

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS SCOTT DUBIN,

Plaintiff-Appellee,

v

CONTESSA LYNN FINCHER,

Defendant-Appellant.

UNPUBLISHED

June 19, 2014

Nos. 318076; 319177

Washtenaw Circuit Court

LC No. 12-000833-DM

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In Docket No. 318076, defendant appeals as of right from the trial court's August 15, 2013, amended divorce judgment, challenging various provisions concerning the award of sole legal and physical custody of the parties' child to plaintiff. In Docket No. 319177, defendant appeals by delayed leave granted from the trial court's September 12, 2013, temporary ex parte emergency order suspending her parenting time and November 5, 2013, postjudgment order addressing various matters heard on October 3, 2013. For the reasons set forth in this opinion we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties married in 2008. Their only child was born in 2009. After the parties moved to Texas in 2011, defendant was hospitalized for mental health issues involving depression and suicidal ideation. After defendant's release from the hospital, the parties returned to Michigan. Defendant participated in therapy after her return to Michigan, but she was later hospitalized following a manic episode and diagnosed with bipolar disorder. Plaintiff filed a complaint for custody of the parties' child in anticipation of defendant's release from the hospital in February 2012. The trial court granted plaintiff's ex parte motion for temporary custody and appointed an attorney to serve as guardian ad litem for the child.

In March 2012, plaintiff filed a divorce action, which was consolidated with the earlier custody action. In January 2013, the trial court determined that the guardian ad litem could fully and actively participate in the custody proceeding and legally advocate for the child's best interests. The parties' custody dispute was initially heard by a referee in January and February 2013. The referee recommended that plaintiff be awarded sole legal and physical custody of the child.

In July 2013, following the preparation of transcripts of the referee hearing and defendant's filing of objections to the referee's recommendation, the trial court rendered its decision regarding the custody dispute. The court declined to consider additional evidence, with the exception that it assumed that defendant's current home was suitable for the child, it considered defendant's current employment, and it received testimony from the parties to ascertain whether there had been a breakdown in the marital relationship. The trial court awarded sole legal and physical custody of the child to plaintiff. Defendant was awarded parenting time contingent on her taking her prescribed medication and following her treatment providers' recommendations, as well as ameliorative parenting time to be supervised by Catholic Social Services. The trial court expressed an intent to transition to a parenting coordinator, but ordered the lawyer-guardian ad litem (hereafter "LGAL") to continue to provide services for the child for at least six months. Defendant now appeals as of right from the amended judgment of divorce in Docket No. 318076.

After the trial court entered its amended judgment, defendant proceeded *in propria persona* in postjudgment proceedings. On September 12, 2013, the trial court granted the LGAL's motion for an ex parte order suspending defendant's parenting time pending a hearing scheduled for October 3, 2013. The trial court also entered an order on November 5, 2013, resolving various matters addressed at the October 3, 2013 hearing. As part of the second order, the trial court ordered that the child undergo a psychological evaluation and adjourned the hearing on defendant's motion to set aside the ex parte order suspending her parenting time. Defendant appeals the September 12 and November 5 orders by leave granted in Docket No. 319177.

After the entry of the two orders at issue in Docket No. 319177, the trial court determined in December 2013, that defendant should be allowed supervised parenting time. It also denied defendant's pro se motion for disqualification, which was also denied by the chief judge. Following an evidentiary hearing on January 3, 2014, the trial court found clear and convincing evidence that it was necessary to suspend defendant's parenting time and to have the minor child assessed for mental health issues. The trial court also determined that supervised parenting time should continue and that it would need additional input from Catholic Social Services to determine whether to increase defendant's parenting time. On January 24, 2014, the court entered an order modifying the ex parte order to provide for the supervised parenting time.

II. DOCKET NO. 318076

A. LEGAL CUSTODY

In Docket No. 318076, we first consider defendant's arguments relating to the trial court's findings regarding the child's best interests and its determination that plaintiff should be awarded sole legal and physical custody of the child. Defendant argues that she should have been awarded legal custody or, at a minimum, that the parties should have been awarded joint legal custody of the child.

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. Thus, a trial court’s findings of fact must be affirmed on appeal unless the evidence clearly preponderates in the opposition direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). The trial court’s discretionary rulings are reviewed for an abuse of discretion. *Berger*, 277 Mich App at 705; see also *Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011). Clear legal error occurs when the trial court incorrectly chooses, interprets, or applies the law. *Wardell v Hincka*, 297 Mich App 127, 133; 822 NW2d 278 (2012).

The trial court issued its decision following a referee hearing pursuant to the procedure in MCR 3.215(F)(2). The trial court is required to conduct a de novo hearing to render its own decision on a matter, independent of any prior ruling made by the referee, *Sturgis v Sturgis*, 302 Mich App 706, 708; 840 NW2d 408 (2013), however, MCL 552.507(5) permits the court to impose reasonable restrictions and conditions at the hearing. Further, the court is not precluded from considering the referee’s report and recommendation. See *Dumm v Brodbeck*, 276 Mich App 460, 465; 740 NW2d 751 (2007). Here, defendant does not raise any claim of procedural error regarding the manner in which the trial court conducted the de novo hearing.

We note that both parties argue on appeal that the transcript of the referee hearing is incomplete or could not be fully transcribed from the recording of the hearing. As plaintiff indicates, the court rules establish procedures for an appellant to invoke to provide this Court with a settled statement of facts where a portion of the record is incomplete or missing. See MCR 7.210(B)(2). To the extent that defendant failed to utilize that procedure in this case, and her arguments require consideration of facts not of record, those arguments are not preserved for appeal. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 304-305; 486 NW2d 351 (1992). Our review is limited to the record presented to the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Nonetheless, the trial court considered the transcripts of the referee hearing that were produced in the case, and the record of the July 19, 2013, de novo hearing by the trial court indicates that the parties had an opportunity to bring any relevant transcript errors to the court’s attention.

A necessary issue in a custody dispute is whether the child has an established custodial environment with either parent, this determines the burden of proof. If an established custodial environment exists, custody may not be changed unless there is clear and convincing evidence that a change is in the child’s best interests. MCL 722.27(1)(c); *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996). If there is no established custodial environment, a court may modify custody on the basis of the child’s best interests as established by a preponderance of the evidence. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). The existence of an established custodial environment is a question of fact. *Berger*, 277 Mich App at 706. “An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence.” *Id.* at 706-707. In this case, defendant does not challenge the trial court’s finding that an established custodial environment existed with plaintiff.

When considering a party's request for joint custody in a custody dispute, a trial court considers the best-interest factors in MCL 722.23 and "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1); see also *Dailey*, 291 Mich App at 667. The trial court must expressly evaluate each best-interest factor and state its reasons for granting or denying a custody request. *Id.* The trial court's findings with respect to each factor are reviewed under the great weight of the evidence standard. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009); *Berger*, 277 Mich App at 705. "The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction." *McIntosh*, 282 Mich App at 474. The trial court's ultimate custody decision is reviewed for a palpable abuse of discretion. *Berger*, 277 Mich App at 705. A trial court need not give equal weight to each best-interest factor in making its decision. *McCain v McCain* 229 Mich App 123, 131; 580 NW2d 485 (1998).

Here, defendant does not challenge the trial court's findings with respect to best-interest factors (a), (e), (h), and (i), none of which the trial court found weighed in favor of either party. Defendant argues, however, that the trial court erred in finding that factors (b), (c), (d), (g), (j), and (l) each favored plaintiff, and in finding that the parties were equal with respect to factors (f) and (k).

Factor (b) is "[t]he 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." MCL 722.23(b). With respect to religion, and contrary to the assertions of defendant, the record evidence presented in this matter reveals that the trial court expressly recognized that defendant had some religious training when evaluating this factor, but also considered that defendant had changed churches, while plaintiff was preserving the child's church. The trial court weighed the parties equally with respect to education, but questioned defendant's capacity to provide love and guidance to the child in light of her past conduct. As an example, the trial court considered an incident in which defendant took the child out of his crib at night as showing that defendant wants to give love and affection "in any way she wants, when she wants irrespective of Finn's needs." According to plaintiff's brief, this incident was the subject of a recorded conversation that he had with defendant. According to the transcript of that recording, plaintiff accused defendant of speaking angrily with him, while defendant accused plaintiff of speaking to her like a child. In the recording, defendant also indicated that she had tossed the child at plaintiff:

DOUG: Tess, you tossed him at me because you were angry at me.

CONTESSA: I didn't mean —

DOUG: And this is —

CONTESSA: — to toss him.

During a later discussion regarding the child, the parties thereafter stated the following:

DOUG: Because you came in and took him out of his bed at nighttime.

CONTESSA: When I took him out of his bed and he was crying in his crib, when we first got to the chair and I turned on the light to read, he was perfectly happy.

DOUG: Contessa —

CONTESSA: Then you marched in —

DOUG: Contessa —

CONTESSA: — showed your face —

DOUG: — he was screaming —

CONTESSA: — and said that I was undermining you as a parent.

DOUG: Contessa, I had worked to get him to sleep and he was in bed, and you chose that time when you had hours to interact with him before bedtime. To go in and undermine —

CONTESSA: I told you that I —

DOUG: — his routine.

CONTESSA: — fell asleep in the bedroom.

DOUG: Then you should have waited ‘till next morning. And then you got so angry with me that you flung our child at me —

CONTESSA: Okay —

DOUG: — and you practically dislocated his shoulder.

CONTESSA: Oh, well, that’s ridiculous.

At the referee hearing, plaintiff similarly testified that “just prior to hospitalization, her violently almost pulling Finn’s — really hurting Finn’s shoulder in an event just prior to her hospitalization, which I know Contessa denies.”

Another incident considered by the trial court was a recording of defendant’s effort to have the child never say the word “bad.” A video recording of this incident was played at the

referee hearing. Plaintiff testified that it occurred during defendant's parenting time, and the transcript of the recording provides:¹

CONTESSA: Finley, have you ever heard the word "bad"?

FINN: Yeah.

CONTESSA: Who said the word "bad" to you?

FINN: Um, stupid.

CONTESSA: Not stupid. We've already covered that word. The next word is the word called "bad." Have you heard that word?

FINN: (no verbal response.)

CONTESSA: Who said that word to you?

FINN: Um, daddy.

CONTESSA: Uh-huh. This is another word, Finley that is not in our vocabulary, okay.

FINN: Yeah.

CONTESSA: That's something that we don't say. Okay? Okay?

FINN: (no verbal response.)

CONTESSA: Do we agree? All righty then.

This evidence clearly reveals that the trial court correctly questioned defendant's capacity to provide love, affection, and appropriate guidance. Contrary to the assertions of defendant on appeal,² the trial court was not required to comment on all of the evidence regarding defendant's activities with the child. *McIntosh*, 282 Mich App at 474. Reviewed and considered as a whole, the trial court's findings with respect to factor (b) are sufficient to conclude that the evidence does not clearly preponderate in the opposite direction. Therefore, we affirm the trial court's finding that factor (b) favored plaintiff.

¹ Defendant alleges in her brief that this recording was made to rebut a claim that she and her mother, Inez Roberson, were exposing Finn to mental and emotional abuse by telling him that "daddy is bad."

² Relative to this issue and throughout her brief, defendant makes arguments and assertions without proper citation(s) to the record.

Factor (c) is “[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.” MCL 722.23(c). This factor looks to the future, and not which party historically provided income or was earning more income at the time of the trial. *Berger*, 277 Mich App at 712. It is intended to evaluate the parties’ capacity and disposition to provide for the child’s material and medical needs. *Id.* We find no merit in defendant’s argument that the trial court favored plaintiff with respect to this factor based on the LGAL’s sixth report regarding the child. To the contrary, the trial court expressly stated at the July 19, 2013 hearing that the LGAL report was not evidence and that its decision was not based on the LGAL’s report. In addition, the trial court determined in its August 15, 2013 decision denying defendant’s motion for reconsideration, that “even if the court were to have favored defendant on factor (c), the court’s determination of physical and legal custody would not be altered.” Because plaintiff does not address the pertinent evidence, but rather makes an unsupported argument that the trial court relied on the LGAL’s sixth report, she has not established error. Regardless, it is clear from the trial court’s decision denying the motion for reconsideration that this factor, even if considered favorable to defendant, would not affect its custody decision. Therefore, unless this Court finds error with respect to some other best-interest factor, any error was harmless. *Ireland*, 451 Mich at 468.

Rather than the trial court reaching its decision by relying on the sixth report tendered by the LGAL, our review of record clearly reveals that the trial court based its findings regarding factor (c) on other record evidence. The trial court found: “[t]here have been questions about appropriateness of food at Dr. Fincher’s house because the child is often hungry after parenting time.” This conclusion is supported by plaintiff’s testimony that there were numerous times when Finn was hungry after defendant’s parenting time. The trial court also commented on the video that defendant made of Finn’s diaper rash. It found defendant’s decision to make the video recording rather than provide relief for Finn at the earliest opportunity to be very distressing.

Additionally, the trial court took into consideration that defendant told plaintiff after she lost her job in 2012 that he needed to get health insurance, even though she could have purchased COBRA benefits and plaintiff was unemployed. The trial court concluded:

So again we have the capacity and the disposition. And although a person may have the ability to do certain things, it’s understanding the need and doing it as appropriate and necessary, and I have to find in favor of the father on Factor C.

Defendant later moved for reconsideration of this issue on the ground that the trial court erroneously found that plaintiff was unemployed when she asked him to obtain health insurance. The trial court ruled:

Regardless of plaintiff’s employment status, the import was that defendant didn’t consider whether she could obtain COBRA benefits for the parties’ son. Moreover, the court did not rely exclusively on plaintiff’s employment status at the time of defendant’s request. The court considered, *inter alia*, evidence in the record that defendant failed to apply ointment to the minor child’s diaper rash . . . as well as testimony that the child was often returned from parenting time hungry. The court also considered the reasons stated in the Friend of the Court

recommendation on this factor with the exception of defendant's employment status, which changed in the interim. Even if [this] court erred in stating plaintiff's employment status, defendant ignores the additional evidence upon which the court relied to make its determination on factor (c).

Accordingly, defendant is not entitled to relief on this issue.

Factor (d) is "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). This factor "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')." *Ireland*, 451 Mich at 465 n 8. The trial court found that this factor favored plaintiff because there had been a stable, satisfactory environment since he and the child moved out of the marital home, plaintiff established a custodial environment and had been the child's primary parent, and it was desirable to maintain stability for the child. Although the stability of a child's home may be undermined in various ways, *Ireland*, 451 Mich at 465 n 9, we are not persuaded that the evidence that plaintiff was residing in his mother's home establishes that the trial court's finding is against the great weight of the evidence. The trial court's focus with respect with factor (d) was on the desirability of maintaining the custodial environment established by plaintiff for the child. Defendant's concern regarding the possibility that plaintiff could move was appropriately addressed by the trial court when finding the parties equal with respect to factor (e), which focuses on the child's prospects for a stable family environment. *Ireland*, 451 Mich at 465. The evidence does not clearly preponderate against the trial court's finding that factor (d) favored plaintiff. *Fletcher*, 447 Mich at 879; *McIntosh*, 282 Mich App at 474.

Factor (f) is "[t]he moral fitness of the parties involved." MCL 722.23(f). This factor relates to a person's fitness as a parent. *Fletcher*, 447 Mich at 886-887. It concerns "the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct." *Id.* at 887. Considering defendant's failure to address any specific conduct, or even the trial court's findings with respect to this factor, she has not established that the trial court's finding that the parties were equal is against the great weight of the evidence. MCL 722.28.

Factor (g) is "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court gave weight to the assessment of both parties by James Bow, a psychologist who conducted a custody evaluation before the referee hearing. Although defendant accurately argues that the evidence established that she was in remission from her bipolar disorder, the testimony of her therapist at the referee hearing indicates that bipolar disorder is a chronic illness. And according to Bow, a remission merely means that a person has been without symptoms for two months. Bow expressed concerns regarding defendant's history, including her past noncompliance with her medication regimen, and her moderate risk for a relapse. The trial court also expressed concern regarding defendant's past incidents of noncompliance with her medicine regimen. As a whole, the evidence does not clearly preponderate against the trial court's finding that factor (g) favored plaintiff. Defendant has not established any record evidence regarding plaintiff's mental health to support her argument that the trial court should have at least found the parties equal with respect to factor (g).

Factor (j) is “[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). The trial court found that this factor favored plaintiff because he tried to encourage defendant’s relationship with the child as he saw appropriate for the circumstances, while defendant engaged in conduct, such as slapping plaintiff and making certain comments in front of the child, that were indicative of an inability to conform her behavior to the child’s best interests. Considering that the trial court found no reason to doubt plaintiff’s credibility, we reject defendant’s argument that plaintiff’s efforts to obtain temporary custody of the child and to limit defendant’s parenting time demonstrate that the trial court’s decision to weigh this factor in favor of plaintiff is against the great weight of the evidence. This Court gives deference to a trial court’s credibility determinations. *McIntosh*, 282 Mich App at 474.

Factor (k) is “[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child.” MCL 722.23(k). The trial court found that defendant engaged in conduct against plaintiff that could be construed as physical acts of domestic violence, but also expressed agreement with Bow’s determination in his evaluation that this case did not present classic domestic violence dynamics in light of defendant’s mental illness. The court’s decision to give the benefit of any possible doubt to defendant by finding the parties equal is not against the great weight of the evidence. Indeed, we note that defendant testified at the referee hearing that she was willing to accept a determination that the parties were equal with respect to this factor.

Factor (l) is “a catch-all provision, encompassing ‘[a]ny other factor considered by the court to be relevant to a particular child custody dispute.’” *Ireland*, 451 Mich at 464, quoting MCL 722.23(1). It is appropriate for a court to comment on various matters under factor (l), even if they were considered under other factors. *McIntosh*, 282 Mich App at 482-483. It is not necessary that the trial court expressly weigh this factor in favor of either party. *Id.* at 482. Defendant has failed to address the trial court’s finding that factor (l) favored plaintiff based on several concerns regarding defendant’s inability to conform her conduct to meet the child’s needs. Rather, defendant challenges the court’s subsequent comments regarding the parties’ credibility by asserting that she could have shown that plaintiff was not credible if she was permitted to introduce certain evidence. Because the evidentiary questions raised by defendant are beyond the scope of this issue and have not been separately briefed, we decline to address them. *McIntosh*, 282 Mich App at 485 (an appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis of the claim); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995) (evidentiary issue not preserved for appeal where it was not set forth in the statement of questions involved). Further, to the extent that defendant challenges the trial court’s comments regarding the parties’ credibility, she has not established any error. MCL 722.28; *McIntosh*, 282 Mich App at 474.

We also reject defendant’s argument that, when applying factor (l), a trial court should be required to consider which party causes a conflict that might impede an award of joint legal custody where one of the parties requests joint legal custody under MCL 722.26a. Although factor (l) does not preclude consideration of such a circumstance, there is no basis for requiring a court to do so in its evaluation of factor (l). Defendant’s argument is contrary to the catch-all nature of factor (l). *Ireland*, 451 Mich at 464 n 7. In addition, the record indicates that the trial

court considered the conflict between the parties in its findings regarding other best-interest factors, as well as in comments made after it weighed factor (l) in favor of plaintiff. It found “a horrendous lack of trust between the parties.” Defendant has not established that the trial court committed a clear legal error in applying factor (l). MCL 722.28; *Wardell*, 297 Mich App at 133.

Defendant has also failed to establish that the trial court’s findings regarding the parties’ inability to communicate and cooperate, which are pertinent when there is a request for joint custody under MCL 722.26a(1)(b), are against the great weight of the evidence. Further, what is commonly referred to as “joint legal custody” is described in MCL 722.26a(7)(b) as an order providing “[t]hat the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.” See also *Dailey*, 291 Mich App at 670. Considering all of the best-interest factors, defendant has not established that the trial court’s decision to award sole legal custody to plaintiff was a palpable abuse of discretion. Therefore, we affirm the trial court’s custody decision. MCL 722.28; *Berger*, 277 Mich App at 705.

B. PARENTING TIME

Defendant raises several issues concerning the parenting time ordered by the trial court. Parenting time is considered part of a court’s child-custody determination. *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010); see also MCL 722.1102(c). A trial court’s parenting time order is subject to the same standards of review under MCL 722.28 as a custody order. *Berger*, 277 Mich App at 716; *Pickering v Pickering*, 268 Mich App 1, 4-5; 706 NW2d 835 (2005). In the event of an error in a court’s custody determination, the appropriate remedy is to remand for a redetermination, with up-to-date information, unless the error was harmless. *Ireland*, 451 Mich at 468.

Defendant argues that the parenting time ordered by the trial court does not satisfy MCL 722.27a, particularly with respect to the frequency of unsupervised parenting time allowed by the court. Defendant argues that “shared parenting” should commence immediately. We agree with plaintiff that this issue is moot because the parenting time award that is the subject of this appeal was later suspended and then modified following an evidentiary hearing. An issue is moot if an event occurs that renders it impossible for the reviewing court to grant relief. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). In this case, after defendant filed her claim of appeal, the trial court entered an ex parte postjudgment order suspending defendant’s parenting time in response to the LGAL’s emergency motion. The court ultimately reduced defendant’s parenting time to supervised parenting time following an evidentiary hearing on January 3, 2014. The trial court was authorized to enter its orders, despite defendant’s pending appeal, “as the circumstances of the parents and the benefit of the children require.” *Lemmen v Lemmen*, 481 Mich 164, 166-167; 749 NW2d 255 (2008), quoting MCL 552.17(1). Because a parenting time order is subject to modification for proper cause or a change of circumstances, *Shade*, 291 Mich App at 22, and the parenting time order that defendant challenges in Docket No. 318076 has since been modified, defendant’s challenge to that original award of parenting time is now moot.

Even if we were to consider defendant’s argument, however, we would find no basis for relief. Defendant has not identified any factual support for her position that the trial court

improperly delegated its judicial power to determine parenting time to the LGAL. Further, considering the relevant circumstances, we are not persuaded that the trial court committed a palpable abuse of discretion by not allowing overnight parenting time, determining the schedule for daytime parenting time, or with respect to any other condition of parenting time imposed in the August 15, 2013, amended judgment of divorce.

Defendant's independent claim that the trial court limited her "parenting functions" by not scheduling overnight parenting time is essentially a restatement of her challenge to the trial court's parenting time decision in the August 15, 2013, amended judgment of divorce. To the extent that defendant complains that the court improperly prohibited her from driving with the child, this issue is also moot in light of the trial court's subsequent orders suspending and then modifying defendant's parenting time. Lastly, we reject defendant's argument that the trial court contravened MCL 722.27a by not ordering makeup parenting time for missed visits. The amended divorce judgment expressly contemplated that defendant could receive makeup parenting time if the LGAL or the court determined that plaintiff wrongfully withheld parenting time.

C "CLUSTER B" ISSUES

Defendant also raises two issues concerning "cluster B" issues. Defendant argues that the trial court's findings regarding her need for treatment for "cluster B" traits are against the great weight of the evidence, and that the court abused its discretion by requiring treatment for these "phantom traits." The record indicates that both Bow and defendant's therapist concluded that defendant demonstrated "cluster B" traits, even though there was no formal diagnosis of a personality disorder. Further, the trial court's amended judgment of divorce indicated that parenting time was contingent on defendant taking her prescribed medications and "keeping all treatment appointments and following all treatment recommendations." Defendant was also required to remain in treatment with a therapist and psychiatrist, and comply with their treatment recommendations with respect to the issues addressed by Bow, which included the bipolar disorder and "cluster B" issues.

Considering defendant's failure to recognize the roles of her therapist and psychiatrist in her treatment as specified in the amended judgment, and her unsubstantiated claim on appeal that she was required to undergo treatment for "phantom traits," we reject this claim of error.

D. CHILD SUPPORT

Defendant argues that the trial court abused its discretion by refusing to deviate from the child support guidelines for the period through December 31, 2012. This argument is not properly before us because defendant has not cited any factual or legal support for her claim. *McIntosh*, 282 Mich App at 484-485. Based on the argument presented, we are unable to conclude that the trial court abused its discretion in finding that it was not unfair or unjust to determine child support based on the Michigan Child Support Formula (MCSF). *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012); see also MCL 552.605(2); 2013 MCSF 1.04(D) and (E).

E. TUTOR TIME EVIDENCE

Defendant also argues that the trial court erred in excluding evidence from the child's day care provider. Defendant does not identify any evidentiary ruling that she is challenging in this issue, and her cursory presentation of the issue lacks citation to any supporting facts or legal authority. Because defendant's presentation of this claim of error is insufficient to invoke meaningful appellate review, we decline to address it. *McIntosh*, 482 Mich App at 484-485.

F. LGAL APPOINTMENT

Defendant lastly argues that the trial court erred in continuing the LGAL's appointment where, defendant maintains, the LGAL was not able to serve objectively. Defendant also argues that the original appointment only permitted the LGAL to serve as the child's guardian ad litem, not an attorney guardian ad litem. While defendant correctly asserts that the original appointment order only specified that the attorney would be a "guardian ad litem," the trial court's January 22, 2013, order specified that "the GAL can have full & active participation in the hearing & advocate for the best interests of [the child]. Neither party may call the GAL as a witness in the case."

The Child Custody Act, MCL 722.22(f), defines a "guardian ad litem" as "an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney." MCL 722.22(g) defines the "lawyer-guardian ad litem" as "an attorney appointed under section 4. A lawyer-guardian ad litem represents the child, and has the powers and duties as set forth in section 4." Section 4, MCL 722.24, provides that an LGAL has the duties and powers prescribed in MCL 712A.19d.

Although the trial court's January 22, 2013, order does not expressly refer to "lawyer-guardian ad litem," it unambiguously permitted the appointed attorney to function as an LGAL by allowing her to exercise powers under MCL 712A.17d(1)(b) and restricting her ability to be called as a witness under MCL 712A.19b(3). The fact that it does not contain "appointment" language is immaterial because this would place form over substance. Cf. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 220 n 4; 625 NW2d 93 (2000) (the fact that a document was not labeled a "judgment" was not controlling where, for all intents and purposes, it functioned as a judgment); see also *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 326; 657 NW2d 759 (2002) ("appellate courts often look to the substance of a motion or ruling to determine its true nature, not its label"). Any doubt regarding the attorney's status was clarified in the August 15, 2013, amended judgment when the trial court ordered that the attorney's appointment as LGAL continue for at least six months and specified duties consistent with this appointment, such as filing motions on behalf of the child. Therefore, we find no merit to defendant's characterization of the attorney as a mere guardian ad litem.

Defendant has also failed to establish that the trial court erred in continuing the LGAL's appointment, with the objective of transitioning to a parenting coordinator in the future. As indicated by the use of the word "may" in MCL 722.24(2), the trial court's decision to appoint an LGAL to represent a child is discretionary. See generally *Warda v Flushing City Council*, 472 Mich 326, 332; 696 NW2d 671 (2005). We are not persuaded that the trial court abused its discretion in continuing the appointment in this case. To the extent that defendant's argument is directed at the manner in which the LGAL performed her duties on behalf of the child, she lacks standing to assert those arguments. Pursuant to MCL 712A.17d(1), the LGAL's duties are owed

to the child, not the parent. A person does not have a right to assert the statutory rights of another person. *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009).

G. SUMMARY

In sum, defendant has not established any basis for relief from the August 15, 2015, amended judgment of divorce. To the extent that defendant raises additional claims in the “conclusion” section of her brief on appeal, such as a request for reapportionment of the LGAL fees and an order requiring that the child be examined by a multi-disciplinary team, we decline to address these claims because they are not properly before us for review.³ *McIntosh*, 482 Mich App at 484-485.

III. DOCKET NO. 319177

A. SEPTEMBER 12, 2013 EX PARTE ORDER

In Docket No. 319177, defendant raises three issues concerning the trial court’s entry of the September 12, 2013, ex parte order suspending her parental rights.

Defendant first argues that the trial court erred in suspending her parenting time pursuant to the ex parte order, without conducting an evidentiary hearing. Defendant argues that a parent has a right to parenting time under MCL 722.27a(3) unless there is clear and convincing evidence that parenting time would endanger the child’s physical, mental, or emotional health. Defendant’s reliance on MCL 722.27a(3) for purposes of challenging the ex parte order is misplaced because the entry of an ex parte order is governed by MCR 3.207. Subsection (A) of that rule provides that “[t]he court may issue ex parte and temporary orders with regard to any matter within its jurisdiction.” MCR 3.207(B)(1) provides that “the court may enter an ex parte order if the court is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued.”

Moreover, considering that defendant was afforded an evidentiary hearing on January 3, 2014, we conclude that this issue is moot and decline to consider it further. *B P 7*, 231 Mich App at 359. Although an issue is not necessarily moot if it may have collateral legal consequences for a party, *Mead v Batchlor*, 435 Mich 480, 486; 460 NW2d 493 (1990), abrogated on other grounds *Turner v Rogers*, ___US ___; 131 S Ct 2507; 180 L Ed 2d 452 (2011), no such consequences are discernible from defendant’s argument in this case. To the extent that defendant argues that the suspension of her parenting time amounted to a de facto termination of her parental rights, her argument lacks merit because the suspension was temporary in nature.

³ We note that this Court previously rejected defendant’s argument that the LGAL not be permitted to participate in this appeal. *Dubin v Fincher*, unpublished order of the Court of Appeals, entered December 2, 2013 (Docket No. 318076).

Defendant also argues that the trial court erred in failing to put findings on the record concerning the child's best interests relevant to a parenting-time decision, pursuant to MCL 722.23 and MCL 722.27a, when entering the ex parte order suspending her parental rights. Because MCR 3.207 provides the proper legal framework for the trial court to enter an ex parte order, we find no merit to defendant's argument. In addition, this issue is also moot because the trial court made findings regarding the child's interests following the hearing on January 3, 2014. Thus, we are unable to afford any relief with respect to this claim of error.

Lastly, defendant complains that the LGAL's motion to suspend her parenting time was based on inadmissible hearsay. Again, considering that the trial court conducted an evidentiary hearing on January 3, 2014, following which it issued an order modifying defendant's parenting time, this issue is also moot. *B P 7*, 231 Mich App at 359. Accordingly, we decline to address this argument.

B. NOVEMBER 5, 2013 ORDER

Defendant raises two issues concerning the trial court's November 5, 2013 order, resolving various motions heard on October 3, 2013.

First, defendant argues that the trial court erred by not considering exhibits to her objections at the October 3, 2013, hearing. Defendant argues that exhibits filed with a supplement to her motion to set aside the September 12, 2013, ex parte order were part of her offer of proof, and that she was improperly sanctioned for filing that supplement. We reject defendant's argument because the specific ruling made by the trial court that is cited in support of this argument concerns the trial court's ruling on a motion for relief from the August 15, 2013, amended judgment of divorce, pursuant to MCR 2.612, which was based on newly discovered evidence contained in the supplement. Moreover, it is clear from the record that the trial court considered the exhibits in ruling on the motion. Considering defendant's failure to recognize or address the basis for the trial court's decision, appellate relief is precluded. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Defendant also argues the trial court erred at the October 3, 2013, hearing in determining that the LGAL's fees were in the nature of child support and, therefore, nondischargeable in bankruptcy. The trial court's decision is supported by *In re Kassiech*, 467 BR 445 (Bankr SD Ohio, 2012), aff'd 482 BR 190 (Bankr CA 6, 2012). The phrase "domestic support obligation" is defined in 11 USC 101(14A) as including a debt in the nature of support of the debtor's child. A "domestic support obligation" is a nondischargeable debt pursuant to 11 USC 523(a)(5). Further, a state court has jurisdiction to determine the nondischargeability of debts. *In re Hamilton*, 540 F3d 367, 373 (CA 6, 2008); but see *Chao v Hosp Staffing Servs, Inc*, 270 F3d 374, 384 (CA 6, 2001) (bankruptcy court's determination may be controlling if it is called upon to decide the matter). We reject defendant's argument that it should make a difference under Michigan law whether the attorney was acting as a guardian ad litem or an LGAL for the child. In both instances, the attorney is entitled to a fee. See, MCR 3.204(D) and MCL 722.24(4).

To the extent that defendant argues that the trial court should have made a determination regarding the reasonableness of the LGAL's fee and her ability to pay under MCL 722.24(4), the record indicates that the LGAL's practice of billing the parties for her services was established at

the onset of the case and continued in the August 15, 2013, amended judgment of divorce, which provided for the parties to equally be responsible for the LGAL's fees, absent unreasonable conduct by one party, and for each party to "keep current on his/her financial obligation to the LGAL." There is no indication that defendant challenged this procedure or the reasonableness of the LGAL's fees in the trial court. Had defendant desired to contest this arrangement, she should have presented it to the trial court and challenged any unfavorable decision in her appeal from the amended judgment of divorce in Docket No. 318076. Because defendant did not do either, this issue is not properly before this Court. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

We also reject defendant's newly raised argument that the trial court declaration that the LGAL's fees were in the nature of child support constituted an improper retroactive modification of child support or an attempt to make a nunc pro tunc change to an order or judgment. The trial court's declaration that the LGAL's fees are in the nature of "domestic support obligation" under federal bankruptcy law only did not affect the parties' previously established obligation to pay the fees previously ordered and set forth in the August 15, 2013 amended judgment of divorce. Thus, there is no merit to defendant's argument.

C. OTHER ISSUES

Defendant also argues that the trial court erred in denying her pro se request to review the child's psychological evaluation at a hearing on November 5, 2013. "A court speaks through its orders, and the jurisdiction of this Court is confined to judgments and orders." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). Because this challenged ruling is not part of either order appealed in Docket No. 319177, defendant's argument is not properly before us. Defendant's failure to cite any legal authority in support of her claim that she should have been allowed to review the psychological evaluation also precludes appellate relief. *McIntosh*, 282 Mich App at 485.

Defendant also argues that the trial court erred by failing to impute income to plaintiff for the value of his housing when determining child support, because he resided rent-free in his mother's home. Because this Court granted leave to appeal limited to the issues raised in defendant's application and defendant did not raise this issue in her delayed application for leave, and we do not consider this argument. MCR 7.205(E)(4); *Dubin v Fincher*, unpublished order of the Court of Appeals, entered January 30, 2014 (Docket No. 319177).

Affirmed. Plaintiff being the prevailing party may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering