing the parties' marital estate, awarded plaintiff physical custody of the parties' child. We affirm.

Defendant raises several issues regarding the trial court's custody decision. Custody orders must be affirmed on appeal unless the trial court's factual 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. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

I. August 7, 2001, Custody Order

Defendant first argues that the trial court arbitrarily changed custody during the course of trial. We conclude that the order was incorrectly styled as a stipulation of the parties, but that it was substantively valid nonetheless.

At issue is an order issued August 7, 2001, but relating back to July 25, 2001, in which the trial court declared the parties joint custodians and awarded them equal parenting time pending final resolution of the custody dispute. In announcing its decision from the bench, the trial court reported that, instead of conducting trial proceedings, that particular day had been devoted to extensive negotiations between the parties, but that no agreement resulted. The court clarified, "This is not actually being an order made on the basis of a finding of fact. It's a stipulated order," explaining, "we're entering it because we were unable to complete the trial on this date." Defendant's attorney stated that the defense did not agree with the order, but would accept the court's judgment for present purposes.

The parties had come to court that day bound by the terms of a conciliator's recommendations for a temporary order, which the trial court had adopted in January 2001. The conciliator's recommendation included that defendant have "primary physical custody" of the child, with plaintiff having parenting time on alternate weekends, Tuesdays and Thursdays overnight, plus an equal division of holidays. The recommendation further provided for an even split of parenting time in the summer, in one- or two-week increments. The order here at issue stated that the parties were to have joint custody of the child with an even division of parenting time.

A party cannot be held to an agreement respecting the proceedings "unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." MCR 2.507(H). In this instance, defense counsel expressed some general disagreement with the pending order, and nowhere indicated agreement with its precise custody provisions. The order itself is not signed by either party, and nowhere adopts by reference any signed writing. Thus, the order should not have been labeled a stipulation. But examination of the substance reveals that this procedural defect is inconsequential.

Although the conciliator's recommendation that had been in effect designated defendant as having "primary custody," it provided her with only slightly more parenting time than plaintiff, and for the summer months specified an equal division. Because the court ordered an even division of parenting time in early August, this should have only continued the pattern under which the parties were already operating. Changing defendant's label from "primary" to "joint" custodian was only a matter of semantics, especially in light of the near equality of parenting time set forth in the recommendation that afforded defendant the former of those two labels.

In fact, the terms "joint custody" and "primary custody" can be used to comport with each other. See *Overall v Overall*, 203 Mich App 450, 456; 512 NW2d 851 (1994). Under these circumstances, defendant's argument that the trial court's August 7, 2001, order abruptly changed the child's custodial environment by replacing her as primary custodian to recognizing both parties as joint custodians is a strained one, and does not warrant appellate relief.

## II. Evidentiary Issues and Custody Factors

Defendant argues that the trial court erred in its findings and conclusions pursuant to several of the statutory factors governing custody cases, including by way of some erroneous evidentiary decisions. We disagree.

The best interests of a child must be determined through a weighing and balancing of the factors enumerated in MCL 722.23:

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

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

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

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

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

(f) The moral fitness of the parties involved.

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

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

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

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

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

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

“The trial court must consider each of these factors and explicitly state its findings and conclusions regarding each.” *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). However, “[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” MCR 2.517(A)(2). In custody cases, a court is not obliged to “comment upon every matter in evidence or declare acceptance or rejection of every proposition argued.” *Fletcher, supra* at 883, quoting *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981).

Defendant raises several evidentiary issues in general terms, and attacks the court’s decision regarding best interest factors (b), (d), (e), (f), (g), (j), and (k).

#### A. Dr. David James Fugate

Defendant suggests that the trial court wholly substituted Dr. Fugate’s conclusions for its own. A trial court sitting as the trier of fact is obliged to decide the evidentiary issues personally, weighing expert and other testimony as the court sees fit. *Vial v Vial*, 369 Mich 534, 536-537; 120 NW2d 249 (1963); see also *People v Walker*, 142 Mich App 523, 527; 370 NW2d 394 (1985) (“the trial judge, as trier of fact, was obligated to consider the testimony and draw his own conclusions”). In this case, examination of the trial court’s ruling from the bench reveals,

by our count, three explicit references to Dr. Fugate, but each alongside references to other evidence of record. We nowhere sense from the court's statements that it was simply adopting Dr. Fugate's evidence as a substitute for its own conclusions.

In fact, defendant elsewhere takes exception to the trial court's conclusion that certain of her personality traits would negatively affect her parenting, while pointing out that Dr. Fugate had stated that he saw no such correlation and thought such an expectation speculative. While otherwise arguing that the court over-relied on Dr. Fugate, here defendant clearly hopes to make capital out of the trial court's *departure* from the doctor's opinions. Defendant's argument in this particular tends to confirm our sense that the trial court independently weighed all the evidence, including that from Dr. Fugate.

Defendant generally complains that the court afforded Dr. Fugate's evidence too much weight, but does not suggest precisely how much weight would have been proper. This question obviously involves the evidentiary weighing and balancing on the part of a trial court to which an appellate court must afford great deference. "[I]f the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Defendant points to evidence that would tend to mitigate some of Dr. Fugate's negative conclusions concerning her, argues, without elaboration, that Dr. Fugate's report and evaluation was inadequate as a custody evaluation, and complains of things Dr. Fugate might have done but did not. However, these evidentiary particulars obviously go to the weight of the evidence, as adjudged by the trial court, having been tested through the devices of cross-examination, contrary evidence, and argument. Defendant's protestations are only an invitation to reweigh the evidence on appeal, an invitation that we most emphatically decline.

#### B. Dr. Andrew Barclay

When Dr. Barclay, defendant's psychologist, began describing some of his impressions of the parties' child, plaintiff's attorney objected on the ground that the witness had been qualified as a mental health expert only as concerned defendant, and that, during discovery, defendant denied that the child had ever been examined or seen by a mental health professional. Defendant's attorney replied that Dr. Barclay was speaking to ordinary observations of defendant with the child, not to results from a professional relationship with the child. The trial court ruled, "he is offering what could be expert opinions on [the child's] condition, that he's developmentally disabled, that he exhibits anxiety, that he has something resembling post-traumatic stress disorder. So to the extent that his testimony is that of an expert in relationship to the child, I'm not going to allow it." The court admitted photographs that Dr. Barclay took of defendant with the child, but continued to disallow Dr. Barclay's conclusions concerning the child.

On appeal, defendant argues that the court erred in disallowing Dr. Barclay to testify simply as a lay witness as concerned the interaction of the child and defendant.

"[A]n abuse of discretion will be found when the decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Put another way, an abuse of

discretion occurs “where an unprejudiced person, considering the facts under which the trial court acted, would say that there was no justification or excuse for the court’s ruling.” *Auto Club Ins Ass’n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

In this case, the trial court reiterated that Dr. Barclay was appearing as an expert for a particular purpose, and apparently recognized that allowing that expert ostensibly to switch hats for a moment and testify as a lay person would likely result in putative lay testimony flavored with a badge of special expertise. It was thus reasonable for the court to restrict Dr. Barclay’s testimony to the area in which his expertise was recognized. This was no abuse of discretion.

### C. Dr. John Matthew Laurain

Plaintiff brought Dr. Laurain, his personal physician, to testify in rebuttal to allegations against plaintiff concerning substance abuse and domestic violence. Defendant’s attorney objected on the ground that plaintiff had refused to disclose his medical records during discovery. The trial court decreed that it would hear only rebuttal from this witness, adding that the court needed no further evidence concerning testing of the parties. Dr. Laurain testified that he had treated plaintiff for anxiety and sleeplessness, dating from when the parties were expecting the birth of the child, and that the treatment was nonprescription medicine, adding that plaintiff did not want stronger medicine. Afterward, Dr. Laurain saw plaintiff several times for the same problem, and that plaintiff indicated that he did not want a sleeping pill because he wanted to be able to hear the child cry at night.

On appeal, defendant argues that Dr. Laurain should have not been permitted to testify to plaintiff’s medical history because “the court had previously granted [plaintiff’s] request to preclude discovery into his medical records.”

“The assertion of the privilege results in the sanction that the party may not thereafter present or introduce any physical, documentary, or testimony evidence relevant to the patient’s medical history or mental or physical condition.” *Jordan v Sinai Hosp*, 171 Mich App 328, 345; 429 NW2d 891 (1988), overruled in part on other grounds *Domako v Rowe*, 438 Mich 347, 359; 475 NW2d 30 (1991); see also MCR 2.314(B)(2).

However, defendant provides no record citation to show that the trial court did indeed grant a request from plaintiff to shield the latter’s medical records from discovery, this constituting a failure of presentation of appellate argument pursuant to MCR 7.212(C)(7). Plaintiff on appeal declares that no such event occurred.

Searching the lower court record for indications that defendant sought plaintiff’s existing medical records, that plaintiff asserted a privilege, and that the court granted a motion to keep such records from discovery, we find only that, in December 2000, defendant requested an order to release records attendant to the parties’ marriage counseling, but the trial court elicited from defense counsel that there had been no discovery request for such records. The court further stated that medical information would not be discoverable if the opposition asserted its privilege. Nowhere in the lower court record have we found any formal request from defendant for plaintiff’s medical records, nor any formal assertion of privilege in that area from plaintiff.

Because defendant fails to show that plaintiff ever asserted the privilege for medical information, we do not regard the trial court's allowance of Dr. Laurain for limited rebuttal purposes as an abuse of discretion.

#### D. Credibility of the Parties

The trial court repeatedly found defendant to lack credibility, but expressed no such reservations about plaintiff's credibility. Defendant concedes that credibility is normally for the trier of fact to ascertain, but reminds this Court that appellate review of credibility determinations is not entirely precluded, and cites authority for the proposition that there are exceptional situations where the appellate court stands in as good a position as the trial court to view certain evidence. This is not one of them, however. Further, defendant asserts no other bases for appellate determinations of credibility questions.

An appellate court "must, despite any misgivings or inclinations to disagree, leave the test of credibility where our system reposed it—in the trier of the facts." *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). Defendant presents a parade of minor evidentiary episodes that may reasonably be taken to place plaintiff's credibility in a poor light, but they hardly add up to sufficient impeachment as to leave plaintiff's testimony "deprived of all probative value" such as to invite reconsideration on appeal. *Id.* at 410.

Defendant likewise tries to rehabilitate her credibility, but we decline to second-guess the trial court in the matter. Defendant's whole credibility argument is an attempt to persuade an appellate court to assess the evidence anew and arrive at its own credibility determination de novo. Defendant's credibility issues warrant no appellate relief.

#### E. Statutory Best Interest Factors

##### 1. Factor (b)

In concluding that this factor weighed very strongly in plaintiff's favor, the trial court stressed indications that defendant suffered from narcissistic and histrionic personality disorders, but that plaintiff was substantially free from mental health problems. The court also credited plaintiff's representations concerning how plaintiff would relate to the boy, but counted against defendant that she had accused plaintiff of various uncorroborated incidents of misconduct. The court further recognized that defendant had been convicted for theft of a ring. The court thought it likely that defendant's personality traits would interfere with her parenting ability, and that in time she would have difficulty putting the child's needs above her own.

Defendant first alleges as error that the court had nothing favorable to say about plaintiff, but for repeating plaintiff's own general statements. This is only attacking the court's credibility determinations, which, as discussed above, fails to make out a basis for appellate relief.

Defendant next points out that the trial court stated that Dr. Fugate had "diagnosed" in defendant a narcissistic personality "disorder," and reminds this Court that Dr. Fugate in fact specifically stated that he had not made a diagnosis. Dr. Fugate did in fact clarify that he had not made an actual diagnosis, but that "the profile presented in this case would meet the

characteristics of . . . a disorder.” Dr. Fugate further expressed the concern that if untreated these personality traits could interfere with effective parenting.

Concerning the trial court’s characterization of Dr. Fugate’s impression of a narcissistic personality disorder as a diagnosis, we see this simply as the court’s declining to concern itself with the distinction between formal diagnosis and empirical impression. Dr. Fugate’s statements of his observations and concerns well support the trial court’s conclusions in this regard, despite the doctor’s professional reserve in announcing a formal diagnosis, or in projecting his concerns into specific future manifestations. Further, we note that defendant’s own psychologist, Dr. Barclay, upon whose work Dr. Fugate relied in part, expressed no hesitation in describing defendant as “exhibiting a moderate adjustment disorder with anxiety and passive, aggressive histrionic and narcissistic personality features.”

Defendant further argues that the trial court erred in considering the issue of defendant’s mental health with regard to factor (b), where it is expressly covered in factor (g). However, the statutory best-interest factors naturally include some overlap, and a trial court is free to apply evidentiary findings, in reasonable balance, to as many factors as they relate. See *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996), and *Carson v Carson*, 156 Mich App 291, 299-300; 401 NW2d 632 (1986). Because defendant’s emotional state logically bears on factor (b), the trial court properly considered that evidence under that factor, even though mental health is indeed more directly addressed under (g).

For these reasons, the trial court did not clearly err in giving plaintiff the strong advantage under factor (b).

## 2. Factors (d) and (e)

The trial court ruled as follows:

D, the length of time the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity, the child has lived his life in a stable environment.

The permanence as a family unit of the existing and proposed custodial home or homes, the Court finds this factor favors the plaintiff . . . . He’s lived in Mason all of his life. This is his first marriage. It’s very likely that’s where he’ll remain.

On the other hand, the defendant is in her third marriage and has moved with a degree of frequency greater than the plaintiff’s.

Defendant argues that the trial court failed to make a finding on factor (d), or perhaps impliedly found the parties to be equal in that regard. Although the trial court did simply recite what factor (d) involved, then moved on to factor (e), as we read the transcript the court was simply considering those two closely related factors together. Thus, in announcing that plaintiff had the advantage, the court was covering both.

Defendant asserts that the court should have found that she had the advantage, arguing that the evidence indicated that she was the more involved parent, while plaintiff stood to rely heavily on his mother as the child's caretaker. Defendant additionally attacks plaintiff with other evidentiary particulars, namely that the child had been bitten by a dog in plaintiff's parents' home, that plaintiff had shared defendant's concerns about fleas and fleabites on the child but failed to take action, and that plaintiff had used the child's image in commercials for his business.

Concerning dogs and fleas, what mention there was of that in the testimony does not suggest that those mishaps were attributable to the negligence of either parent, or even more to one than to the other. Concerning use of the child's image in advertisements, defendant offers neither explanation nor authority for why this reflects poorly on plaintiff. Nor is it obvious to us why a disagreement over the propriety of using the child's image this way bears on the question of a stable home, the desirability of maintaining continuity in the home, or the permanence of the family unit.

Defendant additionally argues that the trial court misjudged factor (d) in part because of an evidentiary error in refusing to allow a police officer to testify that plaintiff appeared intoxicated when involved in a car accident that occurred while this litigation was in progress. Upon determining that the child was not with plaintiff at the time of the mishap, the trial court declared such testimony irrelevant and refused to allow the officer to appear.

Considering the complexities of character that potentially bear on a custody decision, we hesitate to suggest that a possible drunk-driving episode was wholly irrelevant in this instance. However, in light of the abundance of evidence concerning the characters of the parties, including plaintiff's history of substance abuse, about which the court ultimately expressed some misgivings, the isolated incident here at issue, which did not involve the child, could well have struck the court as insignificant. Assuming, without deciding, that the proffered testimony was in fact relevant, we nonetheless uphold the trial court's decision to exclude it as being a reasonable exercise of discretion in the interests of avoiding cumulative evidence or wasting time. MRE 403.<sup>1</sup>

Defendant finally argues that the court erred in concerning itself with locations of proposed homes when deciding factor (e). This factor concerns permanence of the family unit in the proposed custodial homes, not the general acceptability of them. *Fletcher, supra* at 884. In this case, the trial court's apparent concern with plaintiff's plan to live in Mason might appear to be misplaced, but closer scrutiny reveals simply that the court was recognizing that plaintiff intended to remain in what had been the marital home and the child's primary residence.<sup>2</sup> This was a proper crediting of plaintiff's intention to keep the child in a familiar family environment.

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<sup>1</sup> This Court will not reverse when the trial court reaches the correct result regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

<sup>2</sup> In fact, the home in question is in Leslie, not Mason. However, Leslie is a small town near Mason. The trial court was obviously speaking generally of the Mason area.

For these reasons, defendant has failed to show error in the trial court's holdings under factors (d) and (e).

### 3. Factor (f)

In giving plaintiff the advantage in the area of moral fitness, the court recognized that plaintiff had a history of drug and alcohol abuse, but credited plaintiff's intentions to learn from his mistakes. The court then recited that defendant had lied to plaintiff about her marital history, likely left the marital home to engage in extramarital relations, and stolen a ring.

In disputing the court's findings under this factor, defendant first insists that the court should have believed her and not plaintiff as regards defendant's spending nights away from home. Again, we will not second-guess the trial court's credibility assessments. *Beason, supra* at 805.

Defendant otherwise argues that the evidence does not suggest that the child was exposed to any improper behavior. Factor (f) concerns the relative moral *fitness* of the parties as parents, not the general moral superiority of either in other contexts. See *Fletcher, supra* at 447-448. Thus extramarital relations to which the child was not exposed may be of little probative value concerning parental fitness. *Id.* at 887. In the present case, however, in addition to imputing extramarital conduct to defendant, the trial court found that she had not been honest with plaintiff concerning her marital history, and that she had stolen a ring. Further, the evidence that defendant chose to leave plaintiff and the child behind and spend the night with an extramarital companion does bear at least somewhat on defendant's parental fitness, or sense of family duty in the matter. For these reasons, the trial court did not err in giving plaintiff the advantage under this factor.

### 4. Factor (g)

The trial court concluded that neither party had problems with physical health, and that plaintiff was substantially free of mental health problems. Concerning defendant's mental health, however, the court's remarks included the following:

The defendant . . . has the personality disorder narcissism and histrionics. She is not going to be able to put anyone first in her life, including the child. The accusations that she's made, both before the hearing and during the hearing, are certainly consistent with a histrionic personality disorder.

The Court finds her demeanor on the stand was not credible. It was overly melodramatic, also consistent with a histrionic personality disorder. So the plaintiff is clearly favored.

Defendant offers no argument in rebuttal of the trial court's finding under this factor beyond the arguments we discounted above challenging the way that the court used Dr. Fugate's evidence, and assessed the parties' credibility. Because we concluded above that the court did not err in these regards, we conclude here that the court had a solid basis for finding in favor of plaintiff under factor (g).

## 5. Factor (j)

The trial court credited defendant with good intentions in this regard, but recognized the latter's mental health problems, along with plaintiff's intention to remain in the Mason area, in giving plaintiff the slight advantage.

Defendant points to evidence of her efforts to promote the relationship between the child and plaintiff, but, again, errs in asking this court to join her in second-guessing the trial court's assessment of the evidence. *Beason, supra* at 805. Defendant further argues that the court erred in concluding that she had certain mental health problems, and in applying those findings to this factor. However, we concluded above that the court did not clearly err in its assessment of defendant's mental health, and so reiterate that conclusion here. And, again, evidence may be applied repeatedly to the extent the statutory custody factors overlap. See *Ireland, supra* at 465, and *Carson, supra* at 299-300. The trial court's conclusion that defendant had difficulty placing the needs of others before her own was relevant to this factor.

Defendant additionally points out that plaintiff had briefly succeeded in putting some distance between her and the child by way of obtaining an *ex parte* order. While a court certainly might take such proceedings into account in assessing factor (j), the court did not clearly err or abuse its discretion in declining to weigh heavily such temporary, early-litigation machinations.

For these reasons, the trial court did not err in finding that plaintiff had a slight advantage under factor (j).

## 6. Factor (k)

In giving plaintiff the slight advantage, the trial court observed that defendant had accused plaintiff of domestic violence, but declared her credibility lacking in the matter. The court then observed that defendant had in fact been arrested once, when she slapped plaintiff in the presence of a police officer.

On appeal, defendant argues that the trial court ignored plaintiff's violence, citing her own testimony implicating plaintiff in such conduct. The trial court's explicit discounting of defendant's credibility well enough accounted for that evidence. The court was likewise free not to credit the personal protection order that defendant had obtained against plaintiff as evidence of plaintiff's violent tendencies. *Beason, supra* at 805.

Defendant protests that the incident that led to her arrest for domestic violence was of trivial significance; however, she does not argue that it was of *no* significance whatever. That event was the only corroborated incident of domestic violence in the history of the case. The trial court accordingly did not err in concluding that this factor slightly favored plaintiff.

For these reasons, we decline to disturb the trial court findings and conclusions under the statutory best-interests factors.

### III. Established Custodial Environment

Defendant asserts that the trial court erred in concluding that the child had an established custodial environment with both parties, arguing that the court should have found instead that the child had such an environment exclusively with her.

Normally, resolution of the question of whether and where an established custodial environment exists is at the heart of a custody case, because where there is an established custodial environment, custody may not be changed unless there is clear and convincing evidence that a change is in the children's best interests. *Ireland, supra* at 461 n 2, citing MCL 722.27(c). Where no established custodial environment exists, a court may award custody on the basis of a mere preponderance of the evidence. *Baker, supra* at 579. In this instance, however, the issue is moot.

Because the trial court's decision to award plaintiff sole physical custody effected a change from the established custodial environment with both parties, the court was obliged to proceed on the basis of clear and convincing evidence of the child's best interests, just as would have been necessary had the court found that an established custodial environment had originally existed exclusively with defendant. In other words, the same evidentiary standard would have applied either way, and so defendant would have gained nothing had the court begun by crediting her position that she alone provided the child with an established custodial environment. Because this issue is moot, we need not afford it further consideration.

### IV. Parenting Time

Defendant argues that the trial court abused its discretion in its provision for defendant's parenting time with the child. We disagree. In announcing its decision from the bench, the trial court stated only as follows: "Ordinary parenting time, every other weekend and a midweek visitation overnight. Just the usual, standard parenting time." The judgment of divorce specifies those particulars, and adopts by reference the holiday arrangement within the April 11, 2001, recommendation of the Friend of Court. The latter provides for alternating holidays, alternating spring breaks, equal divisions of Christmas breaks, and two-week blocks for each parent for vacation purposes each summer.

Defendant complains generally that this allowance of parenting time does not reflect defendant's history as the child's primary caregiver. This complaint is inapt. The parenting-time arrangement instead properly reflects the court's designation of plaintiff, not defendant, as sole physical custodian of the child. That legal development obviously supersedes whatever the custom happened to be during the marriage or while the permanent custody decision was pending. Because we found no error in the trial court's evaluation of the statutory custody factors, we conclude here that the parenting time properly reflects defendant's new status as noncustodial parent.

Defendant further complains that she receives no summer or other vacation time with the child, but this is simply incorrect. As stated above, the Friend of Court recommendation that the trial court adopted by reference provides for two-week blocks for each parent for vacation purposes each summer, along with alternating spring breaks and equal divisions of Christmas breaks.

For these reasons we reject this claim of error.

#### V. Defendant's Income

Defendant argues that the trial court erred in imputing to her, for purposes of child support and apportioning certain marital debts, a minimum-wage income of \$10,000 per year. We disagree.

The evidence indicates that defendant earned between \$40,000 and \$45,000 per year before becoming a stay-at-home mother, and that, since the latter development, defendant had no significant income through the divorce proceedings. For purposes of child support and other obligations, the trial court initially considered either imputing to defendant the level of income she had established from her working days, or having the Friend of Court investigate the matter. At the hearing on the motion to enter judgment, however, the court resolved to decide the issue without further delay. The court elicited from defense counsel that defendant presently earned \$60 a week, then reasoned that this was not enough for defendant to live on, and that an investigation might be in order. However, for the sake of entering a final order that day, the court accepted the suggestion that income be imputed to defendant as if she were earning minimum wage, which the court took to be \$10,000 per year.

Defendant's brief argument for this issue includes no acknowledgment that the figure chosen, by presuming minimum wage, was less than what could realistically be expected from defendant once she settled into a self-sufficient, post-marital life. Nor does defendant suggest on appeal that she has been prejudiced by that presumption because it imposed greater financial obligations than she could afford.

On this record, we conclude that the trial court's determination to expedite a final order in this case was commendable, and its decision to disregard defendant's substantial earnings potential for the moment and impose obligations on the basis of minimum wage was at least fair to defendant under the circumstances.

#### VI. Entry of the Final Order

Defendant argues that the trial court erred in including particulars concerning unreimbursed medical expenses, overpayments, offsets, tax deductions, and release of tort claims within the final judgment. We disagree.

MCR 2.602(B) governs the entry of judgments and orders. The rule's procedures for raising objections apply only to matters of form. *Riley v 36<sup>th</sup> Dist Court Judge*, 194 Mich App 649, 650-651; 487 NW2d 855 (1992). Where substantive issues remain to be resolved, the parties should move for rehearing or reconsideration. *Id.* at 651, citing MCR 2.119(F).

In this case, defendant's attorney raised various arguments during the hearing on entry of the order, but nowhere suggested that the hearing was an improper forum for resolving the conflicts then being addressed. Given that it is not always easy to draw a clear line between form and substance where a court is endeavoring to clarify its decisions, where there is no objection, a court should be considered in error only if its last-minute determination when resolving objections to a proposed judgment clearly includes making decisions entirely beyond

the scope of what had been resolved in the earlier proceedings. Nothing short of that would ordinarily constitute plain error affecting substantial rights. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (setting forth the plain-error rule for unpreserved issues in civil cases), citing MRE 103(d) and *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

On appeal, defendant complains that she had no opportunity to present evidence on the matters here complained of, but defendant nowhere suggests what alternative terms should have been included instead, nor that she was ever prevented from bringing evidence on any of those particulars. Although, at the hearing on entry of judgment, defense counsel disagreed with the court on certain particulars, counsel never suggested that the court was deciding issues without a proper evidentiary basis, and never asked the court to take further proofs. The record thus suggests that the defense recognized the procedural propriety of the court's resolving those matters as it did. The inclusion of those particulars in its final judgment was not plain error affecting substantial rights.

## VII. Property Division

Defendant argues that the trial court erred in treating the lot upon which the marital home stood as plaintiff's exclusive nonmarital asset, and in assigning defendant full responsibility for an MBNA Quantum America credit card. Again, we disagree.

In reviewing a trial court's division of a marital estate, this Court must first review the trial court's findings of fact under the clear error standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. A dispositional ruling dividing marital property should be affirmed unless this Court is left with the "firm conviction that the division was inequitable." *Id.* at 152.

### A. The Lot under the Marital Home

A court dividing a marital estate is obliged to differentiate between marital and separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). In this case, there is no dispute that, before the parties' marriage, plaintiff owned the lot upon which the marital home was eventually built. One party's separate property may be awarded to the other party only where the exceptions set forth in MCL 552.401 and MCL 552.23 come into play. *Reeves*, *supra* at 494.

MCL 552.23(1) provides that

if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

MCL 552.401 authorizes the circuit court to include within a divorce decree

appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property.

In this case, defendant argues not that the court should have awarded her an interest in the lot because of need, pursuant to MCL 552.23(1), but that the court should have awarded her an interest because of her contributions to its development into the marital home, pursuant to MCL 552.401.

Where the parties' commingling of premarital and marital funds renders it impossible to determine precisely the postmarital appreciation of a premarital asset, a trial court may treat the entire asset as marital property. *McNamara v Horner*, 249 Mich App 177, 184-185; 642 NW2d 385 (2002). In this case, there is no doubt that defendant contributed substantially to the development of the parcel in question into the marital home. However, because plaintiff owned the lot free and clear as a premarital asset, the facts of this case present no difficulty in determining the value of the lot separate from that of the structure upon it. Indeed, while buildings generally depreciate over time, the land upon which a building stands normally retains its value despite the aging or weathering of the attendant structure (though the potential cost of demolishing the building needs to be considered). Courts routinely treat a building and its land as assets of separate value. See, e.g., *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484 n 18; 473 NW2d 636 (1991), and *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 752; 378 NW2d 590 (1985). The trial court did not clearly err in finding that the lot under the marital home was plaintiff's separate property, and did not abuse its discretion in declining to award any of its value to defendant.

#### B. The MBNA Quantum Credit Card

Plaintiff testified that he received billing statements from the disputed account at his forwarding address, and that the account reflected his name but the street address of defendant's "male companion." According to plaintiff, all charges were incurred after the parties' separation, and until an apparent oversight brought recent statements to his attention, he had never known anything about the card or how defendant used it. Plaintiff estimated that the card carried a current balance of approximately \$20,000. Defendant testified that she used the card for marital and child-rearing expenses, and that plaintiff did know about it. However, defendant additionally testified that she had paid the entire debt on that card a month before trial, and that the current balance consisted of a small credit.

On appeal, defendant only asserts generally that the card reflected marital assets and should have been treated accordingly, providing no details concerning what charges were pending at time of trial, let alone when they were incurred and what they were for. This lack of specificity makes it impossible for this Court to credit her position that any debt on the card should be considered a marital obligation. Further, defendant on appeal neither acknowledges her earlier testimony that she had paid off the large outstanding balance, nor explains whether

she is arguing over a current balance or some suggestion that the division of the marital estate should have reflected her unilateral payment of the large balance in some way.

Further, we note that, in a pleading filed with the trial court in February 2001, in response to plaintiff's request for production of documents, defendant, through counsel, stated as follows: "I have none of our credit card statements through December of 2000. [Plaintiff] took all of them. With regard to all credit cards accounts beginning in January of 2001, we object on the basis that all post separation finances are not relevant in this matter." Defendant thus showed an unequivocal disinclination to treat the MBNA card as anything but her personal, separate business.

For these reasons, we affirm the trial court's division of the marital estate.

### VIII. Judicial Bias

Defendant additionally argues that further proceedings in this case should be assigned to a different judge, alleging bias. However, defendant failed to present this issue within the statement of the questions presented in her brief on appeal, as required by MCR 7.212(C)(5). Appellate review is thus inappropriate. *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996). The issue lacks merit in any event.

In making her case of judicial bias, defendant relies on several of the issues discussed and rejected above. Adverse decisions alone do not indicate bias, even if the decisions are otherwise erroneous. *Band v Livonia Associates*, 176 Mich App 95, 116; 439 NW2d 285 (1989). Further, because we reject all of defendant's claims of error, we find the attendant decisions of the trial court clearly demonstrate a lack of bias.

Defendant otherwise suggests that the trial judge is likely be biased against her because she filed both a motion to recuse the judge and a formal grievance against her. However, defendant cites no authority for the proposition that a judge targeted by such action is thereafter presumed biased, and we decline to upset the presumption of judicial impartiality for that reason. See *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 126-127; 420 NW2d 141 (1988).

To that, we add that our own review of the record here leaves us with no concern that the trial judge was biased in the case, nor any concern that any alleged bias will appear in subsequent proceedings.

Affirmed. Plaintiff, having prevailed in full, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens  
/s/ David H. Sawyer  
/s/ Jessica R. Cooper