STATE OF MICHIGAN

COURT OF APPEALS

DAVID C. RESETAR,

Plaintiff-Counter-Defendant-Appellee,

v

RHONDA SUZANNE RESETAR,

Defendant-Counter-Plaintiff-Appellant.

UNPUBLISHED
March 4, 2008

No. 265269
Wayne Circuit Court
LC No. 04-410078-DM

DAVID C. RESETAR,

Plaintiff-Appellee,

v

RHONDA SUZANNE RESETAR,

Defendant-Appellant.

No. 274047
Wayne Circuit Court
LC No. 04-410078-DM

DAVID C. RESETAR,

Plaintiff-Appellee,

v

RHONDA SUZANNE RESETAR,

Defendant-Appellant.

No. 277150
Wayne Circuit Court
LC No. 04-410078-DM

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from the judgment of divorce and an order denying defendant's motion for a new trial, to amend the judgment of divorce, for relief from judgment, and for a stay of proceedings and appeals, by leave granted, the trial court's denial of her motion to enforce this Court's prior order regarding the sale of the parties' car wash and the trial court's order denying defendant's motion to amend or vacate the judgment of divorce. Defendant also appeals, by leave granted, an order denying defendant's motion requesting the disqualification of the trial court judge. We affirm.

Background

Plaintiff filed a complaint for divorce on April 5, 2004.[1] At a February 8, 2005 settlement conference, the parties indicated an interest in referring the matter to binding arbitration/mediation. An order was entered to that effect, providing that the arbitration would take place on March 12, 2005, that a final arbitration award would be issued by March 21, 2005, and that the parties would appear before the trial court on April 11, 2005 for entry of a judgment of divorce.

On April 11, 2005, the parties appeared before the trial court. The parties having attended mediation/arbitration and having reached no resolution, the trial court ordered that trial would commence that afternoon. Trial did, indeed, commence that very afternoon and continued on various days throughout the next two weeks. A judgment of divorce incorporating the court's oral opinion was entered on May 13, 2005. Relevant to the instant matter, the judgment of divorce awarded defendant the parties' marital home and the primary mortgage associated with the home. Plaintiff was awarded the parties' rental home, the primary mortgage on the home, the parties' car wash business (valued at $630,000.00), and all debts associated with the car wash. The judgment further gave the trial court's approval of a pending sale of the car wash and provided that the proceeds from the sale of the car wash were to be used for repayment of the debts secured by the car wash, with the debts on which defendant had liability being paid first.

Defendant thereafter moved for a new trial and/or amendment of the judgment of divorce, for relief from judgment, and for a stay, which the trial court denied in its entirety. The trial court also denied defendant's motion to amend the judgment of divorce to settle the issue of the car wash, which defendant brought when it was discovered that the sale of the car wash fell through. Defendant thereafter filed an application for leave to appeal the trial court's failure to enforce the judgment of divorce regarding the sale of the car wash and its order denying defendant's motion to amend or vacate the judgment of divorce. In lieu of granting leave to appeal, this Court reversed the trial court's order denying defendant's motion to settle the sale of the car wash, stating: "Where both parties desire the sale of the car wash, the circuit court is directed to appoint a receiver to implement the sale." We remanded for proceedings consistent with the order. *Resetar v Resetar*, order of the Court of Appeals, entered March 23, 2006 (Docket No. 265890). The trial court denied defendant's later motion for enforcement of our remand order and further denied defendant's separate motion to disqualify the trial court judge.

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[1] Plaintiff had previously filed for divorce, but the matter was dismissed in February, 2004 for lack of progress.

Defendant first argues that the trial court erroneously imposed a deadline for the completion of arbitration, then rescinded the parties' arbitration agreement. We disagree.

The existence and enforceability of the terms of an arbitration agreement are judicial questions for the court. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). Judicial questions are reviewed de novo. *Id.*

The domestic relations arbitration act (DRAA), MCL 600.5070 *et seq.*, is a specific and comprehensive statutory scheme that provides for and governs arbitration in domestic relations matters. *Harvey v Harvey*, 257 Mich App 278, 285; 668 NW2d 187 (2003). Pursuant to MCL 600.5071, parties to an action for divorce may stipulate to binding arbitration by a signed agreement that specifically provides for an award with respect to at least one issue concerning, among other things, real and personal property or child custody. The DRAA contains numerous protections, including mandatory pre-arbitration disclosures and detailed procedural requirements. *Id* at 287.

MCL 600.5071 clearly and unambiguously provides that a matter may be submitted to arbitration only by a "signed agreement." Judicial construction of statutory language that is clear and unambiguous is not permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). While the parties in this matter stated on the record their desire to engage in mediation/arbitration, they did not execute a written arbitration agreement as required by the DRAA. Instead, they merely obtained a court order, signed only by the trial court, referring the dispute to arbitration. Where the requirement for a signed agreement was not met, the order for arbitration was improper and the issue of whether any limitations on the arbitration procedure itself were proper is thus moot.

Even if the order referring the matter to arbitration was proper and could be construed as the parties' agreement to arbitrate, we would nevertheless find that the deadlines imposed by the court for completion of the arbitration were appropriate. First, while defendant argues there is no statutory or court rule authority allowing time restrictions to be imposed upon arbitration proceedings, one could also argue that the converse is true—there is no authority *precluding* such limitations.

Second, the authority of the arbitrators is derived from the agreement. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). If, in fact, the order is viewed as a signed agreement of the parties, it is the parties who limited the arbitration/mediation.

Third, and most compellingly, defendant, through counsel, explicitly agreed to the time limitations set forth in the arbitration order. At the settlement conference, defense counsel specifically stated that the parties desired to refer the matter for mediation and, if it did not work, immediately go into arbitration so that they did not leave the mediator's office without a decision. The trial court indicated that the arbitrator must be made aware that his decision would be due by March 21, 2005, and defense counsel related that he had never left the mediator's office without an opinion. Both parties, then, were well aware of the court's proposed limitations and continued to express (through counsel) a desire to engage in arbitration.

Consistent with the parties' desires and understanding, the order for arbitration entered that day contained the timeframe in which the arbitration would proceed as well as the issues to be arbitrated.

At no time did defendant object to or question the time limit for arbitration, nor did she move to set aside the arbitration order. Where defendant explicitly agreed to limit the time in which arbitration would take place, she cannot now assign this agreement as error. "To do so would allow defendant to harbor error as an appellate parachute." *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

Defendant additionally argues that even if the court had the authority to impose a limitation, the limitation was unreasonable because it soon became apparent that they could not arbitrate the case in one day, as previously thought. However, nearly a month passed before the parties were to appear before the court and no one contacted the court to ask for additional time to arbitrate the matter. If defendant believed additional arbitration dates were necessary, the matter could have been brought to the court's attention well within that one-month period. The timeframe imposed was not unreasonable and defendant's failure to request additional time now precludes her argument otherwise.

Next, defendant contends that the trial court abused its discretion in ordering trial on three hours' notice to the parties, and then imposed testimony deadlines that prevented defendant from presenting her case. We disagree.

MCR 2.501(C) states:

> **Notice of Trial.** Attorneys and parties must be given 28 days' notice of trial assignments, unless
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> (1) a rule or statute provides otherwise as to a particular type of action,
> (2) the adjournment is of a previously scheduled trial, or
> (3) the court otherwise directs for good cause.
>
> Notice may be given orally if the party is before the court when the matter is scheduled, or by mailing or delivering copies of the notice or calendar to attorneys of record and to any party who appears on his or her own behalf.

Because the parties were not given 28 days' notice of the trial, the issue is whether any of the exceptions set forth in MCR 2.501 apply.

Here, the trial court presumably relied on the "good cause" exception to the twenty-eight day notice requirement, MCR 2.501(C)(3). We review the trial court's finding of good cause for an abuse of discretion. See *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996).

The parties attempted a one-day mediation on March 12, 2005 and had a hearing date set to enter the Judgment of Divorce on April 11, 2005. A review of the April 11, 2005 hearing transcript reveals that the court received a letter from the arbitrator/mediator indicating that the parties attempted mediation with him but were unable to settle the matter, and that it was his

understanding that no further alternative dispute resolution proceedings were contemplated. Further, as of the April 11, 2005 hearing date, discovery had been closed, no further mediation dates had been scheduled, and no one contacted the court to reschedule or adjourn the hearing. Given the expectation that a judgment of divorce would enter on that hearing date, the parties were well aware that the court expected the case to be completely closed on April 11, 2005. When the parties appeared on the hearing date without a judgment, it was therefore reasonable to go to trial. Moreover, defendant presented the court with a trial brief at the hearing, and, on the second day of trial, defense counsel twice indicated that the case was ready for trial. The trial then proceeded over the course of two weeks. Under the circumstances, there was sufficient good cause to proceed to trial on the date that the judgment was to be entered.

With respect to the limitations at trial, we note that MRE 611 grants a trial court broad power to control the manner in which a trial is conducted, including the examination of witnesses. *People v Mixon*, 170 Mich App 508, 514-515; 429 NW2d 197 (1988), rev'd in part on other grounds 433 Mich 852, 443 NW2d 167 (1989). We review its determination of the scope of examination for an abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999).

The trial court limited both parties' examination of plaintiff, indicating to plaintiff's counsel during direct examination that it did not need to know certain of the information requested, and indicating to defense counsel during cross-examination that he had a limited amount of time in which to complete his questioning. The trial court asked questions of the witness as well and, as it was a bench trial, the trial court presumably knew what testimony it would deem relevant and necessary for its ultimate ruling in the case. Given the above, and noting that defendant has not identified how any limitation in time for questioning plaintiff prejudiced her, the court did not abuse its discretion in limiting defendant's time to cross-examine plaintiff.

Similarly, the trial court did not abuse its discretion in imposing other trial limitations. During trial, defendant indicated that she would need to call no less than ten witnesses in addition to herself and presented the trial court with a substantial trial brief containing a multitude of documents as attachments. The trial court opined that the matter was not a difficult financial case and that the majority of the information sought through the witnesses could be submitted in a written offer of proof.[2] The trial court thus gave defendant an entire day to call what witnesses she felt were most relevant, informing defendant that anything she thought the court needed to know in addition to witness testimony could be submitted in a written offer of proof.

Given that this was a bench trial and the trial court's ultimate duty was to ascertain and divide the parties' assets and liabilities, it was in the best position to determine what evidence would best help her decision if given through live testimony and which evidence would be

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[2] The major issues for resolution were the values of the two homes, the debts incurred by the parties and the reason for the debts, the value of the car wash, and whether plaintiff was withholding cash from the car wash for his sole use.

equally useful but less expensive and time-consuming if presented in written form. The trial court did not abuse its discretion in limiting defendant's time at trial, its actions were within its authority under MRE 611, and the limitations did not preclude defendant from presenting her case.

Defendant next contends that the trial court abused its discretion in precluding the testimony of her forensic CPA. Decisions regarding the admissibility of an expert's testimony are reviewed for an abuse of discretion. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002).

MRE 702 governs expert testimony and provides that an expert witness may testify if the trial court determines that scientific, technical, or other specialized knowledge will assist the trier of fact and if :

> (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Here, defendant's expert, Mr. Wisinski, was retained to determine if the car wash's financial statements were accurately represented for purposes of the divorce proceedings. The expert informed the court, however, that he was going to render an opinion only as to whether the 2003 gross earnings of the car wash were accurately represented. Mr. Wisinski told the court he did not have all of the books concerning the car wash, was not given enough time to analyze the detail behind the car wash expenses, and could not render an opinion as to what was done with any monies not stated in the earnings of the car wash or whether the money was spent on the marital estate or otherwise.

The trial court's duty in this divorce matter was to determine what the assets of the marital estate were, and to determine to what extent, if any, either party diverted assets out of the marital estate for their own personal benefit. Because Ms. Wisinski did not perform a valuation of the car wash and did not have enough information to render an opinion as to the car wash expenses, the trial court could reasonably conclude that any information Mr. Wisinski could provide was not based upon sufficient facts or data and could not assist the trial court in ruling on the ultimate issues concerning the car wash. The trial court thus did not abuse its discretion in precluding the testimony of defendant's forensic CPA.

Defendant next argues that the awarded spousal support was not just or reasonable under the circumstances and that the trial court abused its discretion in setting the support amount. We review a trial court's decision whether to award spousal support for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). We review a trial court's findings of fact related to spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* at 654-655. If there is no clear error, this Court determines whether the dispositional ruling was fair and equitable in light of the facts. *Id.*

The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and spousal support is to be based on what is just

and reasonable under the circumstances of the case. *Moore, supra,* at 654. Facts to consider in awarding spousal support include:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay [spousal support], (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. *Olson v Olson,* 256 Mich App 619, 631; 671 NW2d 64 (2003).

In this case, both parties submitted a statement of their respective expenses and income for the court's consideration, and the trial court specifically addressed the factors relevant to an award of spousal support. The trial court considered the parties' ages and acknowledged that the parties agreed defendant would stay home with the parties' children, while plaintiff made approximately $144,000.00 per year, plus a $7200.00 car allowance. Noting that it awarded plaintiff the car wash, the trial court also noted that it awarded plaintiff all of the debt associated with the car wash. Acknowledging defendant's expressed desire to continue to stay at home with the parties' school-aged children, the trial court indicated that defendant was entitled to rehabilitative spousal support, given that she was young enough and educated enough (she has a bachelor's degree) that she would eventually be able to get back into the workforce. Sorting out what it considered reasonable and necessary expenses, and taking into account the income defendant could receive from part-time work as well as the child support amount awarded, the trial court awarded defendant $1500.00 per month in spousal support for a period of five years. While defendant places significant emphasis on one or two of the factors to be considered in awarding spousal support, in light of the evidence and how it relates to the factors as a whole, we find that the trial court's award of spousal support was just and equitable.

Defendant next argues that plaintiff's failure to sell the car wash, as agreed upon, requires that the judgment of divorce be set aside. We disagree.

We review a trial court's decision to grant or deny a motion to set aside a prior judgment for an abuse of discretion. *Heugel v Heugel,* 237 Mich App 471, 478; 603 NW2d 121 (1999).

MCR 2.612(C)(1) provides for relief from judgments, orders, and proceedings on the following grounds:

> (a) Mistake, inadvertence, surprise, or excusable neglect.
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
> (d) The judgment is void.
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

Defendant is correct that the parties anticipated that the car wash would be sold. Plaintiff moved for permission to immediately sell the car wash during the divorce proceedings, apparently had a buyer lined up, and was proceeding toward the sale. Consistent with that intention, the judgment of divorce awards plaintiff the car wash, indicates the court's approval of the sale of the car wash, and values the car wash at $630,000.00. Plaintiff was also awarded all of debt secured for the purpose of owning or operating the car wash, which was in an amount close to, if not more than, the value of the car wash. Plaintiff was further ordered to pay off the debt from the proceeds of the car wash sale, with the debt that defendant was also held liable for to be paid first. The anticipated sale did not, however, occur, and plaintiff still owns and operates the car wash.

Despite the lack of sale, plaintiff paid off the home equity line of credit (used for the car wash) on the marital home awarded to defendant and defendant has identified no other debt for which she remains liable. Where plaintiff was awarded the car wash, but was also awarded nearly the entirety of the marital debt, most of which was used for the car wash and which approached the value of the car wash itself, it does not appear that the failure to sell the car wash renders the entire judgment unfair. Plaintiff is still saddled with all of the debt and expenses associated with the car wash, and defendant is free and clear of the same. The goal of a court when apportioning a marital estate is to equitably divide it in light of all the circumstances. *Byington v Byington,* 224 Mich App 103, 114; 568 NW2d 141 (1997). That plaintiff retained the car wash does not frustrate that goal or render the judgment inequitable.

Finally, defendant contends that the trial court abused its discretion in awarding her only $750.00 in attorney fees. Attorney fees are not recoverable as of right in divorce actions. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). We review a trial court's grant or denial of attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error. *Id.*

Attorney fees in a domestic relations case are governed by statute, MCL 552.13, and court rule, MCR 3.206(C). According to MCL 552.13(1):

> In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. . .

MCR 3.206 provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Testimony established that plaintiff had already paid $5,000 to defense counsel for defendant's attorney fees, $5,000 for an expert, $6,500 to defendant's prior counsel in the prior divorce proceeding, half of the $2,400 mediation fee, and several thousand dollars of his own attorney fees. While defendant had little income other than the child and spousal support awarded her, she was also awarded the majority of the marital liquid assets while plaintiff was awarded hundreds of thousands of dollars in marital debt, as well as being ordered to pay child and spousal support. The trial court's finding that plaintiff was not in a financial position to pay defendant's attorney fees was thus not erroneous.

As to defendant's allegations that her attorney fees were incurred due to plaintiff's failure to cooperate or comply with discovery requests, the trial court indicated neither party was efficient in their effort to resolve the case. The trial court then engaged in a detailed analysis of each party and counsel's conduct during the proceedings and employed a reasonable rationale in determining that neither party was at fault with respect to the amount of attorney fees incurred. Based on the trial court's well-reasoned and supported findings regarding the parties' ability to pay attorney fees and that neither party was proportionately at fault for incurring any unnecessary attorney fees, the trial court did not abuse its discretion in awarding only an additional $750.00 in attorney fees to defendant.

Docket No. 274047

Defendant asserts that the trial judge's deep-seated antagonism toward defense counsel and application of the Due Process Clause necessitated her disqualification. We disagree.

When reviewing a motion for disqualification, this Court reviews the trial court's findings of fact for an abuse of discretion and the applicability of the facts to the relevant law de novo. *Armstrong v Ypsilanti Charter Twp,* 248 Mich App 573, 596; 640 NW2d 321 (2001).

Disqualification of judges is governed by MCR 2.003, which states in pertinent part:

(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
(1) The judge is personally biased or prejudiced for or against a party or attorney.
(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
(3) The judge has been consulted or employed as an attorney in the matter in controversy.
(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

The party challenging the impartiality of a judge "must overcome a heavy presumption of judicial impartiality." *Van Buren Charter Twp v Garter Belt, Inc,* 258 Mich App 594, 598; 673 NW2d 111 (2003) (citation omitted).

"The Due Process Clause requires an unbiased and impartial decision maker. Thus, where the requirement of showing actual bias or prejudice under MCR 2.003(B)(1) has not been met, or where the court rule is otherwise inapplicable, parties have pursued disqualification on the basis of the due process impartiality requirement." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). "Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases." *Van Buren Charter Twp, supra* at 599. Among those extreme cases are where the judge:

> (1) has a pecuniary interest in the outcome;
> (2) "has been the target of personal abuse or criticism from the party before him";
> (3) is "enmeshed in [other] matters involving petitioner * * * "; or
> (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision maker.
> *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975)(citations omitted).

We must examine claims that due process requires judicial disqualification on a case-by-case basis, *Cain, supra* at 514, and review the totality of the circumstances. *Van Buren Charter Twp, supra* at 601. Disqualification is only necessary "when the risk of actual bias is too prevalent, so that the constitutional guarantee of a fair trial would be inhibited." *Cain, supra* at 514. "[T]he constitutional standard for disqualification is not easily met." *Id.*

Here, defendant filed a motion to disqualify Judge Popke because she was allegedly personally biased or prejudiced against defense counsel. Judge Popke denied the motion to disqualify and defendant sought de novo review of the denial before Chief Judge Kelly. Judge Kelly also denied the requested relief.

Defendant draws our attention to two potential reasons for Judge Popke's bias: defense counsel's denial of Judge Popke's 2002 request for assistance in getting appointed to the Court of Appeals; and, Judge Popke's remarks to defense counsel at 2006 fundraiser. The relevancy of the possible reasons for her alleged bias is questionable. Nevertheless, defendant presents a narrative of the events and conversations that transpired that are different from the version given by Judge Popke. These are thus generally issues of credibility. Judge Kelly heard defense counsel's motion and, apparently found that defense counsel's details of his communications with Judge Popke were not as credible. We give deference to the trial court's ability to judge the credibility of witnesses. See, e.g., *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998).

Defendant also directs this court to an alleged ex parte communication between Judge Popke's clerk and plaintiff as evidence of a personal bias toward defense counsel. However, that the communication "had to be undertaken at Judge Popke's instruction" as alleged by defendant is not borne out by the information elicited at the hearing. According to the information provided at the hearing, Judge Popke did not engage in ex parte communication with plaintiff and did not direct her clerk to do so. The alleged ex parte communication thus does not serve as evidence that Judge Popke had a deep-seated antagonism toward defense counsel.

To the extent defendant takes issue with rulings made during the divorce proceeding which he claims evidence Judge Popke's bias and deep-seated antagonism toward defense

counsel, "repeated rulings against a litigant, even if erroneous, are not grounds for disqualification." *Armstrong v Ypsilanti Charter Township*, 248 Mich App 573, 597; 640 NW2d 321 (2001)(citation omitted). We would also note that rulings were also made against plaintiff during the proceedings and defendant was ultimately awarded the martial home, spousal support and child support, and was relieved of all marital debt.

Finally, defendant directs this Court to Judge Popke losing her patience with defense counsel during trial, making sarcastic remarks, and denying him the opportunity to make a record. After a review of the entire record, however, we are satisfied that the occasional stray remark by the trial judge does not show an actual bias or prejudice against defense counsel. The trial judge's alleged refusal to allow defense counsel to make a record similarly demonstrates no bias or prejudice.

Throughout trial, defense counsel oftentimes asked to make a record on his objections. The trial court generally advised counsel that he should put the matter in writing as they were going to continue with trial. Judge Popke, then, never prevented defense counsel from bringing any objection or argument he may have. Instead, she limited the mechanism through which defense counsel could bring his argument and attempted to keep the trial focused and moving forward. Defendant having failed to establish that Judge Popke harbored deep-seated antagonism toward defense counsel, the trial court properly denied defendant's motion for disqualification premised upon MCR 2.003.

The denial of defendant's disqualification motion brought on due process grounds was also appropriate. Defendant has not identified which, if any, of the four situations illustrated in *Crampton, supra,* this matter falls within, nor has she illustrated anything in this case that would warrant categorizing this matter as "extreme" such that due process principles would require the trial judge's disqualification. And, given the outcome of the trial and the rulings made within, it cannot be said that the risk of bias was so prevalent that the constitutional guarantee of a fair trial was inhibited.

Docket No. 277150

Defendant first asserts that the trial court failed to comply with this Court's remand instructions to appoint a receiver to sell the car wash, despite the fact that the order was the law of the case. Whether the law of the case doctrine applies is a question of law that we review de novo. *Hill v City of Warren*, 276 Mich App 299, 305; 740 NW2d 706 (2007).

The law of the case doctrine provides that " 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.' " *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). As a general rule, the law of the case binds lower courts, which may take no action on remand that is inconsistent with the appellate court's decision on the case. *Id.* at 260.

Courts have recognized several exceptions to applying the doctrine in subsequent proceedings, including, (1) when the law has changed after the first appellate decision, *Ashker v*

Ford Motor Co, 245 Mich App 9, 13; 627 NW2d 1 (2001); (2) to avoid precluding review of constitutional issues. *Locricchio v Evening News Assn*, 438 Mich 84, 109-110; 476 NW2d 112 (1991); and, (3) where the facts do not remain materially or substantially the same, *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). But the law of the case doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Locricchio, supra*, at 109, quoting *Messenger v Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912). The law of the case doctrine is thus discretionary. *Grace, supra.*

On defendant's October 18, 2005 application for leave to appeal, in lieu of granting leave to appeal, we ordered:

> Where both parties desire the sale of the car wash, the circuit court is directed to appoint a receiver to implement the sale. The case is REMANDED to the circuit court for further proceedings consistent with this order.

In her application for leave to appeal, defendant made the following statements:

> Although it is uncontested that Plaintiff still has not sold the car wash and that Defendant's substantial debts remain unpaid, the trial court denied the motion. . .
>
> Defendant's substantial marital debts, which were supposed to be paid off by the car wash sale months ago, remain unsatisfied.
>
> . . .the fact remains that that Plaintiff still retains sole ownership of an exclusive enjoyment of the profits from the significant marital asset- with no end in sight. Meanwhile, Defendant is stuck with a patently inequitable asset distribution and massive, unpaid debts.

Defendant's application for leave to appeal with this Court appears to have been premised in large part upon a claim that debts for the car wash remained unpaid and that defendant was liable for such debts. And we based our order solely on the basis of the facts stated in defendant's application for leave to appeal, as plaintiff did not file a response.

Defendant filed her application for leave to appeal on October 18, 2005 and it is undisputed that plaintiff paid off the home equity line of credit on the marital home awarded to defendant on November 3, 2005. Defendant has not specifically identified any debts that she remains liable for as a result of the car wash not being sold. Given that, and given that our prior order was based on facts that existed at the time the application was filed, but did not exist mere weeks later, the law of the case doctrine is inapplicable and the trial court did nor err in denying defendant's motion to enforce this Court's March 23, 2006 order.

Defendant next argues that the trial court clearly erred in finding that defendant's motion to enforce this Court's remand order was violative of MCR 2.114. Whether the trial court so

erred or not is inconsequential, as the trial court did not impose sanctions upon defendant or her counsel. We thus see no basis to review this issue on appeal.[3]

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto

[3] Defendant's final argument in this appeal mirrors her argument in docket no. 265269 that was previously addressed by this Court, i.e. that plaintiff's retention of the car wash necessitated setting aside the judgment of divorce.