The Court of Appeals Said What!?
A Review of Published Family Law Decisions Over the Last Year

by
Scott Bassett
scott@scottbassett.com
www.divorceappeals.com

***Biondo v Biondo*, C of A No. 294694, 03/15/2011, ___ Mich App ___ (2011).**

One of the agreed-upon divorce judgment provisions obligated the parties to equalize their Social Security benefits, and the parties stipulated to the entry of a qualified domestic relations order (QDRO), which allocated to the wife 50% of the husband's accrued Social Security retirement benefits as of the date of the divorce. When the wife sought compliance with the agreement, the husband asserted that federal law preempted its enforcement. The trial court refused the husband's request to strike that portion of the agreement from the parties' judgment, saying a "deal is a deal."

On appeal, the Court of Appeals agreed with the husband and reversed, finding that 42 U.S.C.S. § 407(a) did not allow the transfer of the husband's Social Security benefits to anyone other than himself. A specific exemption had been enacted in 42 U.S.C.S. § 659(a), which permitted the states to employ Social Security benefits for the enforcement of child support and alimony obligations. However, the exemption did not apply to a property distribution. The federal preemption did not mean that the circuit court exceeded its subject matter jurisdiction under Mich. Const. art. VI, § 13 and MCL 552.6(1); because inclusion of the Social Security term was a mutual mistake by the parties, the circuit court could modify the property settlement provisions on remand and consider the Social Security benefits when formulating an equitable division of the property.

***Carlson v Carlson*, C of A No. 292536, 06/28/2011, ___ Mich App ___ (2011).**

The trial court held an evidentiary hearing, and then adopted a Friend of the Court referee's recommendation modifying the father's child-support obligation. It found that the father, the president of an engineering company, had voluntarily reduced his salary in an attempt to help his company survive during difficult economic times. It then imputed an income of $95,000 to the father. The father appealed, claiming that the trial court erred in imputing $95,000 of income to him.

The Court of Appeals held that in determining the appropriate amount of child support, a trial court was required to presumptively follow the Michigan Child Support Formula. It then held that the trial court's finding that the father had voluntarily reduced his income was not clearly erroneous because the father himself had lowered that income to help his company. However, the trial court had not evaluated the factors set forth in

the Michigan Child Support Formula Manual for imputing income. The Michigan Child Support Formula Manual sets forth a number of factors that must be considered when determining whether to impute income: (1) Prior employment experience; (2) Education level; (3) Physical and mental disabilities; (4) The presence of parties' children in the individual's home and its impact on the earnings; (5) Availability of employment in the local geographical area; (6) The prevailing wage rates in the local geographical area; (7) Special skills and training; or (8) Whether there is any evidence that the individual in question is able to earn the imputed income. MCSF Section 2.10(E). Therefore, the trial court failed to determine whether the father possessed an actual ability and likelihood of earning the $95,000 imputed income. The case was remanded further proceedings.

***Cipriano v Cipriano*, 289 Mich App 361 (2010), lv den by SC on 04/06/2011.**

In November 1993, the trial court issued an order for divorce, awarding 55 percent of the marital property to the wife and $66,000 a year in periodic alimony that was to be paid in $5,500 monthly installments. After several appeals and years of additional trial court proceedings, the Court of Appeals determined that the wife was also entitled to 55 percent, plus interest, of the increase in the value of the husband's interest in his business during the marriage. In 2006, the trial court issued an amended supplemental judgment, ordering the husband to pay the wife $485,155 for her interest in the business and the amount of interest that had accumulated on the asset from June 1993 to September 30, 2006, which was $456,132.

In May 2007, the husband moved to amend the spousal support or the property award or to allow him to make installment payments. The trial court referred the matter to the friend of the court for an evidentiary hearing to determine whether the additional property award to the wife would necessitate an adjustment in the alimony "all the way back to the beginning." Rather than going to the friend of the court, the parties agreed to refer that motion to binding arbitration under the DRAA.

In September of 2008, the arbitrator's final award required the husband to pay $485,155 for the business interest in installments, without interest, and terminated his alimony obligation effective May 2007. The arbitrator granted credit for the husband alimony payments from May 2007 through September 2008, and determined that the husband would continue to pay $5,500 a month until he paid an additional $391,655 to satisfy the $485,155 award. The wife appealed.

The wife moved to vacate, modify, or correct the arbitration award, arguing that the arbitrator failed to follow the law-of-the-case doctrine, impermissibly modified spousal support retroactively, and altered the award after ex parte communications from the husband. In December 2008, the trial court entered an order confirming the arbitrator's award and denying the wife's motions. The wife appealed.

In June 2009, the trial court held a hearing on the husband's motion to reduce the monthly payments. The trial court reduced his monthly payments to $3,870, but did not alter the total amount awarded. The wife also appealed that order.

The Court of Appeals affirmed in part and reversed in part. The award eliminating alimony and substituting property installment payments to the wife was properly confirmed by the trial court because retroactive modification of spousal support was permitted under MCL 552.603(2) from the date of the husband's motion to modify. However, the trial court's modification of the arbitration award reducing the monthly payments from $5,500 to $3,870 was reversed because the husband's motion to modify the award was not made within 21 days after the date of the award, as required by MCR 3.602(K)(1), but several months later, and no justification was given for the modification.

The Court of Appeals rejected the wife's claim that the husband's *ex parte* contact with the arbitrator must result in the award being vacated. The cases she cited in support of her argument were based on *ex parte* contact that violated agreements by the parties regarding the procedures for their arbitration. A bright-line rule to vacate arbitrations due to ex parte contact between a party and the arbitrator would be difficult to reconcile with the standard of review providing that an arbitration award may not be vacated unless an error was so substantial that the award would have been substantially different without the error.

***Dailey v Kloenhamer*, C of A No. 300698, 03/08/2011, ___ Mich App ___ (2011).**

The Court of Appeals held that proper cause or a change in circumstances existed for the trial court to revisit the existing join legal custody order. The record demonstrated that the parents' disagreements had escalated and expanded to topics that had a significant impact on the child's well-being. The parties disagreed about the property educational course for the child and, more significantly, disagreed about the child's medical treatment. Because the parties' recurrent disagreements delayed the child's medical treatment and because further delay could have detrimental effects upon the child's well-being, and because the medical delays were directly relevant to the statutory best interests factor under MCL 722.23(c), the trial court also did not err in finding a proper cause to revisit the legal custody arrangement. Based upon the parties' disagreements, the trial court did not err in finding that it was in the child's best interests that sole legal custody be granted to one parent, and MCL 722.26a(7) authorizes courts, in proper circumstances, to grant joint physical custody to the parties while granting sole legal custody to one party.

***Estate of Reed v Reed*, C of A No. 297528, 06/23/2011, ___ Mich App ___ (2011).**

The wife did not answer or otherwise appear in the divorce action and was defaulted. A default judgment was entered. The wife took no steps to set a default judgment aside after its entry. The judgment contained a pension waiver provision. The husband died post-divorce and his estate filed an action seeking to enforce the divorce judgment and recover pension proceeds paid to the wife by the administrator of the husband's pension plan. The trial court ordered that she turn over the proceeds received. The wife appealed.

The Court of Appeals affirmed the trial court, noting that the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001 et seq., did not preempt an explicit waiver of an interest by a nonparticipant beneficiary. The waiver of the wife's rights to any of the husband's benefits was valid and enforceable. The wife had knowledge and notice of the divorce proceedings and their intended outcome and repeatedly failed to act or respond. This course of conduct evidenced her intention to waive any rights she might have otherwise had to the husband's pension. The default judgment in this matter was conclusive as the wife neither asserted nor demonstrated any procedural error in its entry. Because she failed to respond or to seek to set aside the default judgment, she was barred from arguing that only select portions of the judgment, favorable to her, were enforceable.

***Ewald v Ewald*, C of A No. 295161, 05/26/2011, ___ Mich App ___ (2011).**

The parties were divorced after 16 years of marriage. They had a son and a daughter. The judgment gave them joint legal and joint physical custody, with the son living primarily with the father and the daughter primarily with the mother. The son, in his teens at the time of the divorce had a falling out with his mother and no longer visited her. The mother never sought a court order to enforce parenting time. Nonetheless, the trial court deviated from the MCSF in setting the mother's child support obligation, finding that the father was to blame for the son's alienation from the mother. The nature of the deviation was to calculate child support as if the son spent a significant amount of overnights with the mother. The trial court also awarded her temporary spousal support and attorney fees, but declined to order the father to pay the mother's uninsured health care expenses. The father appealed the child support deviation and the mother cross-appealed the amount of temporary alimony, the amount of attorney fees, and the denial of payment of uninsured health care expenses.

The Court of Appeals held that this was an issue of first impression. Whether a parent's actions that cause a child to refuse to visit the other parent would render it "unjust or inappropriate" under MCL 552.605(2) to apply the "parental time offset" of 2008 MCSF Section 3.03 and permit deviation from the child support formula had not been previously decided. The Court of Appeals concluded that no deviation is permitted

under these circumstances. The Support and Parenting Time Enforcement Act, MCL 552.601 et seq., read as a whole, does not provide for enforcement of parenting time rights by adjusting child support obligations. A parent's alleged interference with the parenting time rights of the other parent is not a circumstance that would permit deviation from the child support formula under MCL 552.605(2). Also, the trial court's finding that the father alienated the son against the mother was clearly erroneous. The Court of Appeals also found no basis for increasing the spousal support award or revisiting the medical expense ruling, but found that the attorney fee award may have been to low and remanded for reexamination of that award.

***Gerstenschlager v Gerstenschlager*, C of A No. 300858, 05/19/2011, ___ Mich App ___ (2011).**

The parties divorced in 2007. The judgment of divorce awarded primary physical custody of the parties' two daughters to the father, who lived in Michigan, but awarded primary physical custody of the parties' son to the mother, who lived in Virginia. The parties initially agreed to this division of parental responsibilities, and also agreed that all three children would be together during the summers, residing alternately with each party.

In July 2010, the father filed a motion for a change of custody to allow the parties' son to live with him and join the parties' two daughters in his physical custody. In asserting a change of circumstances, the father alleged that the mother tended to neglect the boy, that the mother had subjected the boy to erratic changes of residence, improper language, and improper discipline tactics, and that the mother routinely entertained various overnight male visitors. The father additionally asserted that the boy wanted to live with him, and that it would be best if the child were united with his sisters. At the trial court's custody hearing, the mother testified that she had two boarders, whom she had screened through their employers and personal references, that she needed the income from the boarders to meet her child support obligations, and that she had no interaction with the boarders. The trial court found that the presence of the boarders was intrusive and established a change in environment, and that the child's age also instigated a change in his needs. It concluded that a change in circumstances had occurred, and upon consideration of the best interest of the child, that a change in custody was merited. The mother appealed.

The Court of Appeals reversed, holding that normal life changes, such as those affected by the passage of time and concomitant increase in a child's age, do not establish a change in circumstances meriting a change in custody. The trial court committed clear legal error in determining that the child's changes in needs and desires in the ordinary course of growing up constituted a change of circumstances sufficient to warrant a reevaluation of the custody arrangement. Further, the evidence established that the boarders' presence in the home was minimal rather than intrusive, and thus the trial court's determination that the boarders' presence in the home constituted a change of

circumstances sufficient to warrant a reevaluation of the custody arrangement was manifestly against the great weight of the evidence.

***In re Beck*, 488 Mich 6; 793 NW2d 562 (2010).**

The father argued that the Court of Appeals erred in upholding the trial court's order requiring him to continue paying child support after the termination of his parental rights. The Supreme Court disagreed. Because the parental rights identified in MCL 722.2 were distinct and detached from the parental duty identified in MCL 722.3, it was clear that the Legislature determined that parental rights were independent from parental duties. There was no indication that the duty of support was conditioned on the retention of parental rights, just as there was no indication that the exercise of parental rights was conditioned on fulfilling the parental obligation to support. When parental rights were terminated, what was lost were those interests identified as parental rights. The terminated parent lost any entitlement to the custody, control, services and earnings of the minor. Because nothing in the language of MCL 712A.19b affected the duty of support articulated in MCL 722.3, the obligation remained intact. The trial court expressly declined to modify or terminate the father's child support obligation, and he made no showing that the decision was an abuse of discretion.

[Note: The State Bar Family Law Section filed an *amicus* brief written by Kent Weichmann supporting the view that parental rights and parental duties are separate and distinct.]

***Kar v Nanda*, C of A No. 292754, 01/13/2011, ___ Mich App ___ (2011), SC denied leave on 06/28/2011.**

The wife appealed an order denying her motion to dismiss for lack of subject matter jurisdiction. She argued that the trial court lacked subject matter jurisdiction because neither party met the divorce residency requirement in MCL 552.9(1). The Court of Appeals affirmed, holding that the wife clearly "resided" in Michigan for the requisite period under the statute. Although the "resided" requirement in MCL 552.9(1) constitutes a place of abode accompanied by the intention to remain, it did not require an intention to remain permanently and indefinitely. Although the wife intended to leave Michigan once her studies in Ann Arbor were completed in 2012, there was no dispute that she lived in Michigan for years before the divorce complaint was filed, far longer than the 180-day statutory requirement, and, when the action was filed, she intended to remain in Michigan for several more years.

***Licavoli v Licavoli*, C of A No. 295901, 04/26/2011, ___ Mich App ___ (2011).**

The husband appealed from a trial court order granted his former wife's motion to attach assets jointly as tenants by the entireties by the husband and his current wife.

The husband also appealed the trial court's spousal support income withholding order that withheld 50 percent of his earnings.

The Court of Appeals reversed in part, affirmed in part, and remanded for further proceedings. The Court of Appeals held that underlying judgment was the judgment of divorce. It was not entered against the husband and his current wife. Under MCL 600.2807(1), the judgment lien could not attach to the interest in real property owned by the husband and his current wife as tenants by the entirety unless the underlying judgment was entered against both of them.

However, the Court of Appeals upheld the trial court's income withholding order in the amount of 50 percent of the husband's salary. Although the husband may have experienced financial troubles that made it difficult for him to meet his obligations, he failed to comply with the trial court's orders to pay child support or spousal support for a significant time.

***Luckow Estate v Luckow*, C of A No. 294398, 01/27/2011, ___ Mich App ___ (2011).**

The parties submitted their divorce case to binding arbitration and, per the arbitration award incorporated into their 2003 divorce judgment, the husband was required to pay the wife modifiable spousal support in the amount of $2,500 per month until her death or remarriage. In 2005, the husband moved for modification, citing the wife's reduced living expenses. After an evidentiary hearing, the motion was denied. The husband then moved to set aside the decision, and his motion was granted. The parties then stipulated to send the alimony modification issue to binding arbitration. The arbitrator determined that the husband's alimony obligation should be abated to zero, but future spousal support should be reserved. The arbitrator also determined that there was a $35,000 plus alimony arrearage. The award limited the husband's obligation to secure future spousal support by way a life insurance policy to this arrearage amount. The husband moved for adoption of the award, but before the matter was heard, the husband died. His estate was substituted in his place and the trial court adopted the award, ruling that it had the authority to modify alimony after the husband's death.

Within weeks of the trial court's order adopting the arbitration award, the wife moved for an alimony increase, citing a reduction in her income along with increased health insurance costs. The trial court denied the increase, but awarded the wife a portion of the husband's life insurance death benefit equal to the alimony arrearage. The wife filed a motion for reconsideration of the order denying an alimony increase. That motion was heard and granted by a successor judge. The successor judge disagreed with the prior judge's assessment of the equities and ordered an evidentiary hearing to determine the proper amount of alimony. The husband's estate appealed, arguing that reconsideration was improperly granted by the successor judge.

The Court of Appeals reversed, holding that modification of alimony was permitted under MCL 552.28. Alimony could have continued, undergone modification, or have been implemented for the first time following a payor spouse's death. Therefore, the wife had the ability to move for a modification after the husband's death, and the trial court had the authority to entertain and decide that motion, particularly considering the terms of the arbitration award. However, reconsideration should not have been granted by the successor judge. A difference in opinion regarding the equities of the matter did not rise to the level of a palpable error required by MCR 2.119(F)(3). The first judge did not abuse his discretion by declining to order that assets awarded to the husband as part of a property division and now held by the husband's estate be made available for the payment of alimony to the wife.

***McKimmy v Melling*, C of A No. 298700, 02/10/2011, ___ Mich App ___ (2011).**

The mother appealed the trial court's order denying her motion for change of domicile. The mother had moved for permission to change the boys' domicile from Michigan to North Dakota, where her fiancé lived. The Court of Appeals vacated the order and remanded for further proceedings. It held that, in applying MCL 722.31(4)(c), the trial court failed to recognize that the parenting time schedule proposed by the mother was not required to be equal with the current plan. The trial court essentially compared the proposed parenting time schedule with the current plan and found that the current plan was in the best interests of the two boys. However, the inquiry under factor (c) is not which plan, the current plan or the proposed schedule, was better. Rather, the inquiry was only whether the proposed parenting time schedule provided a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the left-behind parent. The trial court should have considered whether the parenting time schedule proposed by the mother provided a realistic opportunity to preserve and foster the father-son relationship without regard to whether the proposed schedule was as equally beneficial to the two boys as the current visitation plan.

***Megee v Carmine*, C of A No. 292207, 11/16/2010, ___ Mich App ___ (2010).**

Pursuant to the parties' divorce judgment, the wife was awarded 50 percent of the husband's Navy disposable retirement pay. The husband challenged the trial court's order that he act as trustee for the benefit of the wife with respect to half of the military spouse's monthly combat-related special compensation under 10 U.S.C.S. § 1413a, and assure delivery of the funds to the wife.

The Court of Appeals reversed. The Court of Appeals first determined that the husband's unilateral decision to elect combat-related special compensation (CRSC) in lieu of the retirement pay divided in the judgment was contrary to the terms and intent of the judgment. The husband remained financially responsible to compensate the wife in an amount equal to the share of retirement pay ordered to be distributed to in the

divorce judgment despite the husband's unilateral and voluntary post-judgment election to waive the retirement pay in favor of disability benefits. However, the trial court's ruling was improper because it required the husband to pay the wife directly from CRSC funds and to pay an amount equal to half of his CRSC, not half of the anticipated, but waived, retirement pay. The compensation to be paid the wife for her share of the of the property division in lieu of the waived retirement pay could come from any source the military spouse chose, but it had to be paid to avoid contempt of court. The case was remanded for entry of an order requiring the husband to compensate the wife with monthly payments equal to 50 percent of the retirement pay he would have been receiving.

***Myland v Myland*, C of A No. 292868, 11/23/2010, ___ Mich App ___ (2010).**

The wife appealed the trial court's divorce judgment concerning the use of a formula to determine the amount of spousal support. The formula subtracted the wife's income from the husband's income and then applied a fraction of .25 to the difference because the parties were married 25 years. The wife claimed that the trial court's use of a formula resulted in the failure to adequately consider the parties' ages, health, and abilities to work; their respective abilities to pay alimony; their needs; and, their prior standard of living.

The Court of Appeals reversed, holding that MCL 552.23 prohibited the use of rigid and arbitrary formulas, such as those used by the trial court, that failed to account for the parties' unique circumstances and relative positions and reaffirmed the mandate that a trial court awarding spousal support had to consider the relevant factors. Moreover, the trial court clearly erred by imputing to the wife an income of $ 7,000 since the trial court made no explicit finding regarding the wife's health or her ability to work, nor did it make any finding that the wife voluntarily reduced her income. The trial court's basis for denying the wife attorney fees, that it only awarded attorney fees where a party engaged in egregious conduct or wasteful litigation and indicated that the wife could use her spousal support to pay her attorney, also constituted an error of law since the trial court failed to apply the proper needs-based analysis in MCR 3.206(C)(2)(a).

***Pecoraro v Rostagno-Wallat*, C of A No. 293445, 01/18/2011, ___ Mich App ___ (2011), leave denied by the Supreme Court on 06/03/2011.**

The child's mother and her husband appealed a trial court order enforcing an order of filiation entered by a New York court that declared another man to be the father of a child conceived and born to the mother during her marriage to her husband based on paternity testing showing the man to be the child's biological father.

The Court of Appeals reversed, holding that the biological father lacked standing to seek paternity under Michigan's Paternity Act because there was no paternity determination made in legal proceedings involving the husband and the mother that

established that the husband was not the father of the child. Therefore, the child was not born out of wedlock as required for standing under MCL 722.711(a), 722.714. Even though the New York court found that the father was the biological father of the child, it did not have personal jurisdiction over the husband and therefore no controversy between the husband and the mother was settled. The court held that the Full Faith and Credit Clause of the United States Constitution did not require it to give effect to the New York order of filiation because the order was not a valid and binding judgment over the husband, as: (1) the New York lacked jurisdiction over the husband; (2) the New York court found that the husband was a necessary party to the paternity proceedings in New York; and (3) the New York court expressly recognized that the effect of its action would ultimately have to be determined by a Michigan court.

***Shade v Wright*, C of A No. 296318, 12/2/2010, ___ Mich App ___ (2010).**

The father appealed the trial court's decision granting the mother's motion to modify the father's parenting time with the parties' minor child. In the original parenting time schedule, the mother was permitted to move with the child from Michigan to Ohio, and the father was to have parenting time two weekends a month and eight weeks during the summer with the mother having parenting time every other weekend. The modified parenting time schedule ordered by the trial court provided that the father would have one extended weekend with the child each month and the entire summer.

The Court of Appeals affirmed, holding that the trial court was not bound by the schedule in the judgment of divorce based on the law of the case doctrine because the determination of the child's best interests was not a question of law but a question of fact and the facts were not materially the same now that the child was in high school. The change in the parenting time did not result in the change in the established custodial environment so the *Vodvardka* framework was not appropriate. The modification was proper based on the best interest factors in MCL 722.23(a)-(l) and the parenting time factors in MCL 722.27a(6)(a)-(i) because the father retained a similar amount of parenting time days and the existing schedule prevented the child from participating in social and extracurricular activities.

***Shouneyia v Shouneyia*, C of A No. 297007, 01/18/2011, ___ Mich App ___ (2011).**

The husband owed money to the wife pursuant to the property division in their judgment of divorce. The moved for the appointment of a receiver over assets or income possessed by the husband and by a corporation co-owned by the husband and his brother. The trial court appointed a receiver over the corporation without joining it as a party. The corporation and the husband appealed, arguing that the trial court's failure to join the corporation as a party defendant in the underlying divorce action precluded the court from exercising authority over the corporation.

The Court of Appeal held that Michigan courts consistently recognized that court may not make an adjudication affecting the rights of a person or entity not a party to the case. The wife argued that the appointment of a receiver did not adversely affect any interested non-party's rights, given that the husband's co-owner in the corporation consented to the receivership. But the wife's argument ignored that the corporation itself amounted to an interested party. The circuit court thus did not have authority to adjudicate the rights of the corporation without first making it a party to the case.

However, under MCR 2.207, misjoinder of parties was not a ground for dismissal of an action. Accordingly, the Court of Appeals affirmed the appointment of a receiver and directed the trial court on remand to add the corporation as a necessary party to the action. MCR 2.205(A). The trial court acted within its discretion by appointing a receiver to preserve funds and property that could satisfy the husband's judgment debt.

***Smith v Smith*, C of A No. 295243, 05/25/2011, ___ Mich App ___ (2011).**

The wife appealed the trial court's judgment of divorce. On appeal, she argued that because each party, under the retirement-accounts section of the property settlement agreement (PSA), was awarded half the total value of the retirement accounts, and because the value of the husband's IRA increased, she was entitled to share in the increase in value.

The parties used fixed values for all the retirement accounts in the PSA. The husband was to retain his IRA, and the wife was to retain all other retirement accounts. To equalize the value each was receiving, the husband was required to transfer approximately $1.4 million to the wife. There was no indication that the parties intended to take into account market fluctuations in dividing the retirement accounts. In the investment-property section, the PSA indicated that the investment accounts would be divided evenly in kind, which arguably took into account market fluctuations. There was no such language in the retirement-accounts section. The increase in value of the IRA was an extrinsic fact not contained in the agreement. Because the terms were unambiguous, the trial court was bound by them, and the parties were required to live up to the terms of their agreement. The Court of Appeals affirmed the trial court's decision denying the wife a share of the increased value of the husband's IRA.