FAMILY LAW UPDATE IN THE YEAR PRIOR TO COVID

ROQUIA DRAPER†

I. CHILD CUSTODY

Family law cases involving questions of the custody and care of a minor child are fact-driven. The Child Custody Act of 1970 provides a

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comprehensive statutory scheme for resolving initial custody determinations, custody modifications, and custody disputes based on the best interests of the child. As the Michigan Court of Appeals in *Dempsey v. Dempsey*[1] recognized:

> A child custody determination is much more difficult and subtle than an arithmetic computation of factors. It is one of the most demanding undertakings of a trial judge, one in which he [or she] must listen to what is said to him [or her] and observe all that happens before him [or her], but a task of requiring him [or her] to discern and feel the climate and chemistry of the relationships between the children and parents. This is an inquiry in which the court hopes to hear not only the words but the music of the various relationships.

A. Change of Domicile of Minor Child

While a request to change the domicile of a minor child commonly occurs after a custody order is entered, *Moote v. Moote* presented an example of a not-as-common request to change domicile prior to entry of a custody order.[2] In May 2018, the plaintiff-mother in *Moote* petitioned for a pre-judgment change of domicile to relocate with her child from Michigan to Alabama so that she could be closer to her family, who could assist her with the support and childcare needed for her to obtain an education and suitable employment.[3] Her proposal for parenting time to the defendant-father after the move included frequent electronic communications between the child and her father and significant parenting time during school breaks.[4] Analyzing the request using the statutory factors for a change of domicile[5] and the *D'Onofrio* four-part analysis,[6] the trial court granted the plaintiff-mother's motion and incorporated the change of domicile and proposed parenting-time schedule into the judgment of divorce.[7]

Although the defendant-father did not present a clear argument pertaining to the factors related to a proposed change of residence, the

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1. Dempsey v. Dempsey, 96 Mich. App. 276, 289, 292 N.W.2d 549, 554 (1980), *overruled by* Dempsey v. Dempsey, 409 Mich. 495, 296 N.W.2d 813 (1980).

2. Moote v. Moote, 329 Mich. App. 474, 942 N.W.2d 660 (2019).

3. *Id.* at 477, 942 N.W.2d at 663.

4. *Id.* at 481, 942 N.W.2d at 665.

5. MICH. COMP. LAWS § 722.31(4) (2001).

6. D'Onofrio v. D'Onofrio, 365 A.2d 27, 29–30 (1976) (adopted by the court in Henry v. Henry, 119 Mich. App. 319, 323–24, 326 N.W.2d 497, 499 (1982)).

7. *Moote*, 329 Mich. App. at 479–84, 942 N.W.2d at 664–67.

Michigan Court of Appeals nonetheless found that the trial court's findings on these factors were not against the great weight of the evidence.[8] First, the proposed relocation had the capacity to improve the quality of life for the child and the plaintiff-mother, as they would be provided with a better support system in Alabama. Whereas in Michigan, the plaintiff-mother worked odd jobs and only worked when the defendant-father could provide care for the child or when the child was in school.[9]

The defendant-father argued that the move was motivated to hurt the relationship between the child and father.[10] The trial court found that the proposed relocation was not an attempt to defeat or frustrate the parenting-time schedule and that, in fact, the plaintiff-mother proposed a new, robust parenting-time schedule that would give the defendant-father *more* parenting time with the child than what he was exercising while in Michigan.[11] Therefore, the proposed parenting-time schedule would provide an adequate basis for fostering the parental relationship between the defendant-father and the child. The court also stated that it was possible to modify a parenting-time schedule to still preserve and foster the parental relationship.[12]

The defendant-father then argued that the trial court failed to properly analyze the best-interests factors.[13] The Michigan Court of Appeals held that it was unnecessary to address the best-interest factors because:

> If, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interested factors in [Michigan Compiled Laws] 722.23 have been established by clear and convincing evidence.[14]

The proposed move would only change the child's domicile but not change the child's established custodial environment with the plaintiff-mother, who had primary physical custody and managed all of the child's education and healthcare needs.[15] Therefore, the trial court was not

8. *Id.* at 484, 942 N.W.2d at 666.
9. *Id.* at 481, 942 N.W.2d at 665.
10. *Id.* at 482, 942 N.2W.2d at 665.
11. *Id.* at 482–83, 942 N.W.2d at 665–66.
12. *Id.* at 483, 942 N.W.2d at 666.
13. *Id.* at 484, 942 N.W.2d at 666–67.
14. *Id.* at 485, 942 N.W.2d at 667.
15. *Id.*

required to undertake a best interest analysis before granting the change of domicile.[16]

B. Modification of Custody: Threshold Determination of Proper Cause or Change in Circumstances

The Michigan Court of Appeals in *Pennington v. Pennington* reinforced the proper framework for analyzing a modification of custody request by requiring that the initial threshold of proper cause or change in circumstances be determined each time a custody modification is requested.[17] In *Pennington*, the court entered a judgment of divorce that granted the parties joint legal custody and granted the plaintiff-mother primary physical custody with supervised parenting time to the defendant-father in light of the age and health condition of the infant.[18] Two years later, an amended parenting-time order was entered giving the defendant-father unsupervised parenting time every other weekend.[19] The plaintiff-mother failed to bring the child to parenting time, and she instead took the child to a pediatrician complaining of vaginal redness and irritation on the child, along with the child's statement that "daddy hurt me."[20] The pediatrician reported the concerns to Child Protective Services, who conducted an investigation.[21]

Several months later, the defendant-father filed for sole physical custody of the child, alleging that circumstances had changed because the plaintiff-mother was not supporting his relationship with the child, which caused him concern about the plaintiff-mother's mental health while the child was in her care.[22] The friend of the court referee found that a change of circumstances existed based on the testimony of the CPS investigator, who stated that the allegations of abuse were unsubstantiated and who expressed concern about the plaintiff-mother's emotional stability when she refused to accept the investigation's findings.[23] The referee then found that the established custodial environment was with the plaintiff-mother and applied the higher burden of proof to change custody.[24] The referee recommended that the parties temporarily share joint physical custody—with the plaintiff-mother having custody Monday through Friday and the

16. *Id.*
17. Pennington v. Pennington, 329 Mich. App. 562, 944 N.W.2d 131 (2019).
18. *Id.* at 565, 944 N.W.2d, at 134.
19. *Id.*
20. *Id.* at 566, 944 N.W.2d at 134–35.
21. *Id.*, 944 N.W.2d at 135.
22. *Id.*
23. *Id.* at 567, 944 N.W.2d at 135.
24. *Id.*

defendant-father having custody every other weekend—and that the plaintiff-mother undergo a psychological evaluation before a final determination of custody.[25] The trial court adopted the recommendation as an interim order.[26]

Several months later, the defendant-father filed a show cause motion and again requested a change of custody. This time, the defendant-father's motion was based on the child's therapist's testimony that the child exhibited inappropriate sexual boundaries during play and recommendation that both parents be psychologically evaluated.[27] The referee recommended the defendant-father be awarded physical custody and the plaintiff-mother have parenting time on alternating weekends, essentially flipping the parenting-time schedule from the prior interim order.[28] The court found an established custodial environment existed with both parents and that the defendant-father had proven by a preponderance of the evidence that a custody change was in the child's best interests; the court entered an order adopting the referee's recommendation.[29]

As to the first "interim" order entered by the court, the Michigan Court of Appeals held there was an insufficient threshold showing of a change of circumstances or proper cause to modify the custody order.[30] Despite the allegations of concern over the plaintiff-mother's mental health, the only relevant evidence was the testimony of a CPS investigator's opinion, which was that the plaintiff-mother was seeking too much medical care for the child and that she was slow to accept that the physician's examination of the child had not substantiated any abuse. There was no articulation of how her conduct went beyond an appropriate level.[31] Indeed, the court went further to state that a parent who did not seriously consider a child's report of potential abuse would be more concerning.[32] Also noteworthy is the court's statement that "a finding that abuse has not been substantiated [by CPS] is not equivalent to a finding that no abuse occurred."[33]

On the second order, the trial court erred by not first making the proper threshold finding of proper cause or a change of circumstance since the interim order was the last custody order entered.[34] The plaintiff-mother

25. *Id.*
26. *Id.* at 567–68, 944 N.W.2d at 135–36.
27. *Id.* at 568–69, 944 N.W.2d at 135–36.
28. *Id.* at 569, 944 N.W.2d at 136.
29. *Id.*
30. *Id.* at 575, 944 N.W.2d at 139.
31. *Id.* at 573, 944 N.W.2d at 138.
32. *Id.* at 574, 944 N.W.2d at 138–39.
33. *Id.* at 574 n.3, 944 N.W.2d at 139 n.3.
34. *Id.* at 577, 944 N.W.2d at 140.

also alleged that the trial court erred when it found that an established custodial environment existed with the defendant-father.[35] Even though the trial court should have never addressed the issue of whether an established custodial environment existed the second time around, the court of appeals, nonetheless, concluded that the trial court erred in finding that the child had an established custodial environment with both parents on the second request to modify custody, where for two years, the defendant-father had only minimal, supervised parenting time, which was increased to one overnight every week.[36] Further, the record did not support a finding that, over an appreciable time, the child "looked to [the] father for guidance, discipline, the necessities of life, and parental comfort."[37] Therefore, the trial court erred when it found that a change was supported by a preponderance of the evidence, rather than the required clear and convincing evidence standard.[38] The Michigan Court of Appeals vacated the trial court's orders, changing the child's custody, reinstated the trial court's interim order, and instructed the trial court to consider updated information, including any evidence of the possibility of abuse during the defendant-father's care.[39]

The facts in *Pennington* did not support finding the threshold to modify custody was met. Contrast *Pennington* with the longstanding conflict between the parents and the children in *Martin*. In *Martin v. Martin*, the Michigan Court of Appeals upheld the trial court's modification of sole legal and physical custody of the parties' remaining minor child, who was seventeen years of age, to the defendant-husband with supervised parenting time to the plaintiff-wife following years of contentious custody and parenting-time issues.[40] The parties were divorced in 2012, and the plaintiff-mother was awarded sole legal and physical custody of the then three minor children with therapeutic supervised parenting time to the defendant-father.[41] While there was evidence supporting the defendant-father's use of improper physical punishments and emotional abuse towards the children, there was also evidence of the plaintiff-mother interfering with the defendant-father's relationship with the children and alienating the children from their father.[42]

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35. *Id.* at 580, 944 N.W.2d at 142.
36. *Id.* at 579, 944 N.W.2d at 141.
37. *Id.*
38. *Id.* at 580, 944 N.W.2d at 142.
39. *Id.*
40. Martin v. Martin, 331 Mich. App. 224, 952 N.W.2d 530, *appeal denied*, 949 N.W.2d 716 (Mich. 2020).
41. *Id.* at 228, 952 N.W.2d at 534.
42. *Id.*, 952 N.W.2d at 533

For the next four years, the defendant-father had no parenting time even though he took significant steps to improve his anger-management and parenting skills and had been showing up to the children's extracurricular activities.[43] After a friend of the court investigation into the defendant-father's motion to enforce parenting-time orders, the trial court entered a parenting-time plan that required the then two remaining minor children to participate in reunification therapy with the father and for the mother to work with her own therapist on her alienating behavior.[44] Within months, the record shows that the plaintiff-mother was undermining reunification efforts, making the children believe they were in danger when with the defendant-father, which could potentially have long-term effects on the future relationships.[45] The plaintiff-mother was held in contempt, and the court imposed a jail sentence as well as adopted a new parenting-time plan that included an extended period of uninterrupted makeup parenting time for the defendant-father.[46]

Despite the conflict, the parties eventually reached an agreement to share joint legal and physical custody of the children and to implement a step-up schedule for increased parenting time for the defendant-father; however, the plaintiff-mother's compliance was short-lived.[47] The defendant-father later moved for sole physical custody of the remaining minor child based on the plaintiff-mother's continued efforts to alienate the children.[48] The parties—again, despite the constant conflict—reached a new agreement months later that the remaining minor child would primarily live with the father, and the mother would have alternating weekend parenting time.[49]

The plaintiff-mother's compliance was again short-lived, as the defendant-father moved for sole physical custody of the minor child based on the mother's continued efforts to alienate the children and her noncompliance with the court's orders.[50] The trial court first determined that proper cause and change of circumstances existed to revisit the custody order based on the facts that the remaining minor child was refusing to engage with therapists and participating in back-channel information gathering against the defendant-father for the plaintiff-mother

43. *Id.* at 230, 952 N.W.2d at 535.
44. *Id.*
45. *Id.* at 231, 952 N.W.2d at 535.
46. *Id.* at 232, 952 N.W.2d at 535–36.
47. *Id.*, 952 N.W.2d at 536.
48. *Id.* at 233, 952 N.W.2d at 536.
49. *Id*. 232–33, 952 N.W.2d at 536.
50. *Id.*

as well as the overall failure of therapy due to the mother's continued interference.[51]

Further, although the child had an established custodial environment with the mother, the trial court found the father had established by clear and convincing evidence that it was in the child's best interest to grant him sole legal and physical custody based on an in-depth analysis of the best-interests factors of MCL 722.23.[52] The trial court changed custody and ordered that the mother have supervised parenting time in the form of therapy sessions and prohibited communication with the children unless authorized by the therapist.[53]

The Michigan Court of Appeals upheld the trial court's determination, finding ample evidence of significant progress made by the defendant-father. The court likewise affirmed the trial court's determination that the plaintiff-mother continued to actively engage in efforts to undermine the father's relationship with the children and that her conduct rose to the level of abuse supporting the threshold finding of proper cause and change of circumstance.[54] The court of appeals also determined the trial court properly found that under factor (j) of the best interest factors,[55] the mother was both unwilling to encourage a relationship between the father and the child and was also actively seeking to sabotage it.[56] The plaintiff-mother alleged that the trial court wrongly favored the defendant-father as to factor (j), arguing that parental alienation was "junk science" and that she was protecting the children from the father's abuse; therefore, she fell squarely within factor (j), which also provides that a court may not negatively consider reasonable action taken by a parent to protect the child against domestic violence by the other parent.[57] In a footnote, the court of appeals noted that while there is dispute in the scientific community as to whether parental alienation is a syndrome, "there is no reasonable dispute that high-conflict custody disputes frequently involve acts by one-parent designed to obstruct or sabotage the opposing parent's relationship with the child."[58]

Evidence admitted by the trial court of the mother's efforts to actively sabotage the relationship included her emails with the child as evidence of

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51. *Id.* at 233–34, 952 N.W.2d at 536–37.

52. *Id.*

53. *Id.* at 234, 952 N.W.2d at 537.

54. *Id.* at 237, 952 N.W.2d at 538.

55. Factor (j) evaluates the "willingness and ability of each of the parties to facilitate and encourage a closing and continuing parent-child relationship between the child and the other parent or the child and the parents." MICH. COMP. LAWS § 722.23(j) (2016).

56. *Martin*, 331 Mich. App. at 238, 952 N.W.2d at 539.

57. *Id.*

58. *Id.* at n.2, 952 N.W.2d at 539 n.2.

"back-channel or surreptitious information gathering."[59] The Michigan Court of Appeals held that the trial court properly admitted and relied on the e-mails between the mother and daughter.[60] First, the e-mails were not admitted for an improper hearsay purpose because they were not being admitted to prove the truth of the matter asserted but rather to show the effect on the reader—the child—and that there was constant contact between the child and the mother during the father's parenting time, which had been forbidden by court order.[61] Second, the emails tended to establish that the mother had been encouraging the child to spy for her and log what was said and done during the father's parenting time; for example, in one email, the mother responded, "good girl, keep them coming."[62]

The plaintiff-mother objected to not only the admission but also to the manner in which those e-mails with the child were obtained, arguing that the trial court violated her right to be free from unreasonable searches and seizures under the Fourth Amendment when it ordered her cell phone be forensically examined. The court of appeals disagreed,[63] and it determined that where there were several procedural safeguards in place to ensure that the information retrieved would not be disseminated and the forensic professional himself had limited search terms and would produce a report for the attorneys only, the trial court did not violate the plaintiff-mother's Fourth Amendment rights.[64] The court went on, stating:

> To the extent that a discovery order entered by a trial court in a civil lawsuit constitutes a search by a government agent within the meaning of the Fourth Amendment, the search would be reasonable if entered by a neutral judge in accordance with "closely circumscribed" rules that provide safeguards equivalent to probable cause.[65]

Probable cause was established when the evidence showed that the mother continued communicating with the daughter via e-mail in violation of the trial court's order, and the phone would produce relevant evidence to the trial court in the custody dispute.[66]

In upholding the trial court's finding that a change of custody was warranted, the court of appeals nonetheless noted it was troubled by the

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59. *Id.* at 540.
60. *Id.* at 541.
61. *Id.* at 541.
62. *Id.* at 541.
63. *Id.* at 542.
64. *Id*.
65. *Id*.
66. *Id*. at 543.

fact that the plaintiff-mother had been unable to visit with the child in therapeutic supervised parenting time because the therapist required payment before the supervised parenting-time sessions. The court, then, left that issue opened to be addressed by the trial court.[67]

C. Modification of Custody: Analyzing Best Interests of the Minor Child

The final step of the analysis in a request to modify custody requires a court to consider, evaluate, and determine whether the requested change in custody would serve the child's best interest under the enumerated factors in MCL 722.23.

1. Best Interests: Consideration of Domestic Violence

Brown is the first case to focus on factor (k) of the best interest factors under MCL 722.23, which requires the court to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child."[68] In the 2014 consent judgment of divorce, the plaintiff-father in *Brown* was awarded primary custody of the five minor children with both parties awarded joint legal custody of the children.[69] In 2016, the parties consented to the plaintiff-father having sole physical *and* legal custody of the children, permitted the defendant-mother to move to Ohio, and reserved specific parenting time for the defendant-mother.[70]

Two years later, the defendant-mother filed a motion to change custody, alleging unsafe and cramped housing conditions in the plaintiff-father's home, lack of basic sanitation and clothing needs of the children, lack of adequate supervision of the children, neglect of the children's emotion needs, denigration of the defendant-mother, and interference with her visitation.[71] Again, in 2019, the defendant-mother filed a motion for a change of custody, this time with the assistance of counsel. She alleged a change in circumstance since the 2016 consent order because the plaintiff-father had moved and was living in an unsafe residence, the children were enrolled in an unaccredited school, the plaintiff-father threatened to withhold the children from the defendant-mother, and the plaintiff-father had a history of perpetrating domestic violence. There was also evidence of the defendant-father using corporal punishment on the children.[72]

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67. *Id*.
68. MICH. COMP. LAWS § 722.23(k) (2016).
69. Brown v. Brown, 332 Mich. App. 1, 6, 955 N.W.2d 515, 519 (2020).
70. *Id.*
71. *Id.* at 7, 955 N.W.2d at 519.
72. *Id.* at 10, 955 N.W.2d at 521.

The trial court granted the defendant-mother's latest motion for a change of custody and granted her sole legal and physical custody of the children.[73] In so ruling, the trial court determined that the plaintiff-father's use of corporal punishment as a disciplinary method was a form of domestic violence.[74] Although the Child Custody Act does not provide its own definition of domestic violence, the Domestic Violence Prevention and Treatment Act (DVPTA) does.[75] The court held that "domestic violence," as used by the Child Custody Act, includes "domestic violence" as defined in the DVPTA.[76] Therefore, the court of appeals held that it was "not against the great weight of the evidence" for the trial court to conclude that the plaintiff-father had committed domestic violence because of the undisputed evidence that he would spank the children with a PVC pipe, which left markings and bruises, discuss with the children why they were being punished, pray with them, and offer "expressions of love at the end of this ritual."[77]

The court of appeals also found that the trial court properly relied upon the abusive treatment of the family's pets to establish proper cause.[78] The court noted that a pet itself cannot be a victim of domestic violence under either the DVPTA or a standard definition of domestic violence.[79] However, "intentionally harming an animal with whom a child (a 'person' under the [DVPTA]) has a significant emotional bond could constitute 'engaging in activity toward a family or household member.'"[80] While harmful and abusive conduct toward an animal is not per se domestic violence since an animal is not an "individual" under the DVPTA, abuse toward the animal for the purpose of distressing or coercing a person emotionally bonded to the animal can constitute domestic violence as to that person.[81] This conduct created an atmosphere harmful to the children's well-being and supported a finding of proper cause to modify custody.[82]

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73. *Id.* at 8, 955 N.W.2d at 520.
74. *Id.* at 10, 955 N.W.2d at 521.
75. *Id.* at 11, 955 N.W.2d at 521.
76. "Domestic violence" under the DVPTA is defined as the occurrence of enumerated acts "by a person that is not an act of self-defense[,]" including "placing a family or household member in fear of physical or mental harm" and "engaging in activity toward a family member or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threated, harassed, or molested." MICH. COMP. LAWS § 400.1501(d) (2018).
77. *Brown*, 332 Mich. App. at 13, 955 N.W.2d at 522.
78. *Id.* at 15, 955 N.W.2d at 523.
79. *Id.* at 14, 955 N.W.2d at 523.
80. *Id.*
81. *Id.* at 14–15, 955 N.W.2d at 523.
82. *Id.* at 15, 955 N.W.2d at 523.

In addition to the treatment of family pets, the court of appeals held that the trial court found proper cause based on the children's living conditions.[83] Notably, the children were not receiving routine medical care, the plaintiff-father was "not diligent in following up" on specific health care needs, the girls lacked proper feminine hygiene products, the plaintiff-father refused professional health treatment for one child who was self-harming, and the plaintiff-father enrolled the children in a school that was neither accredited nor provided proper guidance for the children's educational needs.[84] Therefore, the defendant-mother established her burden to show proper cause and met the clear and convincing standard that the modification would be in the children's best interests.[85] The court did find error in the trial court's analysis of factor (e) of the best interest factors. The trial court focused on the acceptability of the custodial home rather than the permanence of the existing family unit, which the children had with the plaintiff-father and not the defendant-mother.[86] However, the Michigan Court of Appeals considered this a harmless error when considering the best interests as a whole, which favored the defendant-mother.[87]

2. Best Interests: Weighing the Effect of Employment on Ability to Parent

The lens through which courts view the best interests can sometimes require recalibration to match the times. In 2019, "[a]mong married-couple families with children, 97.5 percent" of the households had at least one employed parent, and in 64.2 percent of the households, both parents worked outside of the home.[88] "Does working outside the home compromise a parent's ability to forge and maintain a strong, healthy relationship with her children? What if both parents work outside the home? Is the child essentially without a parent truly committed to parenting and all that the job entails?"[89] This is how the Michigan Court of Appeals began its opinion in *Bofysil v. Bofysil*.

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83. *Id.* at 15–16, 955 N.W.2d at 523–24.
84. *Id.* at 16, 955 N.W.2d at 524.
85. *Id.* at 17, 955 N.W.2d at 523.
86. *Id.* at 21, 955 N.W.2d at 526.
87. *Id.* at 27, 955 N.W.2d at 529.
88. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL 20-0670, EMPLOYMENT CHARACTERISTICS OF FAMILIES—2019 (2020).
89. Bofysil v. Bofysil, No. 351004, 2020 WL 1968642, at *1 (Mich. Ct. App. Apr. 23, 2020).

In *Bofysil*, the plaintiff and the defendant, a same-sex couple, had one child together through IVF.[90] The parties agreed that the defendant would stay home to raise the child while the plaintiff maintained her regular job to financially support the family.[91] Both parties at trial described the plaintiff's efforts to schedule her work around the child's schedule so that she got to spend the most amount of time possible with the child.[92] The plaintiff also testified that the defendant rejected her requests to return to work because of financial hardship.[93] When the parties separated, the defendant took the child and moved nearly two hours away to be with her family.[94] The defendant also expressed her intention to continue to live with her family and remain unemployed to maintain consistency for the child.[95]

In awarding primary custody of the child to the defendant, the trial court heavily favored the defendant's role as a stay-at-home mother to the detriment of the plaintiff.[96] The trial court found both that the established custodial environment was with the defendant, *by virtue of her being a stay-at home mother*, and that the best interest factors (a), (b), (c), (d), (e), and (j) favored her as the stay-at-home parent.[97] The plaintiff appealed, arguing it was error to discount her role simply because she worked outside the home to support the family and that the defendant withheld the two-and-a-half-year-old child from her after the separation.[98]

The court of appeals held that the trial court erroneously found that the established custodial environment was with the stay-at-home defendant by solely relying on the parents' working status, even though the child lived with both parents for the first two and a half years of her life.[99] Each of the parents fulfilled different needs for the child, but both parents provided permanence, security, and stability.[100] The trial court essentially faulted the plaintiff for her full-time employment and treated her as less than a full parent, which was error.[101]

Additionally erroneous were the trial court's findings on the best interests factors, which weighed in favor of the stay-at-home defendant

90. *Id.*
91. *Id.*
92. *Id.* at *1–2, *5.
93. *Id.* at *1.
94. *Id.* at *2.
95. *Id.*
96. *Id.* at *5.
97. *Id.* at *5–6.
98. *Id.* at *1.
99. *Id.* at *5.
100. *Id.*
101. *Id.*

even though there was evidence that the plaintiff was regularly and routinely involved in the child's care.[102] In considering factors (a) and (b) of the best interest factors under MCL 722.23, the trial court erroneously took the parties' agreement that the defendant stay home to mean that she had *more* love to give and a *greater* capacity to care for the child.[103] The court of appeals found it ironic that factor (c)—the capacity to provide the child with food, clothing, and medical care—was inconsistently found to have weighed in favor of both parties equally. This set up the conclusion that the plaintiff was faulted for working full-time outside the home in factors (a) and (b) but then was not credited for this same conduct in (c).[104] The court of appeals also reinforced the longstanding holdings that the court cannot use infidelity to measure a parent's moral fitness under factor (f) unless that infidelity interfered with the parent's ability to parent the child.[105] In using the mere fact of infidelity in analyzing factors (d) and (e) against the plaintiff, the trial court erred and treated the parties disparately since the defendant herself was married when she started her romantic relationship with the plaintiff.[106]

Finally, the trial court committed a factual error when evaluating factor (j).[107] There was undisputed testimony that the defendant immediately set a parenting schedule for the plaintiff.[108] However, the plaintiff testified that the schedule proposed by the defendant purposefully conflicted with her work schedule, leaving the plaintiff with no visitation with the child for a month.[109] Incidentally, the defendant denied additional requests for parenting time when the plaintiff took vacation days to spend with the child.[110]

Further, the trial court erred when it awarded sole legal custody to the defendant; there was no clear evidence that the parties could not agree on major decisions for the child.[111] While the trial court acknowledged incivility and lack of cooperation, the record was not clear that the parties could not agree on major decisions for the child.[112] The court of appeals remanded, reasoning that the parties' use of alternative communication

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102. *Id.*
103. *Id.*
104. *Id.* at *6.
105. *Id.* at *6–7.
106. *Id.* at *6.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at *7.
112. *Id.*

methods could ease the ability of both parties to cooperate and agree on major decisions.[113]

II. TERMINATION OF PARENTAL RIGHTS

A parent has a fundamental interest in the right to control his or her child's care and custody, and the state has to meet specific conditions to infringe on that right.[114] Child protective proceedings governed by the juvenile code, MCL 712A.1–712A.32, are bifurcated into two phases: "the adjudicative phase and the dispositional phase."[115] The adjudicative phase tests whether the court can assume jurisdiction over the children.[116] The dispositional phase outlines a course of action to ensure the child's safety and well-being, with the last resort being the termination of parental rights.[117] The burden in child protective proceedings lies with the petitioner to prove grounds for statutory termination of parental rights by clear and convincing evidence.[118]

A. Respondent Is Not Barred from Raising Error in Adjudicative Phase on Appeal from an Order Terminating Parental Rights

In re Ferranti presents a question of whether a parent who claims that errors occurred in the pleas during the initial disposition portion of the parental termination hearing is barred from challenging those errors at the later dispositional phase.[119] The Michigan Court of Appeals previously ruled in *In re Hatcher* that a parent was barred from raising errors from the adjudicative phase of child protective proceedings in the parent's appeal from an order terminating his or her parental rights, essentially treating the two phases of a child protective proceeding as two separate actions.[120]

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113. *Id.*

114. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *In re* Sanders, 495 Mich. 394, 409, 852 N.W.2d 524, 531 (2014).

115. *In re Sanders*, 495 Mich. at 404, 852 N.W.2d at 529. *See also* MICH. JUDICIAL INST., CHILD PROTECTIVE PROCEEDINGS BENCHBOOK: A GUIDE TO ABUSE & NEGLECT (4th ed. 2021).

116. *In re Sanders*, 495 Mich. at 404, 852 N.W.2d at 529.

117. *Id.*

118. *Id*. at 451, 852 N.W.2d at 555.

119. *In re* Ferranti, 504 Mich. 1, 934 N.W.2d 610 (2019).

120. *In re* Hatcher, 443 Mich. 426, 505 N.W.2d 834 (1993), *overruled by In re* Ferranti, 504 Mich. 1, 934 N.W.2d 610 (2019).

In *Ferranti*, the respondent-parents had several children, but their youngest required special medical care due to spina bifida and neurogenic bladder.[121] The Michigan Department of Health and Human Services (MDHHS) filed a petition to remove the young child from the respondents' care, alleging that the respondents failed to adequately attend to the child's medical needs by missing appointments, failing to refill prescriptions, maintaining a cluttered home that hindered the child's mobility in her wheelchair, and allowing unhygienic conditions that posed health risks to the child. [122] At the pre-adjudication status conference, the respondents admitted they had not refilled several of the child's medications though they could have filled them at no cost.[123] This admission allowed the trial court to exercise jurisdiction over the child.[124] The respondents pled at the initial disposition phase, but the trial court did not explain to the respondents that they were waiving any rights, discuss the consequences of their pleas, or advise the respondents that they could appeal the court's decision to take jurisdiction over the child as required by Michigan Court Rule (MCR) 3.971.[125]

In the dispositional phase, the trial court conducted an in-camera interview of the child but made no record and conducted a visit of the family's home.[126] The trial court ultimately terminated the parental rights as to the youngest child under the two statutory grounds of MCL 712A.19b(3)(c)(i) and MCL 712A.19(3)(g), determining that both grounds were satisfied by clear and convincing evidence because of the unhygienic household circumstances and lack of, or inability to create, hygienic conditions.[127]

The respondent-parents appealed based on the trial court's failure to advise the respondent-parents of their rights before taking their pleas and the trial court's dubious ability to fairly decide the termination as a result of an unrecorded visit to the family home and in-camera interview with the child.[128] The court of appeals affirmed the trial court, holding that the ruling in *Hatcher* prohibited it from considering the respondents' claim that the trial court violated their due process rights by failing to advise them of the consequences of their pleas.[129] Further, the court of appeals held that the home visit did not violate their due process rights and that the

121. *In re Ferranti*, 504 Mich. at 8, 934 N.W.2d at 613.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 8–12, 934 N.W.2d at 613–14.
126. *Id.* at 12, 934 N.W.2d at 615.
127. *Id.*
128. *Id.*
129. *Id.*

respondents waived their claim that the in-camera interview was in error.[130]

The Michigan Supreme Court disagreed with the appellate court, and as a preliminary matter, it abrogated *Hatcher*.[131] In so overruling, the court noted that the *Hatcher* rule prevented the respondent-parents from challenging the undisputed defects in their pleas, which gave the court jurisdiction to determine their rights in a termination hearing, when challenging the order terminating their parental rights.[132] The Michigan Supreme Court indicated that *Hatcher* represented a "foundational mistake" in applying the rule that a court's exercise of jurisdiction cannot be collaterally attacked in a second proceeding.[133] The court also noted that although termination proceedings have an adjudicative and dispositional phase, they are nonetheless one single, continual proceeding.[134] The court vacated the trial court's order of adjudication in *Ferranti* based on the respondent-parents' challenge to the plea.[135]

The Due Process Clause "requires that, for a plea to constitute an effective waiver of a fundamental right, the plea must be voluntary and knowing."[136] MCR 3.971(C)(1) and MCR 3.971(B) reflect this due process guarantee.[137] The way the trial court assumed jurisdiction in *Ferranti* violated the respondents' due process rights, and therefore, the court's ruling was plain error and affected the respondents' substantive rights.[138]

Additionally, the Michigan Supreme Court found that the trial court violated the respondent's due process rights by conducting an unrecorded in-camera interview of the child.[139] Consequently, the case was remanded to the trial court with a different judicial assignment.[140]

Justice Markman dissented, disagreeing that *Hatcher* needed to be overruled since it stood for the proposition that, for the sake of finality, an adjudication could not be collaterally attacked following an order

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130. *Id.*
131. *Id.* at 26, 934 N.W.2d at 622.
132. *Id.* at 29, 934 N.W.2d at 624.
133. *Id.* at 22, 934 N.W.2d at 620.
134. *Id.*
135. *Id.* at 30, 934 N.W.2d at 625.
136. *Id.* at 22, 934 N.W.2d at 620.
137. *Id.*
138. *Id.* at 30, 934 N.W.2d at 625.
139. *See In re* H.R.C., 286 Mich. App. 444, 781 N.W.2d 105 (2009). The Michigan Court of Appeals held that "the use of unrecorded, in camera interviews in termination proceedings violates the parents' due process rights" and consequently vacated the court's order terminating parental rights and remanded the case to a different trial judge. *Id.* at 455, 781 N.W.2d at 113.
140. *In re Ferranti*, 504 Mich. at 36, 934 N.W.2d at 628.

terminating parental rights where the adjudication was not attacked until after the respondents' parental rights were terminated in the disposition phase.[141] Justice Markman was notably concerned with the real-world implication of the majority's holding, stating that it would lead to "wasted time, money, resources . . . but most importantly it would risk disrupting whatever progress and rehabilitation the children might have made during that time."[142] Yet, in this case, the result would likely be the same: the termination of parental rights.[143] Additionally, Justice Markman pondered the majority's choice to overrule *Hatcher* when it had just amended its court rules to require the trial court to advise parents of their rights to appeal the initial dispositional order and of their inability to challenge it after their rights have been terminated, aside from two exceptions.[144]

In *In re Baham*, the respondent-mother was incarcerated when she gave birth to a baby girl.[145] At the time of the child's birth, the respondent-mother still had five years until her earliest release date, but she did not have a clear plan for the present placement of the infant, although she had three potential plans.[146] MDHHS filed a petition seeking custody of the infant while she was still in the hospital.[147] The respondent entered a plea of admission to allegations in the petition. The trial court found that, based on the plea, it had a statutory basis to assume jurisdiction of the infant, who had been temporarily placed with the respondent's brother.[148] The respondent was provided with a case services plan, which she fully complied with and made remarkable progress on while she was incarcerated.[149] Despite this, the trial court found statutory grounds existed to terminate the respondent-mother's parental rights and that termination was in the infant's best interests.[150]

The respondent challenged the finding of jurisdiction, but she did not challenge it until after the dispositional phase and the court's order to terminate her parental rights.[151] Applying the plain-error standard from *In re Ferranti*, the court of appeals found that the trial court could exercise jurisdiction under MCL 712A.2(b) based on the respondent's testimony

141. *Id.* at 36–57, 934 N.W.2d at 628–39.
142. *Id.* at 50, 934 N.W.2d at 635.
143. *Id.*
144. *Id.* at 36, 934 N.W.2d at 628.
145. *In re* Baham, 331 Mich. App. 737, 742, 954 N.W.2d 529, 532 (2020).
146. *Id.* at 742, 954 N.W.2d at 532–33.
147. *Id.*, 954 N.W.2d at 533.
148. *Id.* at 742–43, 954 N.W.2d at 533.
149. *Id.* at 743–744, 954 N.W.2d at 533–34.
150. *Id.* at 744, 954 N.W.2d at 534.
151. *Id.* at 744–45, 954 N.W.2d at 534.

that she did not have an appropriate plan for the infant's care.[152] The court went further, noting that even if the respondent could show plain error, she could not establish how that plain error affected her substantial rights.[153] When the respondent-mother argued that the trial court erred by finding statutory grounds to terminate her parental rights, the court of appeals found the evidence insufficient to establish by clear and convincing evidence that the three conditions found in MCL 712A.19b(3)(h) were met to terminate her parental rights.[154] Under this statute, termination is proper when:

> The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding [two] years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.[155]

While it was clear that the respondent-mother would be imprisoned for a period exceeding two years, the respondent's inability to *personally* care for the child was not dispositive because she provided for the child's proper care and custody by placing him with her brother.[156] Further, the respondent-mother's strict adherence to the case services plan and the progress she made in prison meant there was insufficient evidence to show the third requirement—that there is no reasonable expectation that the parent will be able to provide for proper custody and care—had been met.[157] There was also insufficient evidence to show that there was a reasonable likelihood that the infant would be harmed if returned to the respondent's care, under MCL 712A.19b(3)(h), based on the progress that the respondent made in prison.[158] Determining that the trial court clearly erred when it found statutory grounds to terminate the respondent's parental rights under MCL 712A.19b(3)(h) and (j), the court vacated the trial court's termination order.[159]

In a concurring/dissenting opinion, Judge Gleicher found error with the circuit court taking jurisdiction in the first place; the child was not "without proper care or custody" at the time of the adjudication hearing,

152. *Id.* at 745, 954 N.W.2d at 534.
153. *Id.*
154. *Id.* at 758, 954 N.W.2d at 541.
155. *Id.* at 753, 954 N.W.2d at 538.
156. *Id.* at 754, 954 N.W.2d at 539.
157. *Id.* at 755, 954 N.W.2d at 539–40.
158. *Id.* at 758–59, 954 N.W.2d at 541.
159. *Id.* at 759, 954 N.W.2d at 541.

being in the care of the respondent's brother. That fact should have precluded a finding of jurisdiction.[160] Judge Gleicher noted that "a plea of admission" by the respondent did not excuse a court "of its responsibility to verify a plea's accuracy[,]" citing MCR 3.971(D)(2).[161]

B. A Plea Made at the Adjudicative Phase Must Meet Due Process Guarantees to Be Knowing and Voluntary

The importance of a "knowing" plea under the Due Process Clause to ensure proper jurisdiction of the court in the adjudicative phase of a child protective proceeding cannot be overstated. For the court to exercise jurisdiction over the child and the respondent-parents, either the respondent-parent must enter a plea of admission or of no contest to the allegations in the petition or the MDHHS must provide proof that the allegations in the petition satisfy statutory grounds at trial.[162] This step is crucial because it "protects the parents from the risk of erroneous deprivation of their parental rights" and divests a parent of his or her constitutional right to parent the child.[163]

Distinguishing *Ferranti*, the Michigan Court of Appeals in *In re Pederson* found that while the trial court erred in not advising the respondent-parents that their pleas could be used to terminate their parental rights, the respondents failed to establish how that error was outcome-determinative.[164] In *Pederson*, the trial court gave the respondent-parents an abbreviated advice of rights regarding the effect of their pleas to the jurisdiction on a petition to terminate their parental rights.[165] The respondent-parents' rights were subsequently terminated on a supplemental petition, which used their pleas for the purpose of establishing jurisdiction.[166] Applying the plain-error standard to unpreserved claims in child protective proceedings, the court of appeals held that the trial court erred in not advising, as required by MCR 3.971, the parents that their pleas to jurisdiction could later be used in a termination proceeding.[167] However, despite this error, under the plain-error test's prejudice prong, the respondent-parents failed to prove that the

160. *Id.* at 767, 954 N.W.2d at 546. (Gleicher, J., concurring in part and dissenting in part).
161. *Id.* at 773, 954 N.W.2d at 548.
162. *See* MICH. CT. RS. 3.971, 3.972.
163. *In re* Sanders, 495 Mich. 394, 405, 852 N.W.2d 524, 529 (2014).
164. *In re* Pederson, 331 Mich. App. 445, 466, 951 N.W.2d 704, 716 (2020).
165. *Id.* at 448–49, 951 N.W.2d at 707.
166. *Id.* at 451, 951 N.W.2d at 709.
167. *Id.* at 467, 951 N.W.2d at 717.

error was outcome-determinative.[168] Unlike *In re Ferranti*, in which a complete lack of advisement tainted the entire adjudicative phase, here, the respondents were informed of most of their rights.[169] Most notably, the respondents were advised that if they failed to comply with the case service plans, their rights could be terminated.[170]

C. The Doctrine of Anticipatory Neglect Does Not Automatically Authorize a Court to Assume Jurisdiction over All Children

Is once a bad parent, always a bad parent really the case? The court in *In re Kellogg* answered in the negative.[171] "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ."[172] In *Kellogg*, MDHHS filed a petition to remove both of the respondent-mother's children, which focused almost exclusively on allegations of improper care and custody regarding the older child.[173] As it related to the younger child, the petition asserted only that the respondent had become verbally aggressive with the young child and could not regulate her emotional state when responding to him.[174] The trial court assumed jurisdiction over both children, and the respondent-mother appealed, arguing that the trial court erred in finding ground to take jurisdiction over the younger child.[175]

The Michigan Court of Appeals agreed, finding no independent factual basis for the trial court to assume jurisdiction over the younger child based on its jurisdiction over the older child.[176] The assumption of jurisdiction over one minor child does not automatically mean there are statutory grounds for jurisdiction over a second child.[177] The petitioner, MDHHS, argued for jurisdiction over the younger child, using the respondent-mother's overall mental health, her yelling and swearing at the younger child, her neglect of the younger child's educational needs, her failure to provide the younger child with consistent rules and routine, and her difficultly managing the younger child's wants.[178] However, the court

168. *Id.* at 470, 951 N.W.2d at 718.
169. *Id.*
170. *Id.* at 471, 951 N.W.2d at 719.
171. *In re* Kellogg, 331 Mich. App. 249, 952 N.W.2d 544 (2020).
172. *Id.* at 258, 952 N.W.2d at 549 (quoting Santosky v. Kramer, 455 U.S. 745 (1982)).
173. *Id.* at 251–52, 952 N.W.2d at 545–46.
174. *Id.* at 252, 952 N.W.2d at 546.
175. *Id.* at 253, 952 N.W.2d at 546.
176. *Id.* at 258–59, 952 N.W.2d at 549.
177. *Id.* at 254, 952 N.W.2d at 546–47.
178. *Id.* at 255, 952 N.W.2d at 547.

of appeals determined that a yelling parent, standing alone, does not prove a parent's lack of fitness under MCL 712A.2(b) because it fails to show a substantial risk to the child's mental well-being and does not establish that the child's home environment is unfit.[179] Even under the doctrine of anticipatory neglect, the trial court had an insufficient basis to establish jurisdiction.[180] The doctrine of anticipatory neglect recognizes that the way parents treat one child may be probative of how they may treat other children.[181] While the court did not overturn the doctrine, it instead elucidated that it is not always sufficient to demonstrate a parent's lack of fitness.[182] Specifically, differences between the children diminish the probative value of using the doctrine.[183] The court in *Kellogg* found the following factors did not warrant a finding of jurisdiction based on anticipatory neglect: (i) there was a nine-year age difference between the older child and younger child; (ii) the older child had markedly different needs from the younger child due to mental injury and additional traumas; and (iii) the respondent did not treat the children equally and showed clear favoritism toward the younger child and had a better bond with the younger child.[184] Given the substantial differences between the two children, the court found that the doctrine was not sufficient to establish jurisdiction in this case over the younger child.[185]

D. Petitioner Bears the Challenging Burden of Proof in Parental Termination Cases for a Reason

The Michigan Supreme Court in *In re Curry* recognized the demanding evidentiary standard and burden of proof when it reversed the trial court's termination of the respondent-parent's parental rights of three minor children.[186] The court based its decision on one child's affirmative response to a leading question in a forensic interview, concluding that the respondent-father had sexually abused her and that the respondent-mother threatened the children with punishment if they discussed the allegation.[187] Having previously been remanded to the trial court, the trial court held an evidentiary hearing and again terminated the respondent-parents' parental

179. *Id.* at 256–57, 952 N.W.2d at 546.
180. *Id.* at 258–61, 952 N.W.2d at 549–50.
181. *Id.* at 259, 952 N.W.2d at 549.
182. *Id.* at 259–61, 952 N.W.2d at 549–50.
183. *Id.*
184. *Id.*
185. *Id.*
186. *In re* Curry, 505 Mich. 989, 938 N.W.2d 735 (2020).
187. *Id.*, 938 N.W.2d at 736.

rights.[188] Although the court of appeals correctly applied the clear and convincing evidence standard in the appeal, the Michigan Supreme Court stated that a review of the entire record left it with a definite and firm conviction that a mistake had been made.[189]

The statutory grounds for termination of both parents' rights based on allegations that a child had been sexually assaulted were simply not established.[190] The decision to terminate the parents' rights was based on two open-ended questions and one leading question posed to the three-year-old and a statement made by the six-year-old that they would be punished for discussing the allegations.[191] The trial court incorrectly placed the burden on the respondent-father to explain why the three-year-old had made the statement.[192] Furthermore, although the mother had stated the children would receive a "whooping" if they talked about the allegations, the court noted that this was a six-year-old child's "hearsay" accounts. It was unclear whether the statements made were an actual attempt to thwart the investigation into the allegations.[193]

E. Relevancy and Weight of Medical Marijuana and Alcohol Use in Termination Cases

The use of medical marijuana by a parent does not equate to automatic risk of harm to the child sufficient to terminate that parent's rights.[194] The parental termination proceedings of *In re Richardson* started when the infant tested positive for the presence of marijuana at birth.[195] The respondent-mother's rights to her two older children had already been terminated due to substance abuse and methamphetamine production.[196] MDHHS filed a petition, claiming the mother had failed to benefit from MDHHS services, had knowingly used marijuana while pregnant, and had placed the newborn at an unreasonable risk of harm through her substance abuse during pregnancy.[197] Contemporaneous with the termination proceedings, the respondent-mother began a self-initiated inpatient substance abuse treatment program, enrolled in a parenting class, and

188. *Id.*, 938 N.W.2d at 737.
189. *Id.*
190. *Id.*, 938 N.W.2d at 737–38.
191. *Id.*, 938 N.W.2d at 738.
192. *Id.*
193. *Id.*
194. *In re* Richardson, 329 Mich. App. 232, 253 (2019).
195. *Id.* at 235.
196. *Id.*
197. *Id.*

started getting her seizures under control through medication rather than the use of medical marijuana.[198]

At the initial hearing, the mother admitted that she had not previously been working with a neurologist because the medical marijuana was alleviating her seizures, but she wanted her baby back, so she would "play the battle with medication."[199] The referee heard testimony from two doctors about the proper usage of marijuana to treat seizures and from the mother about the necessity of medical marijuana.[200] Despite this testimony, the referee ordered that the marijuana usage stop, even though there were no incidents during the respondent-mother's parenting time.[201] The referee further concluded that the respondent-mother was using her seizures as a pretense to use marijuana.[202] The respondent-parents' parental rights were terminated under MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(g).[203] However, on appeal, the court of appeals noted that the referee placed far too great an emphasis on the respondent-mother's consumption of medical marijuana without explaining whether the continued marijuana use had any actual negative effect on her parenting ability, absent supporting evidence.[204] During her parenting-time visits, the respondent-mother acted appropriately and never appeared impaired. In the absence of medical marijuana, the respondent-mother's seizures may have worsened, impairing her parenting ability.[205] The court of appeals stated that the referee adhered to his "preconceived opinions" on marijuana and that it is not the mere undesirable acts of parents that justify terminating their parental rights but rather there must be an actual showing of harm or risk to the children resulting from these acts.[206] The Michigan Medical Marihuana Act[207] explicitly states, "[a] person shall not be denied custody or visitation of a minor for acting in accordance with [this] act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated."[208]

During the proceedings, MDHHS also modified its petition to include the respondent-father, who at the time of the petition had been incarcerated but was released from incarceration by the time of the final disposition

198. *Id.* at 238.
199. *Id.* at 238–39.
200. *Id.* at 244–45.
201. *Id.* at 246.
202. *Id.*
203. *Id.* at 248.
204. *Id.* at 248–50.
205. *Id.* at 252.
206. *Id.* at 253.
207. MICH. COMP. LAWS §§ 333.26421–333.26430 (2008).
208. *In re Richardson*, 329 Mich. App. at 247.

hearing.[209] As to the termination of the father's parental rights, the court of appeals held that the record did not support terminating the father's parental rights, especially on the basis of the mother's marijuana use.[210] While the trial court found fault with the father for working demanding hours upon his release from prison, the appellate court disagreed. The court of appeals called it a "Catch-22" for parents in child protective proceedings, where they are considered neglectful if they have inadequate employment or if the employment is inflexible, without considering the nature of employment for which the parent might be qualified.[211]

While the court of appeals vacated the termination of both parents' rights in *Richardson*, which involved the use of marijuana, the court upheld the termination of a mother's parental rights in *Rippy*, where the infant was born with fetal alcohol syndrome.[212] Notably, the court of appeals in *Rippy* held that the trial court was not required to make reasonable efforts to reunite the respondent-mother and the infant before terminating her rights.[213] The court reasoned that terminating the respondent-mother's parental rights was warranted because the respondent-mother subjected the child to aggravated harm, meeting an exception to reunification efforts under MCR 3.977(E).[214] The mother-respondent argued that a guardianship should have been established for the infant and that the grandmother was willing to serve as guardian.[215] The court of appeals found no merit in this argument as the facts did not support the trial court considering guardianship under MCL 712A.19a(8).[216] The trial court found that it was in the infant's best interests to terminate the parental rights of the respondent-mother, as the respondent-mother had a long history of alcohol abuse and untreated mental health issues and the infant already had extensive health issues that the respondent-mother could not manage.[217] Further, there was no indication in the record that the grandmother was willing to serve as guardian; there was no petition for guardianship.[218]

209. *Id.* at 236, 249.
210. *Id.* at 256.
211. *Id.* at 256 n.13.
212. *In re* Rippy, 330 Mich. App. 350, 354, 948 N.W.2d 131, 133 (2019).
213. *Id.* at 359, 948 N.W.2d at 135–36.
214. *Id.* at 358, 948 N.W.2d at 135.
215. *Id.* at 359, 948 N.W.2d at 135–36.
216. *Id.*
217. *Id.* at 360–62, 948 N.W.2d at 136–37.
218. *Id.* at 359, 948 N.W.2d at 135–36.

F. Interplay Between the Adoption Code and Paternity Act

The cases of *In re MGR* and *In re LMB* highlight the interplay between the Paternity Act[219] and the Michigan Adoption Code.[220]

The petitioners in *In re MGR* filed an adoption petition four days after the birth of MGR, and the respondent-father subsequently filed a paternity action one month later.[221] The trial court, sua sponte, stayed the adoption proceedings pending resolution of the paternity action.[222] After appeal, the court of appeals directed the trial court to commence and issue an opinion on the adoption hearings, which the trial court did.[223] However, it also subsequently entered an order of filiation one month after the Section 39[224] opinion over the birth mother's requests to stay the paternity proceedings.[225] The petitioners appealed the Section 39 ruling, and the court of appeals found the ruling appeal moot due to the order of filiation.[226]

The Michigan Supreme Court clarified that although the Paternity Act and Michigan Adoption Code have competing interests, under MCL 710.25(1), "[a]ll proceedings under [the Michigan Adoption Code] shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition."[227] Adoption proceedings may be stayed only based upon a showing of good cause.[228] The petitioner's appeal was not moot, where the paternity action should have been stayed, pending the resolution of the adoption proceedings, which necessarily included the appeal of the Section 39 opinion.[229] The order of filiation, entered after the appeal of the adoption proceeding was filed, was erroneously entered; the denial of the birth mother's motions to stay constituted an abuse of discretion by the trial court.[230] The Michigan Supreme Court went a step further to vacate the trial court's determination that the putative father should receive

219. MICH. COMP. LAWS §§ 722.711–722.730 (1956).
220. MICH. COMP. LAWS §§ 710.21–710.70 (1999).
221. *In re* MGR, 504 Mich. 852, 852, 928 N.W.2d 184, 185 (2019).
222. *Id.*
223. *Id.*
224. A hearing held under MICH. COMP. LAWS § 710.39 of the Michigan Adoption Code, MICH. COMP. LAWS §§ 710.21–710.70.
225. *In re MGR*, 504 Mich. at 852, 928 N.W.2d at 185.
226. *Id.*, 928 N.W.2d at 186.
227. *Id.*, 928 N.W.2d at 185.
228. *See In re* MKK, 286 Mich. App. 546, 555, 781 N.W.2d 132, 139 (2009) (citing MICH. COMP. LAWS § 710.25(2)).
229. *In re MGR*, 504 Mich. at 852, 928 N.W.2d at 186.
230. *Id.*

protection as a "do something" father under MCL 710.39(2) of the Michigan Adoption Code.[231]

In a concurring opinion, Justice Markman stated he would have taken a stronger approach than the majority opinion, noting that the Legislature's intent was unequivocally clear under MCL 710.25(1) that the adoption proceedings *must* take priority and that there is no good cause exception because *In re MKK*[232] was wrongly decided.[233]

In dissent, Justice Viviano articulated that the father in *MGR* satisfied the good cause analysis under *In re MKK* in that he timely asserted his rights by refusing consent to the adoption proceedings and that his filing of a separate paternity action was not an attempt to thwart the adoption proceeding.[234] Justice Viviano also disagreed with the majority opinion, finding that the respondent-father qualified as a "do something" father and protecting his parental rights under MCL 710.39(2). The respondent-father offered the birth mother a place to live, obtained medical care for the birth mother's daughter, bailed the birth mother out of jail, and called child protective services to ensure the birth mother and unborn child received medical care.[235] MCL 710.39(2) reads that a "do something" father can be established when he has "provided substantial and regular support or care *in accordance with the putative father's ability* . . . ."[236] Moreover, Justice Viviano believed the trial court did not abuse its discretion in finding that the respondent-father's actions demonstrated good cause.[237] Notably, Justice Viviano believed that *In Re MKK* "represents an admirable effort by the [c]ourt of [a]ppeals to balance the competing rights, interests and responsibilities of the parties when determining whether to go forward with the proceedings under the Adoption Code or a case filed under the Paternity Act."[238] Justice Viviano disagreed with the majority and found that the trial court was correct to apply the good-cause analysis from *In re MKK*.[239]

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231. *Id.*, 928 N.W.2d at 186–87.

232. The court of appeals in *In re MKK* analyzed a father's petition to stay the adoption petition pending a ruling in his paternity action under the "good cause" standard, and it found good cause to stay the adoption proceeding. *In re MKK*, 286 Mich. App. at 546, 563, 781 N.W.2d at 132, 142–43. The *MKK* court analyzed the interplay between the Adoption Code and Paternity Act and indicated that it was not a constitutional issue but primarily found it to be an issue of statutory construction on a case-by-case basis. *Id.* at 555, 781 N.W.2d at 138–39.

233. *In re MGR*, 504 Mich. at 852, 928 N.W.2d at 187–88.

234. *Id.* at 859–68, 928 N.W.2d at 191–98.

235. *Id.* at 867, 928 N.W.2d at 196–97.

236. *Id.*, 928 N.W.2d at 196.

237. *Id.* at 866, 928 N.W.2d at 195.

238. *Id.* at 862, 928 N.W.2d at 193.

239. *Id.* at 866–67, 928 N.W.2d at 195.

The Michigan Supreme Court decided another adoption case involving a paternity action on the same day as *In re MGR*.[240] After his birth, LMB was placed with petitioners, who filed to adopt LMB.[241] The respondent-father, who had not been established as the legal father, objected to the adoption, and the case proceeded to a hearing under MCL 710.39(1) of the Michigan Adoption Code.[242] At the contested hearing, the trial court declined to terminate the respondent-father's rights and reinstated the birth mother's parental rights.[243] The petitioners appealed the ruling and, while the appeal was pending, requested a stay in the respondent-father's pending paternity action filed after the contested hearing had already started.[244] The trial court in the paternity action denied the stay and entered an order of filiation while the adoption case was pending.[245] A separate appeal ensued, and the court of appeals reversed the trial court's order denying the stay of the paternity proceedings, noting that adoption proceedings have the highest priority and may be stayed only upon a showing of good cause on a case-by-case basis.[246]

The Michigan Supreme Court reversed the court of appeals opinion, dismissing the petitioner's appeal in the paternity action as moot, and vacated the trial court's opinion, reinstating the birth mother's parental rights.[247] In so doing, the court found that the trial court abused its discretion in the adoption proceeding in declining to terminate the respondent-father's rights, reasoning that under MCL 710.62, if it is not in the best interests of the child to grant custody to the putative father, the court *shall* terminate his rights to the child.[248] The evidence at the Section 39 hearing established that it would not have been in the best interest of the child to grant custody to the respondent-father, and therefore, the trial court was mandated to terminate his rights at that hearing.[249] Further, the collateral reinstatement of the birth mother's parental rights at the hearing was also an abuse of discretion.[250] Justice Viviano dissented from the majority opinion, relying on the good cause standard enunciated in *In re MKK*, but he nonetheless agreed with the ultimate result since he believed

240. *In re* LMB, 504 Mich. 869, 928 N.W.2d 181 (2019).
241. *Id.* at 869, 928 N.W.2d at 181.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*, 928 N.W.2d at 181–82.
246. *Id.*, 928 N.W.2d at 182.
247. *Id.*, 928 N.W.2d at 181.
248. *Id.*, 928 N.W.2d at 181–82.
249. *Id.*
250. *Id.*

that applying the good cause analysis reached the same result as that of the majority.[251]

III. PROCEDURAL CONSIDERATIONS

The Servicemembers Civil Relief Act (SCRA) is federal law enacted in 2003 and amended after that to provide certain benefits and protections to those men and women who put their obligations and affairs on hold to take up the "burdens of the nation."[252] Particularly, the SCRA protects servicemembers against default judgments in civil actions when the servicemembers cannot appear because of their active duty military service.[253] One of the provisions under the SCRA lays out the mechanism to request a stay of an open court matter.[254] *Johnson* dealt with an interpretation of that mechanism.

In *Johnson*, the plaintiff-mother was on active duty as a medical review worker in the United States Army.[255] Several post-judgment motions were filed, alleging that the mother should be held in contempt for parenting-time violations.[256] The plaintiff-mother failed to appear for several show-cause hearings and requested a stay of the proceedings under the SCRA based on her status by submitting a letter authored and signed by her.[257] The court ordered the plaintiff-mother to appear telephonically; instead, the plaintiff-mother submitted another letter signed by her commanding officer with her anticipated possible date of availability.[258] When she did not appear, the trial court denied the stay, specifying that the letter did not satisfy the conditions for a mandatory stay under the SCRA.[259] Ultimately, after the plaintiff-mother failed to show up to a subsequent hearing, the court ordered the plaintiff-mother to transfer custody of the children to the father for temporary physical placement, and it suspended her driver's license and other occupational licenses as part of its enforcement powers.[260]

To apply for a stay under the SCRA, a servicemember's petition must contain two key components.[261] First, the servicemember must submit a

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251. *Id.* at 870, 928 N.W.2d at 183.
252. *See* 50 U.S.C. §§ 3901–4043 (2004); *see also* Johnson v. Johnson, 329 Mich. App. 110, 119, 940 N.W.2d 807, 813 (2019).
253. 50 U.S.C. § 3931.
254. 50 U.S.C. § 3932.
255. *Johnson,* 329 Mich. App. at 115, 940 N.W.2d at 811.
256. *Id.*
257. *Id.* at 116, 940 N.W.2d at 811.
258. *Id.* at 117, 940 N.W.2d at 812.
259. *Id.*
260. *Id.* at 118, 940 N.W.2d at 812.
261. *Id.* at 120, 940 N.W.2d at 813.

"letter or other communication setting forth facts stating how current military duty requirements materially affect the servicemember's ability to appear"[262] *and* a date when the servicemember will be available to appear.[263] Second, the service member must submit a letter or other communication from the commanding officer stating that the servicemember's current military duty prevents appearance *and* that military leave is not authorized for the servicemember at the time of the letter.[264]

On appeal, the Michigan Court of Appeals upheld the trial court's ultimate finding that, while the trial court erred in determining that the information needed to be in two separate documents, the letter submitted by the plaintiff-mother was nonetheless insufficient to satisfy the requirements of a mandatory stay.[265] Specifically, the fact that the plaintiff-mother authored the letter did not violate the first prong, since the first prong, unlike the second prong, did not have a requirement as to who is to make the statements.[266] Nonetheless, the letter authored by the plaintiff-mother and signed by her commanding officer was insufficient to satisfy the conditions of the first prong. The plaintiff-mother stated only in general terms that her workload had increased due to the Global War on Terrorism but did not state how those duties *materially affected* her ability to appear.[267] Additionally, her request only offered a *potential* date on which she might be able to appear *telephonically*.[268] Under the SCRA, she was expected to provide a clear date.[269] The trial court did not err in denying the request for stay under the SCRA.[270]

On the order for temporary physical placement of the children with the defendant-father, the trial court abused its discretion because it did not hold an evidentiary hearing, make the necessary determinations, or provide the required notice.[271] The trial court must also determine whether the change of custody is in the children's best interests and make specific findings of fact regarding each of the twelve statutory best-interest factors of MCL 722.23.[272] The trial court did not do this, and furthermore, it did

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262. 50 U.S.C. § 3932(b)(2)(A).
263. *Id.*
264. 50 U.S.C. § 3932(b)(2)(B).
265. *Johnson,* 329 Mich. App. at 123–25, 940 N.W.2d at 815–16.
266. *Id.* at 123, 940 N.W.2d at 815.
267. *Id.* at 124, 940 N.W.2d at 815–16.
268. *Id.* at 125, 940 N.W.2d at 816.
269. *Id*.
270. *Id.*
271. *Id.* at 129, 940 N.W.2d at 818.
272. *See id.* at 128–29, 940 N.W.2d at 817–18; *see also* MICH. COMP. LAWS § 722.23 (2016).

not even determine whether there was proper cause or a change of circumstances, or an established custodial environment, before ordering the temporary placement of the children with the defendant-father.[273]

Interestingly, the temporary order of placement had a statement in it that it was entered "ex parte."[274] However, while the court of appeals clarified that a court could enter an ex parte custody order under MCR 3.207(B) so long as specific facts pled set forth irreparable injury, loss, or damage required from the delay to effect notice, a trial court should not be permitted to frustrate the purpose of the law by issuing ex parte orders without any notice to the custodial parent or a hearing on the issue by calling it "ex parte" without making any threshold finding.[275]

IV. VETERAN BENEFITS FEDERAL PREEMPTION

Foster involved a discussion of federal preemption over state court's subject matter jurisdiction when a judgment of divorce has been entered with an offset provision related to veteran benefits.[276] The parties entered a consent judgment in December 2008 that entitled the plaintiff-wife to fifty percent of the defendant-husband's military pension earned during the marriage, which the defendant-husband was already collecting.[277] At the same time, the defendant-husband was also receiving military disability benefits after suffering serious and permanent disabling combat injuries.[278]

The parties agreed that the defendant-husband's disability benefits were not subject to division by the court because they were not marital property under federal law.[279] The consent judgment of divorce awarded the plaintiff-wife fifty percent of the defendant-husband's disposable retirement pay that accrued during the marriage.[280] Under federal law, in order to avoid double payment, veterans who receive retirement and disability pay must give up an amount of retirement pay equivalent to the disability pay.[281] It is beneficial to the veteran recipient more often than not to elect to receive disability benefits since they are not taxable, and

273. *Id.* at 129, 940 N.W.2d at 818.
274. *Id.* at 129–30, 940 N.W.2d at 818.
275. *Id.* at 130–31, 940 N.W.2d at 818–19.
276. Foster v. Foster, 505 Mich. 151, 949 N.W.2d 102, *reh'g denied*, 506 Mich. 851, 945 N.W.2d 842 (2020).
277. *Id.* at 155, 949 N.W.2d at 103.
278. *Id.* at 157, 949 N.W.2d at 105.
279. *Id.*
280. *Id.*
281. *Id.* at 162, 949 N.W.2d at 108.

retirement benefits are.[282] As such, the parties also agreed that if the defendant-husband elected to receive Combat-Related Special Compensation (CRSC), a form of military disability benefits, he would directly pay any reduction in the retirement benefit that his wife was entitled to receive as a result of that election since he would have to give up retirement pay equivalent to his disability pay election.[283] In turn, this would reduce the plaintiff-wife's entitlement to fifty percent of the retirement pay.[284]

In February 2010, the defendant-husband made the election to receive disability in lieu of retirement benefits, reducing the plaintiff-wife's monthly benefit.[285] Under the judgment, the defendant-husband was required to pay the plaintiff-wife the reduction in her share directly as a result of this election.[286] The defendant-husband, however, refused to follow the terms of the consent judgment and failed to pay the difference to the plaintiff-wife.[287] As a result, there were numerous post-judgment enforcement hearings where the trial court found the defendant-husband in contempt of the judgment and ordered him to pay, guaranteed by an appearance bond secured with a lien on his mother's home.[288]

On appeal to the Michigan Court of Appeals, the defendant-husband argued that the trial court erred by not finding that the consent judgment, as it applied to the CRS arrangement, was preempted by federal law.[289] The court of appeals affirmed the trial court's ruling and held that the federal law did not preempt their agreement.[290] The defendant-husband sought leave to appeal to the Michigan Supreme Court, which remanded the case back to the court of appeals in light of the opinion of the Michigan Supreme Court in *Howell v. Howell*.[291] The court of appeals distinguished *Howell* and again affirmed the trial court's ruling.[292]

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282. *Id.*
283. *Id.* at 105.
284. *Id.* at 163, 949 N.W.2d at 108.
285. *Id.* at 158–59, 949 N.W.2d at 105–06.
286. *Id.* at 157, 949 N.W.2d at 105.
287. *Id.* at 159, 949 N.W.2d at 106.
288. *Id.* at 160, 949 N.W.2d at 106.
289. *Id.* at 158, 949 N.W.2d at 106.
290. *Id.*
291. 137 S. Ct. 1400 (2017). The *Howell* case dealt with general service-connected disability pay under a different section than CRSC benefits, reiterating that "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property." *Id*. at 1405.
292. *Foster*, 505 Mich. at 168, 949 N.W.2d at 110. The court of appeals in *Foster* overruled *Megee v. Carmine*, 290 Mich. App. 551, 574–75, 802 N.W.2d 669, 681 (2010), which distinguished CRSC under Title 10 from general service-connected disability pay in Title 38, as binding precedent. *Foster*, 505 Mich. at 161, 949 N.W.2d at 107. In *Megee*, the court held that:

The defendant-husband again applied for leave to appeal, arguing that CRSC is precluded from being considered disposal retirement pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), and therefore, federal law preempts the states from exercising jurisdiction over these benefits, including division of such benefits.[293]

In a thorough discussion on the federal framework for military retirement and disability pay and the Supremacy Clause of the United States Constitution, the Michigan Supreme Court overruled the precedent in *Megee v. Carmin* and determined that the same principles in *Howell* were applicable to the instant case.[294] The Michigan Supreme Court noted that while *Howell* did not concern CRSC specifically, it nonetheless is applicable to such benefits. It relied on the several instances that the Supreme Court of the United States granted certiorari and vacated state court judgments because of federal preemption as to waived retirement pay for veterans.[295]

While the USFSPA allows state courts to treat disposable retired pay as divisible property in a divorce, it nonetheless does not grant states the power to address military retirement pay that has been waived to receive disability benefits.[296] Where *Megee* opposes the United States Supreme Court's efforts to preclude the states from doing so by enacting federal legislation preempting state's powers, *Megee* must be overruled.[297] As such, *Howell* and federal preemption precludes a provision in a judgment of divorce that entitles a nonveteran former spouse to receive payments equal to what she would have received if the veteran spouse had not elected to waive his retirement pay in order to obtain CRSC.[298]

Although the plaintiff-wife in *Foster* tried to distinguish *Howell* based on the fact that the parties consented to her continued receipt of funds equal to what she would have received had her husband not elected to receive CRSC, the Michigan Supreme Court disagreed. It noted that an agreement such as the consent judgment that provided the plaintiff-wife

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> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment.

Megee, 290 Mich. App. at 566–67, 802 N.W.2d at 677–78.

293. *Foster*, 505 Mich. at 161, 949 N.W.2d at 107.

294. *Id.* at 173–74, 949 N.W.2d at 114.

295. *Id.* at 167, 949 N.W.2d at 110–11.

296. Mansell v. Mansell, 490 U.S. 581, 594–95 (1989).

297. *Foster*, 505 Mich. at 172, 949 N.W.2d at 113–14.

298. *Id.* at 168, 949 N.W.2d at 111.

with this is an impermissible "assignment" prohibited by 38 U.S.C § 5301(a)(3)(A).[299]

Notably, the concurring opinion by Justice Viviano provides a full analysis in finding that not all types of federal preemption deprive state courts of subject matter jurisdiction.[300] State courts are only deprived of subject matter jurisdiction over federal law claims where Congress has not designated a federal forum for resolution of the class of disputes at issue.[301]

V. MEDIATION PROTOCOL

Mediations in domestic relations matters have a high rate of successful resolution.[302] The keys to success in domestic relations mediations are that the parties are allowed to resolve their disputes privately and are empowered to be the captains of their futures. MCR 3.216 provides the framework for domestic relations mediations.[303] The court rule was amended in 2017 to require a mediator to screen for the presence of domestic violence throughout the mediation process.[304] *Pohlman* addressed the question of whether a party may seek to overturn a consent judgment of divorce if the mediator does not screen for domestic violence during mediation.[305]

In *Pohlman*, the parties settled the outstanding issues in their divorce at mediation and signed a settlement term sheet containing the essential terms of resolution at mediation.[306] At the mediation, both parties were represented by counsel. The parties did not interact with each other at mediation because the mediator used shuttle-type mediation between the parties; the mediator was experienced, and the time spent at mediation was

299. *Id.* at 170–71, 949 N.W.2d at 112–13. *Foster* cited 38 U.S.C. § 5301(a)(3)(A) (2004), which provides that where a beneficiary entitled to compensation enters into an agreement with another person under "which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation . . . such agreement shall be deemed to be an assignment and is prohibited." *See id.*; *see also Foster*, 505 Mich. at 173, 949 N.W.2d at 113.

300. *Foster*, 505 Mich. at 186–87, 949 N.W.2d at 121–25.

301. *Id*. at 187, 949 N.W.2d at 121.

302. COURTLAND CONSULTING, EFFECTIVENESS OF CASE EVALUATION AND MEDIATION IN MICHIGAN CIRCUIT COURTS (2011).

303. MICH. CT. R. 3.216.

304. MICH. CT. R. 3.216(H)(2). MICH. CT. R. 3.216(H)(2) requires the mediator to make reasonable inquiry as to whether either party has a history of coercion or violent relationship that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. *Id.*

305. Pohlman v. Pohlman, No. 344121, 2020 WL 504775 (Mich. Ct. App. Jan. 30, 2020).

306. *Id.* at *1.

not out of the ordinary.[307] The defendant-husband moved to enter a consent judgment of divorce incorporating the settlement term sheet signed by the parties at mediation, and the plaintiff-wife objected, claiming she did not knowingly enter into the judgment.[308] The trial court rejected her arguments and rejected her reconsideration motion that alleged she was subjected to duress and coercion at mediation and did not understand what she was signing.[309] Later, the plaintiff-wife argued that the mediation was invalid because the parties did not undergo proper domestic violence screening under MCR 3.216(H)(2), claiming in an affidavit that she was the victim of domestic violence during the parties' seventeen-year marriage.[310]

The Michigan Court of Appeals determined that the later-filed affidavit by the plaintiff-wife was not properly presented to the trial court, but even if it were, the court did not find error with the entry of the judgment based on the executed settlement term sheet.[311] There was no dispute by the parties or the courts that the mediator failed to comply with the requirement of MCR 3.216(H)(2).[312] However, the plaintiff-wife failed to articulate how the mediator's failure to comply with the court rule rendered the settlement agreement void.[313] Absent a showing of prejudice resulting from noncompliance with the court rules, such an error was considered to be harmless.[314]

The plaintiff-wife also argued that the settlement term sheet she signed at mediation was void because it was signed under duress. She claimed she was pressured by her attorney and the mediator to sign a document that she did not read or reasonably understand.[315] To succeed on a claim of duress, the plaintiff-wife was required to establish that she was illegally compelled or coerced to sign the settlement sheet by "fear of serious injury to her person, reputation or fortune."[316] When a party claims that her attorney coerced her, she must show that the opposing party participated in that coercion or influence to overturn a consent judgment, which the plaintiff-wife could not.[317] The plaintiff-wife also argued that her ability

307. *Id.*
308. *Id.*
309. *Id.* at *1–2.
310. *Id.* at *2.
311. *Id.* at *2–3.
312. *Id.* at *3.
313. *Id.*
314. *Id.*
315. *Id.* at *4.
316. *Id.*
317. *Id.* at *5.

to consent was impaired by severe stress.[318] However, the court pointed to the fact that the plaintiff-wife signed the settlement agreement and initialed the changes, which were in her favor. Additionally, the court ruled that her failure to read the settlement agreement was not an adequate defense to enforcing the terms of the agreement.[319] Under these circumstances, an evidentiary hearing was not warranted.[320] The court of appeals also recognized that a "certain amount of pressure to settle is fundamentally inherent in the mediation process . . . that pressure to settle is not, by itself, coercion."[321]

The court of appeals affirmed the trial court in a two-to-one decision. Judge Gleicher authored a dissenting opinion arguing that the case should have been remanded back to the trial court for an evidentiary hearing as to whether the settlement was voluntary.[322] Responding to the dissent, which the majority indicated ignored the procedural posture of the case, the majority opinion stated, "How and if issues are raised in the trial court often controls the outcome of an appeal. . . ."[323] The Michigan Supreme Court considered the application for leave to appeal the court of appeals' decision, and in light of the appellee's decision not to contest the application, remanded the case back to the trial and directed that the trial court conduct an evidentiary hearing on the appellant's argument that her signature on the settlement agreement was involuntary.[324]

VI. QUALIFIED DOMESTIC RELATIONS ORDER

When a judgment of divorce awards an interest in a retirement plan to a former spouse, entry of a qualified domestic relations order (QDRO) is a prerequisite to effectuating the distribution of the benefits to the alternate payee spouse for the interest.[325] The Michigan Court of Appeals in *Dorko* explained that a QDRO is an order that arises out of the divorce judgment and is not an actual action to enforce a noncontractual money obligation.[326] In *Dorko*, the ex-husband moved to set aside his ex-wife's proposed QDRO and to deny the amended proposed QDRO, for her fifty percent

318. *Id.* at *6.
319. *Id.*
320. *Id.* at *6.
321. *Id.* at *5.
322. *Id.* at *7–11.
323. *Id.* at *5.
324. Pohlman v. Pohlman, 957 N.W.2d 338 (2021).
325. OFFICE OF RET. SERVS., DEP'T OF TECH., MGMT. & BUDGET, R0912X, DOMESTIC RELATIONS ORDERS: BACKGROUND AND INSTRUCTIONS (2015), https://www.michigan.gov/documents/ors/R0912X_DRO_Instructions_365736_7.pdf [https://www.michigan.gov/documents/ors/R0912X_DRO_Instructions_365736_7.pdf].
326. Dorko v. Dorko, 504 Mich. 68, 76, 934 N.W.2d 644, 648–49 (2019).

interest in his pension. He argued that the proposed QDRO was submitted ten years and eight days after entry of the judgment of divorce and was therefore barred by the ten-year limitations period under MCL 600.5809(3).[327] In between entry of the judgment of divorce and the submission of the proposed QDRO, the ex-husband started to collect his full pension and retirement benefits such that by the time the QDRO was submitted, the pension was in pay status and paying out one hundred percent of the benefits to the ex-husband.[328]

While the *Dorko* appeal was pending, a different panel of the Michigan Court of Appeals decided *Joughin v. Joughin*,[329] finding that "the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself." Therefore, the QDRO was not subject to the ten-year limitations period.[330] The argument in *Joughin* against entry of the proposed QDROs was that the submission of the proposed QDROs was an attempt to enforce the twelve-year-old judgment of divorce, and because more than ten years had lapsed since entry of judgment, the entry of the proposed QDROs was barred.[331] The plaintiff in *Joughin*, who was seeking to enter the proposed QDROs to effectuate her interest in the pension and annuity account, argued that the statutory period of limitations for an action to enforce a noncontractual money obligation does not begin to run until there is a triggering event, that being when the participant actually retires.[332] After entry of the QDROs by the trial court, the court of appeals upheld the entry of the QDROs, but it did so for different reasons.[333] The Michigan Court of Appeals found both parties' premise that MCL 600.5809 controlled the case flawed because the statute only applies to "actions to enforce . . . contractual money obligation[s]."[334] Rather, the court of appeals held that "the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce itself."[335]

In its opinion in *Dorko*, the Michigan Supreme Court abrogated the *Joughin* finding by holding that the entry of a QDRO was not merely a ministerial task but rather a complicated process that must meet the requirements imposed by the plan administrator.[336] The right to entry of

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327. *Id.* at 72, 934 N.W.2d at 646.
328. *Id.* at 71, 934 N.W.2d at 646.
329. Joughin v. Joughin, 320 Mich. App. 380, 388, 906 N.W.2d 829, 833 (2017).
330. *Id.*
331. *Id.* at 384, 906 N.W.2d at 829.
332. *Id*.
333. *Id.* at 386, 906 N.W.2d at 831.
334. *Id*.
335. *Id.* at 388, 906 N.W.2d at 832.
336. Dorko v. Dorko, 504 Mich. 68, 78, 934 N.W.2d 644, 649 (2019).

the QDRO was adjudicated in the divorce judgment and thus, while the former spouse could object to form or content, he did not have the right to challenge the entry of the QDRO itself.[337] As such, the ten-year limitation period under MCL 600.5809(3) does not apply to bar the entry of the QDRO.[338] However, the ten-year limitation would apply if a party sought to recover payments that a former spouse took in contravention of the divorce judgment since that is a substantive obligation, which would give rise to an independent cause of action rather than the procedural nature of entry of the QDRO.[339]

VII. ATTORNEY FEES

The general rule on attorney fees provides that attorney fees are not recoverable unless expressly authorized by statute, court rule, judicial exception, or contract.[340] One of the statutory bases for attorney fees in domestic relations cases is MCR 3.206(D).[341] MCR 3.206(D)(1) provides that "[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding."[342] The phrase "at any time" is the subject of discussion in *Colen v. Colen*.[343] In *Colen*, the plaintiff-wife brought a post-judgment request for attorney fees two years after incurring the attorney fees.[344] The plaintiff-wife relied on the language in MCR 3.206(D)(1), which says a party may seek attorney fees "at any time[,]" and MCL 552.13(1), which also authorizes attorney fees necessary to defend or carry out an action.[345] The trial court found the request for the attorney fees under these bases untimely because the plaintiff-wife waited more than two years to request attorney fees on parenting-time motions that had already been resolved.[346] The plaintiff-wife appealed, arguing that the trial court abused its discretion and erred as a matter of law by finding her motion for attorney fees was untimely.[347] The Michigan Court of Appeals ultimately upheld the trial court's

337. *Id.* at 76, 934 N.W.2d at 648.
338. *Id.* at 79, 934 N.W.2d at 650.
339. *Id.* at 77, 934 N.W.2d at 649.
340. Haliw v. City of Sterling Heights, 471 Mich. 700, 706–07, 691 N.W.2d 753, 756 (2005).
341. MICH. CT. R. 3.206(D).
342. MICH. CT. R. 3.206(D)(1).
343. Colen v. Colen, 331 Mich. App. 295, 952 N.W.2d 558 (2020).
344. *Id.* at 298, 952 N.W.2d at 561.
345. *Id.* at 301, 952 N.W.2d at 562.
346. *Id.* at 299–300, 952 N.W.2d at 562.
347. *Id.*

decision, adopting the approach in *Avery v. Demetropoulos*.[348] *Avery* involved an appeal from an award of attorney fees under MCL 600.2591, which provides a prevailing party with an award of attorney fees and costs incurred in connection with a civil action or defense that the court determines to be frivolous.[349] The *Avery* court determined that while there is no timing requirement in MCL 600.2591, "the appropriate standard to apply to the statute is whether the motion for costs was filed within a reasonable time after the prevailing party was determined."[350]

Using the *Avery* approach, the court of appeals in *Colen* concluded that "a motion for attorney fees under MCR 3.206(D) must be brought within a reasonable time after the fees sought were incurred and that what constitutes a reasonable time depends on the particular facts and circumstances of each case."[351] The court of appeals also gave the trial court discretion in further concluding that its determination of whether a request is submitted within a reasonable time is within its inherent authority to "impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice."[352]

Accordingly, the trial court did not abuse its discretion and was within its "inherent authority to manage its affairs and sanction litigants" in denying the plaintiff-wife's motion for attorney fees pre-dating her instant motion on child support as she neglected to request or pursue attorney fees for almost two years.[353] The *Colen* court distinguished the case of *Smith v. Smith*,[354] which involved a request to recover attorney fees in the context of ongoing litigation that was actively proceeding in the court.[355] However, in *Colen*, almost two years had elapsed since the motion was resolved without either party taking any action in the trial court.[356] The case was remanded for a development of the record on the plaintiff-wife's request for appellate fees under MCR 3.206(D)(2)(a).[357]

Based on the holding in *Colen*, the phrase "at any time" in MCR 3.206(D)(1) defined the procedural timing of when a party may bring a request for attorney fees, but it was not intended to be a measure of the

348. *See id.* at 304, 952 N.W.2d at 564; *see also* Avery v. Demetropoulos, 209 Mich. 500, 501, 531 N.W.2d 720, 721 (1994).
349. *Avery*, 209 Mich. App. at 500, 503, 531 N.W.2d at 720–22.
350. *Id.*, 531 N.W.2d at 722.
351. *Colen*, 331 Mich. App. at 295, 952 N.W.2d at 558.
352. *Id.* at 304, 952 N.W.2d at 564.
353. *Id*. at 305, 952 N.W.2d at 565.
354. Smith v. Smith, 278 Mich. App. 198, 748 N.W.2d 258, *cert. denied*, 482 Mich. 1053, 769 N.W.2d 591 (2008).
355. *Colen*, 331 Mich. App. at 295, 952 N.W.2d at 558.
356. *Id.* at 298, 952 N.W.2d at 561.
357. *Id.* at 310, 952 N.W.2d at 567.

period of the attorney fees incurred such that it would allow all attorney fees to be requested at any time.[358] Instead, *Colen* clarified that the request itself may be brought at any time in the proceedings, but the period for which the attorney fees requested were incurred must be within a reasonable time relative to *when* the request is brought depending on the facts of each particular case.[359]

VIII. NAME CHANGE OF MINOR CHILD

Under MCL 711.1, a minor child who is fourteen years or older may seek to have his or her name changed with the consent of the custodial parent and with notice to the noncustodial parent so long as the other parent, despite having the ability to do so, has failed or neglected to provide regular and substantial support for two or more years.[360] In *In re Warshefski,* the minor child, AR, petitioned to change his name to match that of everyone in his father's household, where he lived.[361] AR's mother, who had no contact with AR for the past three years but did regularly pay child support, objected to the name change petition.[362] The trial court did not grant the name change under MCL 711.1, but it did grant the name change petition under common law authority, reasoning that the court had the ability to make a name change if it finds that the change is in the minor child's best interests, which is not abrogated or superseded by MCL 711.1.[363] The Michigan Court of Appeals reasoned that circuit courts are courts of general jurisdiction, and they are presumed to have subject-matter jurisdiction, unless it is expressly prohibited or given to another court by the constitution or statute.[364] Subject-matter jurisdiction includes the right to exercise broad authority over a class of cases and not merely the particular case at hand.[365]

The court of appeals focused on whether the court had a proper basis to grant AR's petition.[366] To make the determination of whether the name change was in the child's best interests, the trial court appointed a lawyer-guardian ad litem to interview the child, and all the parties involved had the opportunity to express their opinions and provide testimony.[367] The

358. *Id.*
359. *Id.*
360. MICH. COMP. LAWS § 711.1 (2020).
361. *In re* Warshefski, 331 Mich. App. 83, 86, 951 N.W.2d 90, 92 (2020).
362. *Id.* at 85–87, 951 N.W.2d at 92.
363. *Id.* at 93–95, 951 N.W.2d at 95–96.
364. *Id.* at 88, 951 N.W.2d at 93.
365. *Id.* at 89, 951 N.W.2d at 93.
366. *Id.* at 93, 951 N.W.2d at 95–96.
367. *Id.* at 94–95, 951 N.W.2d at 96.

trial court found it was in the child's best interests to have the same last name as everyone in the household.[368]

368. *Id.*