FAMILY LAW

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I. INTRODUCTION

During this *Survey* period,[1] the Michigan appellate courts decided many cases, some more influential than others, with topics ranging from child support[2] and attorney fees[3] to jurisdiction[4] and personal protection orders.[5] Each case places its unique fingerprint on the practice of family law in Michigan, and affects the lives of hundreds of litigants around the state. Though the cases discussed below are not a comprehensive inventory of the family law cases decided by Michigan appellate courts, they do cover some of the more significant and interesting cases decided this *Survey* period.

II. JURISDICTION

Jurisdiction is the first hurdle that any attorney approaches when confronted with a family law case, or any case for that matter. Determining subject-matter jurisdiction in a case often requires consideration of both the court that the case is filed in, and also strategy, progression, and resolution of the case.

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1. This *Survey* period covers cases decided from June 1, 2010, to May 31, 2011.
2. *See In re* Beck, 488 Mich. 6, 793 N.W.2d 562 (2010).
3. *See* Myland v. Myland, 290 Mich. App. 261, 804 N.W.2d 124 (2010).
4. *See* Kar v. Nanda, 291 Mich. App. 284, 286, 805 N.W.2d 609, *appeal denied*, 489 Mich. 976, 799 N.W.2d 4 (2011).
5. *See* Jenson v. Puste, 290 Mich. App. 338, 801 N.W.2d 639 (2010).

In *Kar v. Nanda*,[6] the Michigan Court of Appeals clarified a nuance in a well-settled area of divorce jurisdiction.[7] MCL section 552.9(1) states that a court "*shall not*" enter a judgment of divorce unless one of the parties has resided in Michigan for "180 days immediately preceding the filing of the complaint."[8] *Kar* addressed the definition of "resided in" for purposes of the divorce jurisdiction.[9]

The facts of the case are undisputed.[10] Both parties were citizens of India, but were living in the United States.[11] The Plaintiff-Husband traveled for his job and was never in one place for very long, including at the time of the filing of the divorce.[12] Plaintiff-Husband filed the case in Washtenaw County, Michigan, where the Defendant-Wife was a graduate student.[13]

Neither party disputes that the Defendant-Wife was present in Michigan for at least 180 days immediately preceding the filing of the divorce complaint.[14] Plaintiff-Husband argues that the statute merely requires one of the parties, in this case the Defendant-Wife, "to be present in the state for" at least 180 days to fulfill the requirement of the statute for purposes of "residing."[15] Defendant-Wife argued that not only was presence for at least 180 days required, but also that the same party had to meet "the legal definition of residence," meaning "an intent to remain in Michigan."[16]

The Michigan Court of Appeals determined that the issue was one of statutory interpretation, and the court could not ignore the legislature's use of the past tense "resided" for purposes of the statute.[17] The court determined that the legislature only intended to require past presence in the state in order to establish proper divorce jurisdiction.[18] Based on public policy, the court also denied Defendant-Wife's interpretation of the statute.[19] The mere allegation in a divorce case that one, or both, parties did not intend to continually reside in Michigan would open

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6. Kar v. Nanda, 291 Mich. App. 284, 805 N.W.2d 609, *appeal denied*, 489 Mich. 976, 799 N.W.2d 4 (2011).

7. *Id.* at 286-88.

8. MICH. COMP. LAWS ANN. § 552.9(1) (West 2010) (emphasis added).

9. *Kar*, 291 Mich. App. at 287.

10. *Id.* at 285.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 287.

15. *Kar*, 291 Mich. App. at 287.

16. *Id.*

17. *Id.* at 287-88.

18. *Id.* at 288.

19. *Id.* at 292.

questions about jurisdiction if the court accepted Defendant-Wife's interpretation, even if the parties both lived in Michigan their entire lives.[20]

In *Foster v. Wolkowicz*,[21] the Michigan Supreme Court addressed the definition of "initial custody determination"[22] for purposes of the Uniform Child Custody and Enforcement Act ("UCCJEA").[23] The parties lived together in Illinois but never married.[24] The parties moved to Michigan and had a child there in October 2006.[25] In January 2007, the parties executed an acknowledgment of parentage identifying the Defendant as the father of the child.[26]

In April 2007, the parties and the child moved back to Illinois and continued living together as a family.[27] When "the relationship between the parties ended" in May 2008, the "[Plaintiff-Mother] and the child returned to Michigan to live with [her family]" and five days later, the Plaintiff-Mother filed an action in Monroe County Circuit Court, arguing that Michigan had "home state" jurisdiction under the UCCJEA.[28] On June 4, 2008, the Defendant-Father initiated a case in Illinois, claiming that only Illinois had "home state" jurisdiction.[29]

Pursuant to the UCCJEA, a telephone conference was held involving both "the Michigan and Illinois courts" and both parties, after which the two courts determined "that an evidentiary hearing" would be held in the Michigan court "to determine which state had home-state jurisdiction."[30] After that hearing, the Michigan court found that by entering into the acknowledgment of parentage, the parties had thereby consented to Michigan having jurisdiction.[31]

On appeal, the Michigan Court of Appeals agreed that Michigan had jurisdiction over the matter, but for a different reason.[32] The court of appeals determined that the acknowledgment of parentage qualified as an "initial custody determination" for purposes of the UCCJEA, because, according to the Acknowledgment of Parentage Act, once the

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20. *Id.*

21. 486 Mich. 356, 785 N.W.2d 59 (2010).

22. Uniform Child Custody Jurisdiction and Enforcement Act, MICH. COMP. LAWS ANN. § 722.1101 (West 2010) [hereinafter "UCCJEA"].

23. *Id.*

24. *Foster*, 486 Mich. at 359.

25. *Id.*

26. *Id.*

27. *Id.* at 360.

28. *Id.*

29. *Id.*

30. *Foster*, 486 Mich. at 360.

31. *Id.* at 361.

32. *Id.*

acknowledgment of parentage is signed by both parties, the mother receives "initial custody" of the child.[33] The court of appeals further reasoned that since Michigan had made an initial custody determination, the home state of the child was of no consequence because Michigan had continuing jurisdiction under the UCCJEA.[34]

The Michigan Supreme Court disagreed with both the trial court and the court of appeals, and ruled that the acknowledgment of parentage was not an initial custody determination.[35] The Michigan Supreme Court remanded the case to the trial level for determination of the home state.[36] The court reached this conclusion for two reasons: one, the language of the Acknowledgment of Parentage Act, and two, the definition of "initial custody determination" under the UCCJEA.[37]

The Acknowledgment of Parentage Act provides: "After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court."[38] The Michigan Supreme Court noted that by the plain language of the statute, the Acknowledgment of Parentage Act specifically states that the Act is not meant to affect either parent's ability to seek custody in court.[39] Rather, the Act seems to encourage it.[40]

Additionally, the UCCJEA defines a custody determination as a "judgment, decree, or other court order."[41] The Michigan Supreme Court concluded that by definition, an acknowledgment of parentage could not be a custody determination because the acknowledgment is not a court order.[42] Although an acknowledgment of parentage may be a custody determination as a matter of law pursuant to the Act, an acknowledgment is not a custody determination as a matter of court order, and thus does not qualify as an initial custody determination for purposes of the UCCJEA.[43]

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33. *See id.* at 361-62; *see* Acknowledgment of Parentage Act, MICH. COMP. LAWS ANN. § 722.1006 (West 2010) [hereinafter "AOPA"].

34. *Foster*, 486 Mich. at 362.

35. *Id.* at 368.

36. *Id.*

37. *See id.* at 366-68.

38. AOPA, MICH. COMP. LAWS ANN. § 722.1006.

39. *Foster*, 486 Mich. at 366 (citing MICH. COMP. LAWS ANN. § 722.1006).

40. *Id.*

41. MICH. COMP. LAWS ANN. § 722.1102(c) (West 2010).

42. *Foster*, 486 Mich. at 366-67.

43. *Id.*

III. CUSTODY

During the *Survey* period, the Michigan appellate courts clarified what constitutes the "change in circumstance standard," the standard originally applied in *Vodvarka*.[44]

In *Gerstenschlager v. Gerstenschlager*,[45] the court decided a child custody dispute between a child's biological mother and father.[46] The parties' Judgment of Divorce awarded primary physical custody of the parties' two daughters to the Plaintiff-Father and primary physical custody of the parties' son to the Defendant-Mother.[47] After three years of this arrangement, the Plaintiff-Father filed a motion for "a change of custody to allow the parties' [minor] son to live with him[,] asserting a change in circumstances."[48] The Plaintiff-Father alleged that the Defendant-Mother neglected the parties' minor son, subjected him to "numerous changes of residence, improper language, improper discipline tactics," subjected him to "various overnight male visitors," and that the parties' minor son wished to live with the Plaintiff-Father and his sisters.[49] The Defendant-Mother testified at the hearing on the motion that she had taken in two boarders, "a police officer and a member of the Air Force," whom she had screened.[50] She explained that the extra income was used to satisfy her child support obligations, and that the boarders had very little to no interaction with the parties' minor son.[51] The trial court held a change in circumstances had occurred because the Defendant-Mother had taken in boarders and because the child was getting older and had different needs and desires.[52] The trial court ordered custody of the parties' son to the Plaintiff-Father.[53]

The *Gerstenschlager* case addressed whether a child's natural age progression and Plaintiff-Mother taking in boarders constituted a sufficient change in circumstances, significant enough to justify a change of physical custody to Defendant-Father.[54] The Child Custody Act of 1970 governs child custody.[55] MCL section 722.27 states in relevant part

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44. *See* Vodvarka v. Grasmeyer, 259 Mich. App. 499, 675 N.W.2d 847 (2003).
45. 292 Mich. App. 654, 808 N.W.2d 811 (2011).
46. *Id.* at 655.
47. *Id.*
48. *Id.*
49. *Id.* at 656.
50. *Id.*
51. *Gerstenschlager*, 292 Mich. App. at 656.
52. *Id.*
53. *Id.*
54. *Id.* at 657.
55. The Child Custody Act of 1970, MICH. COMP. LAWS ANN. § 722.27 (West 2010).

that if a child custody dispute arises from a judgment of the circuit court, then the court, for the best interest of the child, may "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances."[56] Additionally, "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child, unless there is presented clear and convincing evidence that it is in the best interest of the child."[57]

Gerstenschlager creates important precedent, because the Michigan Court of Appeals held that when a circuit court considers the best interest factors to determine whether a change in custody is appropriate, the circuit court may not consider that the child's changes in needs and desires associated with the ordinary course of growing up as those changes are not sufficient to constitute a change in circumstances.[58] Additionally, a change in the custodial environment, such as the custodial parent taking in boarders, which does not significantly affect the child's space and privacy, may be considered, but is not dispositive in determining whether a change in circumstances exists to justify a change in custody.[59]

IV. CHILD SUPPORT

The Supreme Court of Michigan and Michigan Court of Appeals each decided an important child support case during the *Survey* period.

In *In re Beck*,[60] the Michigan Supreme Court decided whether a parent whose parental rights were involuntarily terminated could nevertheless be ordered to pay child support.[61] The Respondent-Father's two children were made wards of the court as a result of drug use by both parents.[62] The trial court ordered both parents to pay child support to the custodian, the children's maternal grandmother.[63] The children's mother regained custody of both children, but the Respondent-Father did not make any progress towards reunification.[64] Thus, the Department of Human Services ("DHS") petitioned the court to terminate the

56. *Gerstenschlager*, 292 Mich. App. at 657.
57. *Id.*
58. *Id.* at 658-59.
59. *Id.*
60. *In re* Beck, 488 Mich. 6, 793 N.W.2d 562 (2010).
61. *Id.* at 7-8.
62. *Id.* at 8.
63. *Id.*
64. *Id.* at 8-9.

Respondent-Father's parental rights.[65] The trial court granted DHS's petition, but ordered the Respondent-Father to continue to pay child support for the minor children.[66]

On appeal, "Respondent[-Father] did not challenge the termination of his parental rights, but instead challenged only his continuing obligation to pay child support."[67] The Respondent-Father claimed that holding him responsible to pay child support after his parental rights had been terminated violated "his constitutional right to due process."[68] The Supreme Court of Michigan upheld the trial court order requiring Respondent-Father to continue to pay child support even after his parental rights were terminated.[69]

The Michigan Supreme Court based its decision on Michigan statutory language, as it addresses parental rights and parental obligation to support their children.[70] MCL section 722A.19b(5) provides that "[i]f the court finds that there are grounds for termination of parental rights and the termination of parental rights is in the child's best interests, the court shall order termination of parental rights . . . ."[71] The court rejected Respondent-Father's claim "that his 'right to due process' was violated," because he cited no authority to prove his claim, nor did the court find any authority to support his claim.[72] The court cited MCL sections 722.1 through 722.6 for the definition of parental rights—the "custody, control, services and earnings of the minor."[73] "The sole parental obligation identified in [MCL section] 722.3 is the duty to provide a child with support."[74] The court explained that "[u]nder the plain language of the statute, parental rights do not include or contemplate parental obligation."[75] MCL section 722.3(1) states that:

> The parents are jointly and severally obligated to support a minor as prescribed in section 5 of the [S]upport and [P]arenting [T]ime [E]nforcement [A]ct . . . unless a court of competent jurisdiction modifies or terminates the obligation or the minor is

65. *Id.* at 9.
66. *In re Beck*, 488 Mich. at 9.
67. *Id.*
68. *Id.*
69. *Id.* at 16.
70. *Id.* at 10-16.
71. *Id.* at 11 (quoting MICH. COMP. LAWS ANN. § 712A.19b(5) (West 2010) (internal quotations omitted)).
72. *In re Beck*, 488 Mich. at 11.
73. *Id.* at 12 (citing MICH. COMP. LAWS ANN. § 722.2 (West 2010)).
74. *Id.* (citing MICH. COMP. LAWS ANN. § 722.3 (West 2010)).
75. *Id.*

> emancipated by operations of law, except as otherwise ordered by a court of competent jurisdiction.[76]

The court reasoned that "[b]ecause the parental rights identified in MCL 722.2 are distinct and detached from the parental duty identified in MCL 722.3, it is clear that the Legislature has determined that parental rights are independent from parental duties."[77]

The Michigan Supreme Court held that nothing in the statutory structure indicates that a parental obligation to support children is contingent on continuing parental rights.[78] The parental duty to support children continues, unless it is modified or terminated by a court of competent jurisdiction.[79]

In *Ewald v. Ewald*,[80] the Michigan Court of Appeals addressed an issue of first impression: "whether a parent's actions that cause a child to refuse to visit the other parent would render it 'unjust or inappropriate' under MCL 552.605(2) to apply the 'parental time offset' of 2008 MCSF 3.03, so as to permit deviation from the [child support formula]."[81] The parties had two children during their marriage.[82] During the divorce proceedings the parties' son had a falling out with the Defendant-Mother.[83] The Defendant-Mother did not seek court enforcement of her parenting time.[84] The parties were both high-school educated and supported the family financially through rental income derived from partial ownership of a large family farm, salaries earned for management of the farm, and other income from rental property.[85] The parties did not dispute valuation of the marital property or its division.[86] However, the Plaintiff-Father sought clarification and "reconsideration of [his] child support" obligation in light of the $518,000.00 the "[D]efendant-[M]other would receive" from him in exchange for her interest in the farm, which would be "capable of being invested to produce income," and also in light of the fact the Defendant-Mother "did not exercise parenting time with the parties' [minor] son."[87] The court issued a

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76. MICH. COMP. LAWS ANN. § 722.3(1).
77. *In re Beck*, 488 Mich. at 14.
78. *Id.* at 16.
79. *Id.*
80. 292 Mich. App. 706, 810 N.W.2d 396 (2011).
81. *Id.* at 715.
82. *Id.* at 709-10.
83. *Id.* at 710.
84. *Id.*
85. *Id.*
86. *Ewald*, 292 Mich. App. at 711.
87. *Id.* at 712.

supplemental brief indicating that child support would be recalculated as if the Defendant-Mother had significant parenting time with the parties' son, because the Plaintiff-Father was at fault for the breakdown in the relationship between the Defendant-Mother and son.[88]

The Michigan Court of Appeals held that the trial court erred as a matter of law when it deviated from the child support formula in order to punish the Plaintiff-Father, rather than to determine each parent's fair share of child support in light of their combined net incomes.[89]

V. SPOUSAL SUPPORT

Spousal support represents a highly litigated, and often contentious, area of family law. This year was no exception, as Michigan courts tackled two highly litigated cases covered in this section of this Article.

The Michigan Court of Appeals rejected the concept of the trial court using a systematic formula to derive a spousal support amount in *Myland v. Myland*.[90] The trial court found that the Defendant-Husband's annual income was $62,500 and imputed an income of $7,000 per year to the Plaintiff-Wife.[91] Based only on those numbers and a twenty-five year length of the parties' marriage, the trial court applied a mathematical formula, seemingly of its own creation, and determined that the spousal support award should be $1,156 per month.[92]

The court of appeals rejected the trial courts' process and application of its mathematical formula, even if used only as a "guideline."[93] Stated clearly, the Michigan Court of Appeals "cannot sanction the use of such a blunt tool in any spousal support determination, and the trial court's use of this formula here was an error of law."[94] Use of a formula fails to take into consideration any of the non-numerical facts relevant to spousal support such as the ages of the parties, health and ability to have gainful employment, and prior standard of living.[95]

In *Rose v. Rose*,[96] the Michigan Court of Appeals considered the issue of non-modifiable spousal support agreements.[97] The parties entered a consent judgment of divorce in 2006 after twenty-two years of

88. *Id.*
89. *Id.* at 722.
90. Myland v. Myland, 290 Mich. App. 691, 804 N.W.2d 124 (2010).
91. *Id.* at 695.
92. *Id.* at 695-96.
93. *Id.* at 696.
94. *Id.*
95. *Id.*
96. 289 Mich. App. 45, 795 N.W.2d 611 (2010).
97. *Id.* at 49-50.

marriage.[98] In an effort to retain complete ownership over the company purchased during the marriage, the Defendant-Husband agreed to pay a large sum, $230,000 per year, of non-modifiable spousal support to the Plaintiff-Wife rather than sell the company, which was valued at approximately $6 million at the time of the divorce.[99] As part of his reasoning for not turning the company into a cash asset, the Defendant-Husband asserted that he wished to keep the company within his family.[100] Shortly after the divorce became final, the Defendant-Husband turned over management of the company to his son from a prior marriage.[101] Both parties explicitly agreed that the spousal support would be non-modifiable, and the Judgment of Divorce reflected that agreement.[102]

In January 2008, the Defendant-Husband discovered that his son had committed management errors, some of which were of questionable integrity, which caused the value of the company to plummet and eventually close its doors in March 2008.[103] In April 2008, the Plaintiff-Wife filed a motion to enforce the spousal support provision of the parties' Judgment of Divorce, and the Defendant-Husband filed a motion to modify spousal support, and for relief from judgment pursuant to MCR 2.612.[104]

The trial court denied Defendant-Husband's motion to modify his spousal support order based on the well-settled principles laid out in *Staple v. Staple*.[105] The Michigan Court of Appeals affirmed.[106] In *Staple*, the court concluded that the parties may knowingly agree to forgo their statutory right for modification of support, and the court must enforce that agreement.[107] In doing so, the *Staple* court recognized "five public policy reasons [that] courts should enforce nonmodifiable" agreements.[108] One of those policy reasons specifically speaks to the circumstances in *Rose*: to allow the non-modifiable agreement to be used as part of a complete settlement of all issues, including asset division.[109]

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98. *Id.* at 47.
99. *Id.*
100. *Id.* at 48.
101. *Id.*
102. *Rose*, 289 Mich. App. at 48.
103. *Id.*
104. *Id.* at 48-49.
105. *Id.* (stating that the trial court's findings complied with *Staple v. Staple*, 241 Mich. App. 562, 564, 616 N.W.2d 219 (2000)).
106. *Id.* at 62.
107. *Staple*, 241 Mich. App. at 575.
108. *Id.* at 579.
109. *Id.*

The Michigan Court of Appeals in *Rose* reversed the trial court's finding regarding the Defendant-Husband's motion for relief from judgment, pursuant to MCR 2.612.[110] The trial court granted Defendant-Husband's motion and reduced his obligation from $230,000 per year to just $900 per month.[111] The court of appeals excluded all grounds for relief from judgment rather quickly, except for the ground of MCR 2.612(C)(1)(f), which permits the court to grant a motion for relief from judgment for "any other reason justifying relief from the operation of the judgment."[112]

In determining whether the court of appeals could properly set aside the judgment under MCR 2.612(C)(1)(f), the court had to decide if the rights of the Plaintiff-Wife would be detrimentally affected if the judgment were set aside, and whether extraordinary circumstances exist so that setting aside the judgment would be just.[113]

Not only did the court of appeals find that Plaintiff-Wife would be extremely and detrimentally affected if the judgment were set aside (representing a reduction in income from $230,000 per year), it also found that the circumstances presented were not extraordinary.[114] The court of appeals opined that the Defendant-Husband was a businessman, and thus should have recognized that any list of factors could present a downturn in the value of his business, making it difficult for him to complete the terms of the judgment.[115] The court was careful to point out that the circumstances surrounding the loss of a $6 million asset—especially at the fault of Defendant-Husband's son—may have been tragic, but they were not extraordinary, and thus do not warrant setting aside a previously contracted, non-modifiable spousal support judgment.[116]

VI. PERSONAL PROTECTION ORDERS

Although often a highly litigated issue at the trial court level, rare is it to find a Michigan Court of Appeals case that substantially impacts the personal protection order (PPO) process. However that is exactly what

110. *Rose*, 289 Mich. App. at 62.
111. *Id.* at 57-58.
112. *Id.* at 51-58 (quoting MICH. CT. R. 2.612(C)(1)(f)).
113. *Id.* at 54 (quoting Lark v. Detroit Edison Co., 99 Mich App. 280, 284, 299 N.W.2d 653 (1980)).
114. *Id.* at 62.
115. *Id.*
116. *Rose*, 289 Mich. App. at 62.

the ruling in *Jenson v. Puste*[117] did, in which the court determined that a PPO could not be sealed.[118]

In *Jenson*, the trial court denied a Respondent-Ex-Husband's motion to seal a PPO.[119] In order to come to its conclusion, the court interpreted MCR 8.119(F)(1) and (5).[120] The parties in *Jenson* divorced in March 2006.[121] The Petitioner-Ex-Wife filed for a PPO in November 2006 claiming that the Respondent-Ex-Husband had physically assaulted her in the past and had recently been calling her friends, breaking into her house without permission, and tapping on the windows late at night.[122] The trial court granted the PPO, and it expired a year later without violation or further trouble between the parties.[123]

In April 2009, the Respondent-Ex-Husband filed a motion to seal the court record pursuant to MCR 8.119(F)(1).[124] Attached to the motion was a consent order signed by the Petitioner-Ex-Wife consenting to the sealing of the PPO, but she did not participate any further in any of the proceedings, neither at trial level nor on appeal.[125]

The Respondent-Ex-Husband argued that under MCR 8119(F)(1) the court had the discretion to seal court records upon the motion of a party who specifically identifies the "interest to be protected," and upon a finding of good cause.[126] However, the court determined that the limited discretion carved out in MCR 8.119(F)(1) was trumped by the very specific language of MCR 8.119(F)(5), which states that "a court may not seal a court order or opinion . . . ."[127] The court concluded that a court order or opinion could never be sealed, including a PPO, even if good cause were to be shown.[128]

VII. CONCLUSION

The area of family law is complicated and ever-changing. Each year, family situations evolve that present new and challenging questions for our court system to digest. Although only a few cases were decided

117. 290 Mich. App. 338, 801 N.W.2d 639 (2010).
118. *Id.* at 339.
119. *Id.* at 340.
120. *Id.* at 343.
121. *Id.* at 339.
122. *Id.*
123. *Jenson*, 290 Mich. App. at 340.
124. *Id.*
125. *Id.* at 340-41.
126. *Id.* at 343.
127. *Id.* at 344-45 (quoting MICH. CT. R. 8.119(F)(5)).
128. *Id.* at 347.

during the *Survey* period, these cases represent the willingness of our court system to manage the changing needs of Michigan's families.