2021-22 COURT RULE STATUTE CASE LAW UPDATE

Ryan M. O'Neil
Oakland County
Friend of the Court

Michigan Court Rules

- MCR 2.107(G)
  - Notwithstanding any other provision of this rule, until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of subsection (C)(4)
    - Unless unavailable, all service (except for the filing of a case) must be done using electronic means (i.e., e-filing)
    - Serving another party by email does not require consent (as it previously did).

Michigan Court Rules

- MCR 2.407
  - (G) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial are required to use remote participation technology (Videoconferencing under this rule or telephone conferencing under MCR 2.406) to the great extent possible

Michigan Court Rules

From: Brian Oakley
To: ADMcomment
Subject: Virtual court-moving forward
Date: Thursday, January 20, 2022 10:13:03 AM

I have sat on the District Court bench since 1999. I have been Chief Judge since January 2020. Zoom is a wonderful tool to have in our toolbox but it should not be the norm for DC criminal proceedings. I have found it to be workable and actually helpful in most civil case hearings, especially where both parties are represented. My main objection to Zoom is in DC criminal case hearings. In the past two years I have had to ask and/or tell defendants to:
-stop smoking
-stop driving
-stop eating
-put a shirt on
-sit up in bed if they could not be bothered by actually getting out of the bed

In addition, I have had a defendant stay on his treadmill during the entire conversation I had with his attorney regarding an adjourned date for a PCC. Another woman sat for a hair braiding session through an entire bench trial. After I asked her to stop washing her dishes. The 'cake topper' may be the woman who took her phone into the restroom with her. Luckily my recorder was fast on the 'remove' button.

Others do not want judges to have discretion over when hearings will be held remotely.

Some want discretion as to when hearings will be conducted remotely.

Courts should not be left to their own discretion to implement remote hearing rules.

Most legal aid offices, and private attorneys work in more than one courthouse/county. Consistency between courtrooms in different counties is a foundation of justice. If each Judge is allowed to make decisions regarding how or when remote hearings are allowed, litigants (and attorneys) will be confused and frustrated. Many low-income litigants rely on information from word of mouth from others in their communities. Allowing wide variations in rules and policy will make educational materials and outreach to communities extremely intricate and burdensome. These variances will affect low-income residents of Michigan more than those who can afford attorneys who will advise them through these

Michigan Court Rules

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October 29, 2021

Clerk, Michigan Supreme Court
ADMcomment@courts.mi.gov

Re: ADM File No. 2020-08

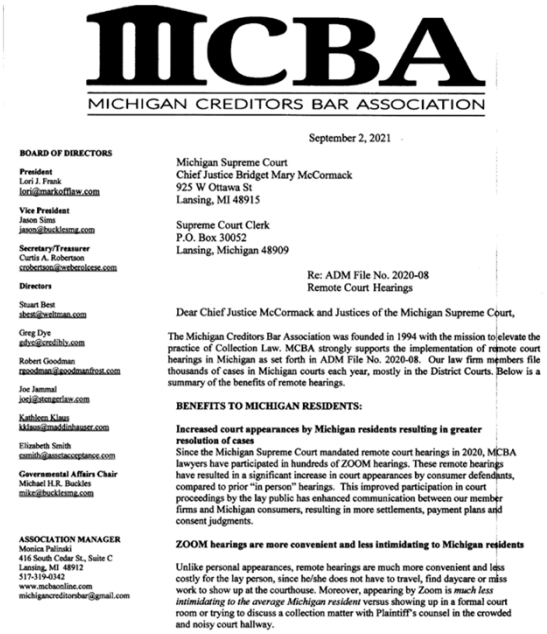
Dear Clerk,

We are writing to comment on this proposed order on behalf of the Legal Services Association of Michigan (LSAM). LSAM is a non-profit organization created in 1982 and is composed of the twelve largest civil legal aid programs in Michigan. LSAM's member programs provide direct legal services to low income Michiganians in over 50,000 cases each year. As providers of direct service, including countless hours litigating cases in court, these proposed court rules greatly impact our work and the lives of our clients, and we are grateful for the opportunity to share some comments with you.

I. Remote Participation in Court Proceedings: MCR 2.305 and MCR 2.407

In our experience, remote hearings are a critical option for many people to engage with the courts, and are sufficient for many hearing types. The guardrails included in the rule are proper and necessary, and aim to promote fair use of remote hearings. Collectively we realize that there are some types of hearings that necessitate in-person testimony or inspection of evidence, and we encourage the Court to develop relevant guidelines for this question upon receiving input from all interested parties. Consistency is important to equal treatment by all courts, and without detailed direction, our experience is that courts vary widely in what they deem appropriate for remote hearings.

Remote hearings have also had a dramatic impact on the ability for legal services attorneys to provide assistance to low income people, and have increased the number of clients our programs have been able to serve in the last eighteen months because of time savings from traveling to court and waiting for cases to be called. The only reason that the Eviction Diversion Programs were possible, particularly in more rural areas, was because attorneys could easily move from court to court, representing many people in each one. Additionally, it has made it easier for our advocates to reach and help clients in far flung areas - some of our offices have service areas of 3,300 sq. miles where attending a simple court hearing could literally take 5 hours because of travel time. Remote hearings have also allowed pro bono attorneys to expand the courts in which they are willing to practice and represent our clients, since travel is no longer an issue. Remote court,



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MICHIGAN CREDITORS BAR ASSOCIATION

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September 2, 2021

Michigan Supreme Court
Chief Justice Bridget Mary McCormack
925 W Ottawa St
Lansing, MI 48915

Supreme Court Clerk
P.O. Box 30052
Lansing, Michigan 48909

Re: ADM File No. 2020-08
Remote Court Hearings

Dear Chief Justice McCormack and Justices of the Michigan Supreme Court,

The Michigan Creditors Bar Association was founded in 1994 with the mission to elevate the practice of Collection Law. MCBA strongly supports the implementation of remote court hearings in Michigan as set forth in ADM File No. 2020-08. Our law firm members file thousands of cases in Michigan courts each year, mostly in the District Courts. Below is a summary of the benefits of remote hearings.

BENEFITS TO MICHIGAN RESIDENTS:

Increased court appearances by Michigan residents resulting in greater resolution of cases
Since the Michigan Supreme Court mandated remote court hearings in 2020, MCBA lawyers have participated in hundreds of ZOOM hearings. These remote hearings have resulted in a significant increase in court appearances by consumer defendants, compared to prior "in person" hearings. This improved participation in court proceedings by the lay public has enhanced communication between our member firms and Michigan consumers, resulting in more settlements, payment plans and consent judgments.

ZOOM hearings are more convenient and less intimidating to Michigan residents

Unlike personal appearances, remote hearings are much more convenient and less costly for the lay person, since he/she does not have to travel, find daycare or miss work to show up at the courthouse. Moreover, appearing by Zoom is *much less intimidating to the average Michigan resident* versus showing up in a formal court room or trying to discuss a collection matter with Plaintiff's counsel in the crowded and noisy court hallway.

Michigan Court Rules

- *There is a split amongst the Michigan Supreme Court Justices as to how the court should proceed in conducting future hearings.*

"[T]he improvements in transparency and access to justice are also staggering; remote access has greatly increased court visibility, allowed more people to get legal representation, and reduced the number of cases defaulted because litigants couldn't make it to court. People who would have missed a court date because they didn't have bus fare or couldn't afford to miss work have been spared the consequences of failing to appear (time in jail and accumulated debt)."

"Our choice is not between smartphones and barristers' wigs."

"Justices Viviano and Bernstein would disregard all this progress for the people most historically excluded from our justice system in the name of 'we should go back to the way we've always done it.'"

- Chief Justice Bridget McCormack

"[W]e share a deeply held conviction that our state courts should return to in-person proceedings as much and as quickly as possible."

"Those procedures reflect centuries of tradition that have placed courtrooms and courthouses at the center of the judicial process. There is a reason that our taxpayers have provided each judge in Michigan with a separate courtroom. They represent more than just physical structures. Courthouses hold 'symbolic importance" in our society, and their presence "affirm[s] the presence of a community, of a society, by reflecting its values back to itself.'"

- Justices David Viviano and Mark Bernstein

Michigan Supreme Court Order, July 26, 2021

Statutory Update

- Driver License Suspension
  - MCL 552.628
    - (1) For a friend of the court case, a payer's occupational license or recreational or sporting license, or any combination of the licenses may be suspended if both of the following circumstances are true:
      - (a) An arrearage has accrued in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.
      - (b) An order of income withholding is not applicable or has been unsuccessful in assuring regular payments on the support obligation and regular payments on the arrearage.
    - (2) For a friend of the court case, a payer's driver license may be suspended if both of the circumstances in subsection (1) are true and both of the following additional circumstances are true:
      - (a) The court has conducted an ability to pay assessment and determined that the payer has an ability to pay the support but is willfully not making his or her support payments.
      - (b) The office of the friend of the court determines that no other sanction would be effective in assuring regular payments on the support obligation and regular payments on the arrearage

Caselaw – Custody

O'Brien v. D'Annunzio _____ Mich ____, _____ NW2d_____ (Docket No. 161335) (June 11, 2021)

- Michigan Supreme Court case 
- Facts:
  - November 2017: Trial Court entered an ex parte order that suspended Mother's parenting time without a hearing. The suspension resulted in a change in the established custodial environment after Mother did not see or communicate with the minor children for fifteen (15) months.
  - When the trial court conducted a hearing, it was based on events that occurred before the established custodial environment was altered by the trial court's ruling in 2017.
- Four Opinions from the Michigan Supreme Court:
  - The majority opinion vacated the trial court's order and remanded the matter to a new judge to conduct an evidentiary hearing.
  - A concurring opinion addressed Mother's efforts to resolve the matter with Father in lieu of appealing the issuance of the ex parte order that suspended her parenting time, as the appeals process would have had the same effect to modify the established custodial environment absent an evidentiary hearing
  - A third opinion, which concurred in part and dissented in part, agreed with the majority to vacate but believed that more guidance should be given to the trial court for how to proceed on remand. The opinion also dissented with the re-assignment to a different judge. The opinion also rejected the reading of the majority order that the custody order be vacated and that the children be placed with Mother whom they have not seen in 3 ½ years. Instead, the third opinion would remand with direction that the trial court consider updated information to fashion a new order.
  - A fourth opinion dissented entirely from the majority finding that the application for leave should have been denied as Mother herself contributed to the delay in seeking to adjourn multiple hearings.

MCL 722.27(1)(c)

. . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.. . .

Caselaw - Custody

Kostreva v. Kostreva_____ Mich App. ____, _____ NW2d_____ (Docket No. 352029,353316) (June 24, 2021)

- Facts:
  - Mother and Father shared joint legal custody of the minor child.
  - Father retained possession of the minor child's passport.
  - In 2019, Mother's mom died while visiting Mother in the United States.
  - Mother requested that Father consent to the minor child traveling with her to Poland.
  - Father did not consent and would not provide the passport.
  - Mother filed an emergency motion which was granted.
  - The trial court held an evidentiary hearing to determine which parent should be the custodian for the minor child's passport.
  - The trial court ordered that Father pay fees in excess of $6,000 and that Mother be the custodian of the passport. Father appealed.
- Court of Appeals ruled that the change of custodian of the passport was not a change in custody as it had no impact on the established custodial environment.
- Court of Appeals also rejected Father's claim that the ex parte order denied him his due process rights as it lacked an affidavit and verification as required by MCR 3.207. The United States Supreme Court has previously ruled that emergency relief may be granted without strict adherence to formal requirements (i.e. affidavits)
- The Court also rejected Father's claims that, because Mother did not object to the Referee's recommendation that he retain custody of the passport, that the issue was precluded from being reviewed by the trial court under MCR 3.215(E)(4)&(5). Father provided no legal authority that the trial court was precluded from reviewing the issue on its own motion.

Caselaw - Custody

***Oliveri v. Veliz*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2021 (Docket No. 354814, 354817)**

- Facts:
  - Mother and Father divorced in Florida while attending law school. The parties had one (1) child and even though the trial court observed that the parties had a poor relationship in which Mother accused Father of being physically and verbally abusive, the Florida court awarded the parties shared responsibility in making decisions for the minor child.
  - The judgment also provided the parties with two (2) different parenting plans depending on the physical distance between the parties.
  - Mother relocated to Michigan to live and Father supposedly bought a residence in Michigan as well. Based on this, the Florida court entered an order to enforce the parenting time order and for the parties to exchange addresses.
  - In 2019, the Florida court declined to continue exercising jurisdiction as it found that Mother and the minor child resided in Michigan and the parties ultimately consented to registering the judgment in Michigan.
  - The parties then brought motions in 2020 with Father alleging he was entitled to makeup parenting time and Mother alleging she was entitled to makeup parenting time and a request for sole legal custody.
  - The trial court denied Mother's request for make-up parenting time and sole legal custody.
- The Court of Appeals rejected Mother's argument that she was entitled to a court hearing.
  - Mother attached a voluminous amount of communications between the parties to permit the trial court the ability to conclude that Mother had not demonstrated a change in circumstance and/or proper cause.
  - Further, the Court rejected Mother's assertion that the parties' history of poor communication was proper cause to modify legal custody. The Court noted that while the parties were indeed bad at communicating, they acknowledged as such and were making efforts to improve (i.e. using Our Family Wizard).

Caselaw – Custody

***Echols v. Kabza*, unpublished per curiam opinion of the Court of Appeals, issued November 9, 2021 (Docket No. 355876)**

- Pursuant to the terms of the Judgment of Divorce, entered in 2013, Mother and Father were awarded joint legal custody of their minor child with equal parenting time. The parties struggled to co-parent which prompted the trial court to appoint an L-GAL. Father tried to have the L-GAL removed on multiple occasions. The trial court held an evidentiary hearing which lasted twenty-two (22) days spanning over the course of a year. The trial court awarded Mother sole legal custody, ordered that the parties continue to equally share parenting time, and discharged the L-GAL.
- The Court of Appeals rejected Father's argument that the trial court erred in considering evidence relating to events that transpired prior to the most recent custody order. *Vodvarka* does not preclude a trial court from considering such evidence. The Court affirmed the trial court's finding that Factor (b), the capacity and disposition of the parties to give the child love, affection and guidance and to continue the education of the minor child, favored Mother.

Caselaw – Custody

***Brady v. Heck*, unpublished per curiam opinion of the Court of Appeals, issued June 10, 2021 (Docket No. 355417)**

- Mother and Father had a child out of wedlock. A custody action was filed in 2020 in which a temporary order was entered that gave the parties joint legal custody and provided Father with supervised parenting time.
- This order was later amended to provide Father with unsupervised parenting time.
- Following trial, the trial court found that the minor child only had an established custodial environment with Mother and none of the best interest factors favored Father, yet ultimately the court awarded the parties joint legal and physical custody.
- The Court of Appeals vacated the custody order and remanded to the trial court. The trial court's findings did not conclude that Father had demonstrated by clear and convincing evidence that joint physical custody was in the child's best interests.

Caselaw – Custody

Masters v. Masters, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2021 (Docket No. 355290)

- Facts:
  - Mother was granted sole physical custody of the minor child while Father underwent therapy and treatment to address emotional issues. During this time, Mother was to supervise Father's parenting time.
  - A year later Father filed a motion to enforce his parenting time. Father alleged that Mother was not allowing him to exercise parenting time with the minor child outside of seven (7) occurrences. Father's time was changed to take place at Growth Works.
  - Mother went into hiding with the minor child and Father could not serve her with his motion.
  - Father then moved to change custody alleging that Mother's disappearance was a change in circumstance. The detective testified that the minor child and Mother were still in Canada. The trial court issued a bench warrant for Mother's arrest but denied the motion to change custody.
- The Court of Appeals vacated the trial court's order.
  - The Court rejected the trial court's assertion that a change in circumstance could not be determined without Mother present. The fact that Mother engaged in parental kidnapping was, in and of itself, a change in circumstance.
  - The trial court, on remand, was directed to consider Mother's disruption to the child's living and educational settings as well as frustrating a meaningful relationship between the minor child and Father.

Caselaw – Custody

Tyrrell v. Tyrrell, unpublished per curiam opinion of the Court of Appeals, issued October 14, 2021 (Docket No. 356862)

- Facts:
  - Father and Mother had two (2) children during their marriage. During the pendency of the divorce case, Father was awarded supervised non-overnight parenting time. The court also ordered that a parenting time assessment be completed by a counseling center but this assessment was never done.
  - Following trial, the parties were awarded joint legal custody with Father receiving supervised parenting time pending the completion of the assessment.
- The Court of Appeals affirmed the trial court's exclusion of Mother's homeschooling methods as not being relevant under MRE 401.
- "The trial court had discretion to exclude evidence that would involve a needless waste of time, and it exercised that discretion because because the nature of defendant's methods would not help the trial court assess the children's school records without a more objective assessment of their performance compared to that of other similarly situated children.
- The children were also enrolled in a public school with good grades compared to their classmates who were not homeschooled - so the homeschooling methods of Mother were not relevant.

MRE 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Caselaw – Custody

***Pueblo v. Haas*, unpublished per curiam opinion of the Court of Appeals, issued December 28, 2021 (Docket No. 357577)**

- Facts:
  - Plaintiff and Defendant were in a same-sex relationship and were never married.
  - Defendant underwent in-vitro fertilization and gave birth to the child – did not use Plaintiff's eggs.
  - Plaintiff did not adopt the minor child but both parties held themselves out as the parents of the child.
  - The parties continued to co-parent the minor child even after their relationship terminated.
  - Plaintiff filed a complaint under the Child Custody Act of 1970 which was dismissed with prejudice by the trial court. Plaintiff appealed and argued that she had standing as the child's equitable parent.
- The Court of Appeals rejected Plaintiff's claim that she was a natural parent as the parties were not married pursuant to *Lake v. Putnam*, 316 Mich App 247 (2016).
- Plaintiff countered that she has standing under the "elastic definition" of natural parent pursuant to *LeFever v Matthews*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 353106).
- The Court distinguished this case from *LeFever* as in that case, Plaintiff's eggs were used and Defendant gave birth thereby giving a physical connection to the children as a result of the genetic relationship. The Court also declined to extend the equitable parent doctrine to parties who were not married irrespective of the fact that marriage was not a legal option for the parties at the time the child was conceived.

Caselaw - Custody

***Bofysil v. Bofysil*, _____ Mich App _____, _____ NW2d _____, 2020 (Docket No. 351004)**

- Update on application to Supreme Court.
- Court of Appeals overturned the trial court in a published opinion in 2020.
  - Facts:
    - Parties married and had a child. Defendant stayed at home while Plaintiff worked but was home for lunch, took the child to the park, gave the child baths, and put the child to bed.
    - After parties separated, Defendant moved the child to her parents more than 100 miles away, and kept the child away from Plaintiff until the FOC set up a schedule. Despite the fact that the parties agreed they had a shared custodial environment for the 2 years prior to separation, and both parents provided the child with security, stability, and permanence.
    - Trial Court found that an established custodial environment existed only with Defendant because she was the stay at home parent. The trial court also found that Plaintiff having a new girlfriend (who was also married) before the divorce case was finalized reflected poorly on her morality as part of the best interest analysis.
    - Court of Appeals reversed and remanded to the trial court to reconsider physical and legal custody.
- Michigan Supreme Court denied the application for leave to appeal.
  - But in a dissenting opinion, Justice Viviano took the Court of Appeals to task for disregarding the standard of review, applying the facts as if the COA was the trial court, and misapplying the law.

Caselaw – Parenting Time

***Kuebler v. Kuebler*, unpublished per curiam opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 354327, 355934, 356641, 356709)**

- Pursuant to the terms of the Judgment of Divorce, Father was awarded sole legal and physical custody while Mother was awarded supervised parenting time as a result of Mother's "serious personality disorder." Mother was also to undergo psychotherapeutic treatment. Mother has a history of making allegations against Father of domestic violence against Mother and abuse against the minor children. None of these allegations were substantiated. Father also had anger issues and the judgment provided that he was to undergo mental-health treatment.
- Mother filed a motion to modify parenting time in 2017. That motion was denied without a hearing by the trial court and following two (2) remands from the Court of Appeals, an evidentiary hearing was eventually held. The trial court treated Mother's request as a motion to modify custody and denied the request finding no change in circumstance and/or proper cause and opined that Mother's conduct had gotten worse instead of improving. The trial court increased Mother's child support obligation after she obtained employment at the University of Michigan and made the support retroactive to when Mother obtained her new position.
- The Court of Appeals affirmed the trial court's rejection of Mother's motion to modify custody (which Mother had titled as a request to move parenting time). Mother's motion alleged that she was simply seeking to modify the conditions of parenting time and that the court should apply the standard in *Kaeb v Kaeb*, 309 Mich App 556, 570; 873 NW2d 319 (2015). However, Mother's motion was not to transition from supervised parenting time for two (2) hours per week to unsupervised parenting time for two (2) hours per week. Instead, Mother's motion sought overnight weekend parenting time, expanded weekday parenting time, and holiday parenting time. The Court of Appeals appears to have given great deference to the trial court's finding that Mother's request to modify parenting time from supervised time to overnight parenting time altered the established custodial environment and found that, regardless of the standard applied, the trial court correctly found that Mother did not demonstrate a change in circumstance or proper cause and that her behavior had worsened and not improved since the last custody order. Mother had fabricated a PPO petition against Father, disparaged him in Facebook posts, wrote a letter to the State Bar of Michigan commissioner, and filed a complaint with his employer.

Caselaw – Parenting Time

***Gittler v. Steenhoven*, unpublished per curiam opinion of the Court of Appeals, issued September 23, 2021 (Docket No. 356034)**

- Facts:
  - Following the entry of a judgment of divorce, the trial court ordered Mother's parenting time take place exclusively at her parents' home, that her parents be present at all times, and that an alarm be placed on the minor child's bedroom door.
  - These safety measures were put into place as a result of a CPS investigation following Mother's homicidal ideations against the minor child.
  - Mother filed a post-judgment motion to lift safety restrictions and to change custody for the minor child to attend kindergarten.
- The Court of Appeals reversed the trial court's lifting of the restrictions finding that it was against the great weight of the evidence to lift safety restrictions where Mother had previously had ideations of slitting the minor child's throat and had, in the past, voluntarily gone off of her medications.
- The Court affirmed the school choice and modification of physical custody. The Court found that the trial court did apply the clear and convincing evidence standard. The Court found that Mother did take care of the child (getting him ready in the morning, etc.) and that the shortcomings cited by Father (i.e. not transporting the minor child) were a result of the safety plan. The Court also affirmed the trial court's findings that Mother's mental health issues did not prevent her from parenting the minor child.
- A dissenting opinion would have affirmed the trial court's removal of the safety restrictions finding that they were no longer necessary.

Caselaw – UCCJEA

Veneskey v. Sulier, _____ Mich App _____, _____ NW2d _____, 2021 (Docket No. 355471)

- Facts:
  - Minor child was living in North Carolina with her Mother, Stepfather and half-sibling in a home owned by Grandparents.
  - Mother died.
  - Grandparents obtained a power-of-attorney from the stepfather and removed the minor child from North Carolina to Michigan. The minor child's Father was not consulted.
  - The probate court in Michigan granted a limited guardianship to Grandparents. Grandparents then sought custody in Michigan with Father being identified as the defendant.
  - Father sought summary disposition as he filed a custody action in North Carolina which was the last residence of the minor child. The trial court granted Father's motion and dismissed the Michigan custody action.
- Grandparents contended that there was a gap of time between the minor child having a parent in North Carolina and a custody action being filed in Michigan, and thus, North Carolina was not the minor child's home state.
- The Court of Appeals disagreed and ruled that "[A]n individual who removes a minor child from the home state should not obtain a benefit between the removal date and date of filing of a custody petition in Michigan by claiming that this period destroyed the prior occupancy period and relationship to the home state." In this case, the guardianship petition was filed only days after the minor child was removed from North Carolina which is the child's home state pursuant to MCL 722.1102(1)(a).
- Additionally, the Court found that Michigan should decline jurisdiction as it was not a convenient forum pursuant to MCL 722.1207, specifically, that the minor child spent more time in North Carolina.

Caselaw – Change of Domicile

***Vannatter v. Vannatter*, unpublished per curiam opinion of the Court of Appeals, issued July 1, 2021 (Docket No. 355388)**

- Mother and Father had two (2) minor children. They shared joint legal custody of the children with an equal parenting time schedule. Father sought to modify the parenting time schedule and change domicile to Arkansas. The trial court found The *D'Onofrio* factors supported the move and was in the minor child's best interests.
- The Court of Appeals affirmed the trial court's finding that the move had the capacity to improve the lives of Father and the minor children.
  - Even though Father would initially make less, his new position was as a supervisor in and eligible for pay raises and more vacation time.
  - Father's wife would see her income double.
  - Father also testified that the family would be able to buy a home in Arkansas, which is not something they believed they could do if they remained in Michigan.
- The Court also affirmed the trial court's finding that awarding Mother every Christmas break, Spring break, and the entirety of the summer would enable her to continue to foster a meaningful relationship with the minor children.

Caselaw – Child Support

***Milne v. Milne*, unpublished per curiam opinion of the Court of Appeals, issued September 23, 2021 (Docket No. 355862)**

- The Court of Appeals reversed the trial court's child support order as the trial court did not properly consider the imputation factors pursuant to MCSF 2.01(G)(2). Specifically, the trial court made general findings that Mother was capable of working a full-time job without making any findings regarding her actual ability to do so.

Case Law: Child Support

***Kuebler v. Kuebler*, unpublished per curiam opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 354327, 355934, 356641, 356709)**

- Case facts previously covered
- The trial court retroactively modified the child support obligation pursuant to MCL 552.603(b) finding that Mother did not properly inform the Friend of the Court office of her new employment.
- Mother obtained new employment in January of 2018 and that month did inform the FOC of her new employment but not the new income.
- The trial court concluded that Mother did not commit a fraud on the court by not disclosing her income, and in making that finding, MCL 552.603(b) was inapplicable.
- Even Mother's misrepresentation that there was a no-contact order between the parties does not rise to the level of a misrepresentation under the statute. The Court ordered that the support be modified to January 2020 when the motion was filed.

Caselaw – Spousal Support

***Glowacki v. Glowacki*, unpublished per curiam opinion of the Court of Appeals, issued June 10, 2021 (Docket No. 350691)**

- Facts:
  - At the time the parties married, Wife worked in the aviation industry and Husband was completing medical school.
  - He ultimately opened his own practice with contributions from Wife who also worked in the practice until 2012 when she remained at home to take care of the children from a previous relationship.
  - The parties ultimately found themselves with a tax liability to the state and federal government totaling nearly $2.7 million.
  - Wife was initially granted innocent spouse status but that status was later denied for the periods of 2011-2014 and 2016.
  - The parties blamed one another during trial for living beyond their means.
  - The trial court found that the parties were equally responsible for the tax liability.
  - Husband was awarded the medical practice.
  - The trial court ordered Husband to pay Wife $30,000 per month in spousal support for four (4) years and then held that Wife's claim to support would be forever barred.
- The Court of Appeals vacated the portion of the spousal support award that barred any future spousal support after four (4) years as the parties did not negotiate or consent to the spousal support award and modification of spousal support was not barred. .

Caselaw – Spousal Support

***Elliot v. Elliot*, unpublished per curiam opinion of the Court of Appeals, issued July 15, 2021 (Docket No. 353269)**

- Facts:
  - Consent Judgment of Divorce provided that Husband would pay Wife $3,000 per month in spousal support and that Husband's anticipated retirement at age 65 would constitute a change in circumstance to consider a modification.
  - Husband retired in 2019 and petitioned to terminate the support obligation.
  - The trial court did an interim reduction from $3,000 to $2,000 per month, and following a two (2) day evidentiary hearing, reduced the obligation further to $1,700, and then ultimately $1,500 per month.
- The Court found that the trial court's error in this case came by applying the legal standard set forth in *Walker v Walker*, 155 Mich App 405; 399 NW2d 541 (1986). That case was established before 1990 and is no longer binding as there is a more recent case on point. Instead, the trial court should have applied *McCallister v McCallister*, 205 Mich App 84, 85;517 NW2d 268 (1994). In *McCallister*, the Court held that it was appropriate for a trial court to consider a party's property when contemplating whether he/she had an ability to pay. The trial court is required to consider "all circumstances" of the case including retirement accounts.
- The Court also held that parties are unable to "contract away" the equitable powers that are granted to the circuit court. Such agreements would be void as they are contrary to public policy.
  - Parties cannot waive the court's equitable power under MCL 552.23(1) to fully consider "the ability of either party to pay [spousal support]. . ."

Caselaw – Spousal Support

***McGlown v. Hall*, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2021 (Docket No.353885)**

- Facts:
  - Wife worked for Chrysler earning $120,000 per year.
  - Husband owned several closely held businesses with gross receipts of $2.5 million/year.
  - Following a 7 day trial, the trial court issued a lengthy opinion. Wife appealed.
- Wife challenged the value of Husband's businesses and income but failed to provide any legal authority in her brief. The Court of Appeals remarked, "[B]ecause this state's courts do not serve as the research assi stants of the litigants before them, *Walters*, 481 Mich at 388, "[t]his Court will not search for authority to sustain or reject a party's position," *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995).
- Finally, the Court rejected Wife's argument that she was entitled to spousal support and affirmed the trial court's finding that the property awarded to her was "sufficient to ensure the suitable support and maintenance of both plaintiff and the minor child for purposes of MCL 552.23(1).

Personal Protection Order

***SP v. BEK*, _____ Mich App _____, _____ NW2d _____, 2021 (Docket No. 353984, 353992)**

- The Court addressed the novel issue of whether a petitioner can issue a PPO on behalf of minor children against a parent whose rights have been terminated.
- Facts:
  - Petitioner (Mother) and Respondent (Father) were divorced when the PPO petitions were filed. Respondent had been charged with five (5) counts of criminal sexual conduct against the minor children. CPS pursued parental termination based upon the allegations. The trial court terminated Father's rights. Respondent was acquitted on the CSC charges.
  - Nearly two (2) years after the parental termination, Petitioner sought a PPO on behalf of the minor children against Respondent alleging that Petitioner was showing up to the minor children's basketball games and making intimidating gestures towards the children. An ex parte PPO was entered.
  - Respondent alleged that the trial court is precluded from issuing a PPO against him pursuant to MCL 600.2950(26)(b) unless both parents have their rights terminated.
- The Court of Appeals rejected this argument and found that the MCL 600.2950(26)(b) applies to a child where the parental rights of either one or both parents have been terminated. Additionally, the Court of Appeals rejected Respondent's arguments that his actions at the minor child's basketball games did not support the issuance of an ex parte PPO. Not only was his behavior at the basketball game driven by a desire to intimidate and threaten the children, the child sexual abuse allegations against Father alone were sufficient to traumatize the children by just his mere presence at the game.

MCL 600.2950
(26) A court shall not issue a personal protection order that restrains or enjoins conduct described in subsection (1) if any of the following apply:
(a) The respondent is the unemancipated minor child of the petitioner.

Caselaw – Attorney Fees

***Messaros v. Messsaros*, unpublished per curiam opinion of the Court of Appeals, issued November 9, 2021 (Docket No. 356567, 357467)**

- Facts:
  - Mother appealed the trial court's denial of her request for attorney fees.
  - Mother alleged that she earned $18,000, that Father earned substantially more, and that the case was "financially devastating."
  - Mother alleges that MCR 3.206(D) provides that the trial court should have awarded attorney fees because she was unable to bear the expense and Father was.
- The Court of Appeals found that while Father did earn more than Mother, she did not demonstrate that she was *unable* to bear the expense of the litigation.

Caselaw - Property Distribution

***Estate of Judy Zilka v. Robert Zilka*, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2021 (Docket No. 350739)**

- Facts:
  - Wife (in this case, represented by her Personal Representative) was diagnosed with ALS.
  - Wife filed for divorce which resulted in a bench trial.
  - A judgment of divorce was entered with Wife passing away eleven (11) days later.
  - The trial court awarded Husband the vacation home and rendered him to take out a loan in the amount of $163,000 - $125,000 of which was to pay to Wife as well attorney fees and QDRO fees.
  - Wife was granted a life estate in the marital home with Husband receiving a remainderman interest (the life estate was valued at $125,000).
  - Wife also received a life estate in the personal property at the marital home with Husband receiving a remainderman interest.
  - The trial court also awarded Wife items of personal property including a horse trailer and retirement accounts. Husband was also ordered to assume full liability on all joint debt.
  - The initial division was a 70/30 split in favor of Husband. The trial court then ordered a $100,000 life insurance policy on Judy's name be awarded to her.
  - Wife's estate appealed arguing that the division was not equitable as the life insurance policy was not something Wife could enjoy during her life. Husband likewise cross-appealed arguing that the trial court did not consider his ability to pay the debts and in "double dipping" the award of a life estate to Judy by allowing her to live in the home and by requiring Husband to pay her $125,000.
- While the trial court made mistakes in the division, the errors were found to be harmless by the Court of Appeals.
  - The Court rejected the way in which the trial court divided property to ensure that Wife was taken care of until she passed.
  - The trial court also should not have awarded the $100,000 life insurance policy to Judy as it was essentially an award to her heirs.
  - The award of $100,000 to Wife was also speculative as there was no certainty with when she would pass.
  - The Court also rejected the trial court's award of "life estates" to Wife as "questionable." It also contradicts the policy of finality in a divorce proceeding. The trial court also erred but not making any findings nor did the trial court consider MCR 3.206(D).
  - Ultimately, the court did not reverse the trial court, despite the errors, because it reasoned that even if it were to reverse the life insurance award, it would still require awarding Wife's estate $100,000.

Caselaw – Property Division

***Sutariya v. Sutariya*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2021 (Docket No. 345115)**

- Facts:
  - Second appeal to the Court of Appeals following a prior remand to the trial court regarding the award of $1 million of stock ("SE") to Wife as the stock.
  - The stock was designated as premarital and belonging to Husband.
  - The trial court was directed to articulate its findings as to the reason for the award. The trial court was also directed to consider the award of Husband's interest in Chicago Circuit Boards ("CBB") and to make a finding as to whether this asset was premarital and subject to division.
  - On remand, the trial court considered the *Hanaway* factors and found that Wife was employed, during the marriage, in various roles at SE and that her role as the primary caretaker for the minor children allowed SE to grow in value since Husband was able to focus on that firm.
- The Court rejected Husband's argument that MCL 552.401 is inapplicable because it was purchased prior to the marriage. A court may invade a separate asset when the other party contributed to the *improvement* of the property. The Court affirmed the one-third award to Wife of Husband's SE stock.
- The Court affirmed the trial court's award of CCB stock to Husband as his separate property as that property was acquired before the parties' marriage, was not commingled, and received by Husband without any involvement in the day-to-day operation of the company.