STATE OF MICHIGAN

COURT OF APPEALS

GWEN GILBERT,

Plaintiff-Appellant,

v

ALAN ZEKELMAN,

Defendant-Appellee.

UNPUBLISHED
December 20, 2005

No. 263073
Oakland Circuit Court
Family Division
LC No. 2000-645538-DM

Before: Murphy, P.J., and Sawyer and Meter, JJ

PER CURIAM.

Plaintiff Gwen Gilbert appeals as of right from the trial court's order denying her request for a permanent change of custody concerning her three children (Ariel, DOB 8/18/92; Leah, DOB 7/30/94; and Jonah, DOB 6/20/97) with defendant Alan Zekelman. We affirm.

The twelve-year marriage between plaintiff and defendant ended with a judgment of divorce entered on May 16, 2002. The judgment of divorce provided for joint legal and physical custody of the children. On May 29, 2002, the parties stipulated to a parenting time schedule whereby the children would stay with each parent for alternating weeks throughout the year. According to the stipulation, the parenting time schedule was to be effective until May 31, 2003.

On March 19, 2003, plaintiff filed an emergency petition for a temporary change of custody. This petition followed an incident in defendant's home during which Ariel sustained an injury to her head. On April 9, 2003, the court, following the recommendation of the Friend of the Court family counselor, appointed for Ariel a guardian ad litem (GAL), Colleen Ronayne,[1] to make a recommendation regarding defendant's future parenting time. The court also ordered on April 9, 2003, that parenting time would continue in accordance with the May 29, 2002, order, except that Ariel would temporarily have no overnight visits with defendant, and Lori, defendant's current wife, would not be present during Ariel's time with defendant.

[1] On April 13, 2004, the court amended the previous order to provide that Ronayne was a *lawyer* guardian ad litem for all three children, nunc pro tunc to April 9, 2003.

On September 17, 2003, the court entered a stipulated order eliminating the above restrictions on defendant's parenting time. The order was retroactive to July 15, 2003, and provided that the recommendations from Dr. Paul Jacobs, a family therapist, regarding Ariel's parenting time would be followed.

On February 11, 2004, plaintiff moved for a temporary and permanent change of custody and moved to suspend Ariel's therapy with therapist Elaine Swenson. The court denied the request for a temporary change of custody and denied the request to suspend therapy. In addition, Dr. Robert Erard was appointed to evaluate the custody situation. With regard to the request for a permanent change of custody, a seventeen-day evidentiary hearing took place, beginning in June 2004 and concluding in February 2005. The court, in a lengthy opinion, denied plaintiff's request for a permanent change of custody, concluding that the week on/week off, joint custody arrangement should be continued.

On appeal, plaintiff takes issue with several of the court's findings. As noted in *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000):

> "We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." [Citations from *Phillips* omitted.]

Here, plaintiff does not dispute that an established custodial environment existed with both parents. Accordingly, the trial court could not change the established custodial environment "unless there [was] presented clear and convincing evidence that it [was] in the best interest of the child[ren]." MCL 722.27(1)(c). As noted in *Phillips*, *supra* at 26, "[t]he trial court must examine the factors listed in MCL 722.23 to determine the best interests of the child[ren]." MCL 722.23 states:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and

permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

As her first issue on appeal, plaintiff argues that the trial court, in reaching its ultimate decision, erroneously relied on the testimony and opinions of Dr. Erard, the custody evaluator; Swenson, Ariel's therapist; and Dr. Jacobs, the family therapist. Plaintiff argues that Dr. Erard was biased, used a flawed evaluation process, and lacked credible evidentiary support for his conclusions. Plaintiff argues that Swenson was "biased and lacking in credibility and competence." Finally, plaintiff argues that Dr. Jacobs was "largely influenced by Swenson and Defendant."

As noted in *Dragoo v Dragoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997), "[t]his Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." In the child custody case of *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000), this Court flatly stated that "[w]hen reviewing the trial court's findings of fact, this Court defers to the trial court on issues of credibility." Despite this pertinent case law, plaintiff, in making her appellate argument, relies on the case of *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990), wherein the Court stated:

> [T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective

> evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. [Citation and quotation marks omitted.]

Plaintiff also relies on the case of *Bowers v Bowers*, 198 Mich App 320, 324; 497 NW2d 602 (1993), in which the Court, relying on *Beason*, stated that "a court may not immunize its findings from review by purporting to base them on pure credibility determinations in the face of other evidence."

Plaintiff's laundry list of purported problems with the testimony and recommendations of Dr. Erard, Swenson, and Dr. Jacobs simply do not amount to the situation contemplated in *Beason* and *Bowers*. Indeed, the findings and recommendations of these three people were not inherently contradicted by "[d]ocuments or objective evidence" and were not "so internally inconsistent or implausible on [their] face[s] that a reasonable factfinder would not credit [them]. *Beason, supra* at 804.

The trial court, in making its findings, stated, in part:

> Despite Plaintiff's attempts to discredit Dr. Erard by trying to demonstrate his bias toward [sic] her and alleging that he spent more time with Defendant than with Plaintiff, this Court found Dr. Erard's Psychological Report and his testimony to be extraordinarily thorough, credible and persuasive.
>
> * * *
>
> Both Dr. Jacobs and Ms. Swenson presented credible and persuasive testimony . . . .

The trial court properly exercised its duty to evaluate witness credibility, and, despite plaintiff's apparent displeasure with this evaluation, we are not at liberty to second-guess the court in this regard. *Mogle, supra* at 196. No basis for reversal is apparent with respect to this issue.

Plaintiff next argues that the trial court erred in finding that defendant was the favored parent under best interests factor (a), dealing with "[t]he love, affection, and other emotional ties existing between the parties involved and the child." See MCL 722.23(a). With regard to this factor, the trial court, relying primarily on Dr. Erard's report, concluded that Ariel had developed an unhealthy attachment to plaintiff as a result of

> . . . adjustment issues relating to Defendant's marriage to Lori and Lori's presence and influence in their lives as well as Plaintiff's either deliberate or unconscious encouragement of this unhealthy, enmeshed relationship, due to her own experience of being estranged from her own mother. Leah and Jonah have experienced similar adjustment issues, although not to the extreme that Ariel has.

The court, in accordance with Dr. Erard's recommendation, concluded that Ariel needed to "resolve her issues with Defendant and Lori by maintaining, if not slightly increasing,

the time she spends with them." The court also agreed with Dr. Erard that plaintiff needed to stop "catering to [Ariel's] weaknesses."[2]

We conclude that the evidence with regard to factor (a) did not "clearly preponderate[] in the opposite direction" from the trial court's conclusions. *Thompson, supra* at 358. Indeed, while it is clear that the children enjoyed love and affection from and emotional ties with plaintiff, Dr. Erard stated in his report that Ariel, in particular, needed to stop her unhealthy "merger with her mother." Dr. Erard also concluded that Ariel needed to address her conflicts with her stepmother and with defendant through a means *other* than further bonding with plaintiff.

Plaintiff contends that defendant parents the children improperly and is abusive toward Ariel. However, in making these contentions, plaintiff does not provide "specific page references to the transcript, the pleadings, or other document or paper filed with the trial court" as required by MCR 7.212(C)(7). At any rate, we note that Dr. Erard, in his report, found that the evidence of mistreatment of Ariel in defendant's home was "entirely unpersuasive." Under the circumstances, the trial court properly concluded that defendant was favored under factor (a), considering the evidence that plaintiff's relationship with Ariel was *unhealthily* close. Contrary to plaintiff's assertion, the evidence did not clearly preponderate toward a finding that "Plaintiff should be heavily favored under" this factor.

Plaintiff next contends that the trial court erred in concluding that defendant was favored with regard to factor (i), dealing with "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." MCL 722.23(i). Concerning this factor, the court noted the following: (a) Ariel favored being with plaintiff; (b) Leah "has indicated that she would like to spend more time with Plaintiff, but realizes that her time with Defendant is also important;" and (c) Jonah "considers himself too young to state a preference regarding custody." The court additionally stated, in part:

> The Court agrees with Dr. Erard and believes that while Ariel's relationship with Plaintiff is important, at this point in Ariel's life and development, she needs to focus her energy on improving her relationship with Defendant. Even though her preference is to be with Plaintiff, this Court does not find that it would be in her best interest to be with Plaintiff any more than the current parenting time order provides.
>
> With regard to Leah and Jonah, the Court finds that any reluctance on their part when it comes to being with Defendant is rooted in the volatile environment

[2] We note that, while the custody decision obviously pertained to all three children, the majority of the problems surrounding the custody issue pertained to Ariel.

> which Ariel has created in the home. Ariel's behavior and attitude has affected the *whole* family – Leah and Jonah included.
>
> Defendant is favored on this factor. [Emphasis in original.]

We cannot agree with plaintiff that the evidence clearly preponderated in the opposite direction from the trial court's findings and that plaintiff must instead be favored under factor (i). See *Thompson, supra* at 358. While factor (i) refers to the preference of the child, the statutory language modifies the word "preference" with the word "reasonable." As discussed above, Dr. Erard provided evidence that Ariel's attachment to plaintiff was of an *unhealthy* nature and that Ariel's "merger with her mother" needed to be stopped. Accordingly, given that Leah and Jonah did not express a strong opinion either way with regard to the custody situation, it was proper for the trial court to fail to give credence to Ariel's expressed preference of being with plaintiff. Indeed, given the evidence of an unhealthy attachment between Ariel and plaintiff, it was proper for the court to conclude that Ariel's preference for plaintiff was not a "reasonable" preference. See MCL 722.23(i). Under the circumstances, we find no basis for a remand or reversal.[3]

Plaintiff next argues that the trial court erred in concluding that the parties were equal with regard to factors (b) ("[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any"), (d) ("[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity"), (f) ("[t]he moral fitness of the parties involved") (h) ("[t]he home, school, and community record of the child"), and (j) "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents"). See MCL 722.23. Plaintiff argues that she should have been favored under these factors.

With regard to factor (b) ("[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any"), plaintiff contends that defendant engages in behavior requiring complaints to Child Protective Services, disciplines the children improperly, has admitted his parenting limitations, improperly helps Leah complete her homework, interferes with Ariel's schoolwork, and fails to ensure the completion of school assignments when the children are out of school for Jewish holidays. Once again, the evidence did not clearly preponderate towards a finding that factor (b) favored plaintiff. Indeed, Dr. Erard found that the evidence of mistreatment of Ariel in defendant's home was "entirely unpersuasive." He also found that defendant's disciplining of Ariel "cannot properly be adduced as child maltreatment" and that Ariel herself contributed to problems with her schoolwork. The court properly gave credence to Dr. Erard's findings. Moreover, there was evidence that both parents were making an effort to educate their children about the Jewish faith.

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[3] While it is *possible* that a more appropriate finding with regard to this factor would have been a finding that the parties were equal, plaintiff does not argue for such a finding in her appellate brief. Instead, she argues that *she* should have been favored under factor (i).

The trial court did state in its written opinion that "Defendant should not ask the school staff to intervene with disciplining any of the children for out of school conduct," but the court also noted that "Plaintiff has shown up at the children's schools for no apparent reason and has made attempts to get school staff to align with her against Defendant. This is inappropriate behavior on Plaintiff's part, and it must stop." These findings by the trial court regarding plaintiff's actions find support in the evidentiary hearing transcripts. Indeed, there is record evidence that plaintiff had made overly frequent contacts with one of the children's schools and had attempted to get school staff to "be on her side" in the proceedings. Overall, it is clear that the trial court weighed the evidence and properly found that there had been problems with regard to *both* parent's actions. Reversal or remand is not warranted with respect to factor (b).

Concerning factor (d) ("[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity"), plaintiff argues that she should be favored with respect to this factor because she lives in a stable home, whereas defendant "has remarried and has moved from the marital home once already [and] . . . has plans to move again[] and to engage a full time housekeeper . . . to live in and care for the house and the children." Plaintiff contends that "Defendant's home is characterized by hostility, insecurity, instability, abuse and stress." Plaintiff's argument with regard to factor (d) is without merit. Indeed, as noted above, the children have been in established custodial environment *with both parents* for some time. Dr. Erard indicated that defendant's home was "relaxed" during a home visit, and he testified that he did not consider the week on/week off schedule to be "unstable." He also indicated that

> [defendant's] remarriage created an emotional and behavioral crisis for Ariel. . . . *[C]hanging the permanent custody arrangement at this time would only prolong the crisis* and interfere with Ariel's achievement of important developmental tasks. [Emphasis added.]

The trial court properly concluded that the children should continue with their current, established environment, despite the fact that they will have to adjust to defendant's remarriage.

With regard to factor (f) ("[t]he moral fitness of the parties involved"), plaintiff argues that defendant is abusive as a parent and has lied on numerous occasions throughout the pendency of the case. As noted in *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994), "questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent.*" (Emphasis in original.) We find no error with regard to the trial court's finding concerning factor (f). First, there was evidence that the allegations of abuse on defendant's part were just that – allegations. Moreover, while there was indeed evidence that defendant had lied, we simply cannot conclude that the alleged instances of lying were so profound such that they evidenced defendant's inability to be an effective parent. The evidence simply did not "clearly preponderate" in favor of plaintiff with regard to factor (f). *Thompson*, *supra* at 358.

Concerning factor (h) ("[t]he home, school, and community record of the child"), plaintiff argues that the court improperly disregarded evidence that the dynamic at defendant's home was stressful and tense, that defendant had called the police as a substitute for proper

discipline, and that Jonah had been exposed to profanity, violence, and inappropriate movies in defendant's home. The court, in evaluating this factor, noted that "[t]he home, school and community record of the children is fairly good," but the court noted that each child, and particularly Ariel, had displayed some difficulty "as a result of the changes occurring at Defendant's home following his marriage to Lori, as well as this prolonged and contentious litigation." The Court stated that it "believes that through on-going therapy and with the support, cooperation and encouragement from both Plaintiff and Defendant, Ariel's behavioral and emotional issues can be resolved." The Court also stated that it

> discourages Plaintiff's unnecessary interference with the children's schooling, by appearing at their schools for no apparent reason, and for trying to convince teachers, counselors and staff to align with her against Defendant.

We conclude that the trial court properly found that there were problems on the part of both parents with regard to schooling issues. With regard to plaintiff's allegations of defendant's allegedly improper disciplinary procedures, we note again that Dr. Erard found that defendant's disciplining of Ariel "cannot properly be adduced as child maltreatment." We also note Dr. Erard's finding that defendant's home was "relaxed" during a home visit, as well as his findings that Jonah "considers his father as a more patient listener who is also better [than plaintiff] at making him feel really loved." The evidence did not clearly preponderate towards a finding that plaintiff was the favored parent with regard to factor (h).

With regard to factor (j) ("[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents"), plaintiff argues that a great deal of evidence weighs against defendant. The court, in its findings, acknowledged that defendant had not shared vital information with plaintiff about the children. However, the court also indicated that plaintiff "has made it exceedingly difficult for Defendant to be a parent to the children." This finding is supported by record evidence. Indeed, Dr. Erard indicated that plaintiff induced guilt in the children by telling them how lonely she is without them, disparaged Lori in front of the children, called "for superfluous investigations of father's household," and "overtly and secretly arrang[ed] contacts with [the children] in person and by telephone and computer during father's time." Given that *both* plaintiff and defendant displayed problems in terms of facilitating a healthy relationship between the children and the other parent, the trial court did not err in finding that the parties were equal with respect to factor (j).

Plaintiff additionally argues that the trial court should have favored her with regard to factor (l) ("[a]ny other factor considered by the court to be relevant to a particular child custody dispute"). We decline to address this issue because it was not listed as part of the statement of questions presented for appeal. *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997). At any rate, plaintiff's argument relies heavily on *her* assessment of witness credibility, yet it was the trial court's duty to assess credibility. *Mogle, supra* at 196.

Plaintiff next argues that the trial court was required to make an award of sole custody because the parents "were unable to cooperate and agree concerning important decisions affecting the welfare of the children[.]" Plaintiff cites *Fisher v Fisher*, 118 Mich App 226, 232-233; 324 NW2d 582 (1982), in which the Court stated:

> Defendant asks the Court to order joint custody of the parties' children. In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing – including health care, religion, education, day to day decision making and discipline – and they must be willing to cooperate with each other in joint decision making. If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. [Citation omitted.]

We disagree that the trial court erred. The case of *Nielsen v Nielsen*, 163 Mich App 430; 415 NW2d 6 (1987), is instructive. In *Nielson, supra* at 432, the parties had joint custody of their children when the defendant petitioned for sole custody. The defendant, citing *Fisher,* "argued that, due to the parties' inability to cooperate, the joint custody arrangement should be abandoned and defendant granted sole custody of the three children." *Id.* at 434. The *Nielson* Court stated:

> Following a reading of the record, we believe that the court's denial of defendant's petition for sole custody was proper. The court correctly noted that cooperation is only one factor for the court to consider in its decision to grant or deny joint custody. MCL 722.26a . . . . Defendant has misplaced reliance on *Fisher* . . . . The *Fisher* Court found that the parties could not agree on basic child-rearing issues and, therefore, it was obligated to deny defendant's joint custody request. *Fisher, supra* at 233 . . . . The record in the instant case does not show that the parties cannot agree on basic child-rearing issues. Instead, the parties' inability to cooperate has centered on disputes regarding custody times and personal animosity. [*Nielson, supra* at 434.]

The *Nielson* Court concluded that the defendant "did not present clear and convincing evidence that a change in custody was warranted." *Id.* at 435.

Here, the trial court found, analogous to the situation in *Nielson,* that plaintiff did not present clear and convincing evidence that a change in custody was warranted. The trial court's conclusion, which finds support in the record, was that the joint custody arrangement was in the children's best interests. There was not such an extreme divisiveness concerning child-rearing issues in this case such that an award of sole custody was the only solution. Reversal is unwarranted.

Plaintiff next argues that the trial court erred in several respects concerning the appointment of Ronayne as the GAL or the lawyer guardian ad litem (LGAL). The court originally appointed Ronayne as a GAL for Ariel by way of an order dated April 9, 2003. On April 13, 2004, the court amended the previous order to provide that Ronayne was a LGAL for all three children, nunc pro tunc to April 9, 2003. As noted in MCL 722.22(e), "'Guardian ad litem' means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney." Under MCL 722.22(f), "'Lawyer-guardian ad litem' means an attorney appointed under [MCL 722.24]. A lawyer-guardian ad litem represents the child, and has the powers and duties[] as set forth in [MCL

722.24]." Plaintiff argues that the court erred in amending the April 9, 2003, order to designate Ronayne a LGAL for all three children and erroneously "failed to terminate the GAL or to hold an evidentiary hearing on her performance."

We find no basis for reversal. Indeed, plaintiff has simply failed to indicate how the alleged errors perpetrated by the trial court with regard to the GAL or LGAL affected the outcome of the child custody decision. Nor has she provided any authority indicating that a child custody decision may be reversed solely on the basis of irregularities relating to the GAL or LGAL, in the absence of clear evidence that the irregularities affected the outcome of the custody decision.[4] As noted in *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998):

> It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [Citation and quotation marks omitted.]

Plaintiff also argues that the trial court erred in failing to hold an evidentiary hearing concerning Ronayne's fees, and particularly, concerning the amount of time Ronayne actually spent on particular tasks. In *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999), the Court, in addressing a similar issue, stated:

> We likewise reject plaintiff's initial contention that the trial court erred in failing to hold an evidentiary hearing regarding the reasonableness of her fee request. The trial court should normally hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request. Here, however, the trial court did not err in awarding fees without having held an evidentiary hearing because the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision. [Citations omitted.]

In the instant case, there was a sufficient record from which the court could make its award of fees, namely, Ronayne's billing records. Moreover, in addressing plaintiff's concern about excessive charges, the court stated, "I have already reviewed what [plaintiff's counsel] call[s] over charges, the bills, with regard to their reasonableness, and found that they were reasonable on their face." The court additionally stated, "I have already reviewed those bills on their face and concluded that the amount of time spent for the tasks described is reasonable." Under the circumstances, we conclude that the court adequately explained the reasons for its decision – it

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[4] Alternatively, if plaintiff is arguing that the orders *relating to the appointment and performance of the GAL/LGAL in the trial court* (as opposed to the child custody order) be reversed, such an argument is moot. See *Michigan Nat Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997) (discussing mootness). While Ronayne has been appointed as a GAL for purposes of this appeal, plaintiff does not make an adequate argument in her appellate brief with regard to the appellate appointment.

reviewed the billing records and determined that the amount of time spent for the tasks was reasonable. In light of *Head*, *supra* at 113, we find no basis for a remand or reversal.[5]

Finally, plaintiff argues that "[w]hile this Court does not normally consider issues raised for the first time on appeal, it can and should remand this case for assignment to a different judge where clear error reflects judicial impartiality [sic]." Because we have found no clear error on the part of the trial judge, this issue is without merit.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter

[5] We note that plaintiff, in her appellate brief, does not urge us to find the fee award unreasonable but merely asks that we remand the case for an evidentiary hearing with respect to the issue. We additionally note that plaintiff briefly mentions in her appellate brief a problem with regard to Dr. Erard's fees. This issue has been waived because it was not raised in the statements of questions presented for appeal. *Weiss, supra* at 634.